IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

CASE NO: 605/2016

In the matter between:

NEOTEL (PTY) LTD	Appellant
and	
TELKOM 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	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 PROPRIETARY LIMITED	Twelfth Respondent
VSNL SNOSPV PTE LIMITED	Thirteenth Respondent
NEXUS CONNEXION SA PROPRIETARY LIMITED	Fourteenth Respondent
MINISTER OF COMMUNICATIONS	Fifteenth Respondent
MINISTER OF TELECOMMUNICATIONS AND POSTAL SERVICES	Sixteenth Respondent

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INTRODUCTION

1 This appeal concerns the proper interpretation of section 13 of the Electronic Communications Act 36 of 2005 (the ECA).

2 That section deals with the extent to one may let, sub-let, assign, cede or transfer broadcasting service licences, electronic communications services (ECS) licences and electronic communications network service (ECNS) licences or control over these licences. For ease of reference, in what follows we refer mainly just to the "*transfer*" of these licences.

3 Section 13(1) provides that these licences may not be transferred without the prior written approval of ICASA.[1] That much is not in dispute.

4 However, section 13(6) goes on to provide that "*The provisions of section 9(2) to (6) apply, with the necessary changes, to this section.*" Two questions arises in this regard.

4.1 Does this mean that no licence may ever be transferred to an entity which has less than 30% Black Economic Empowerment (BEE) equity ownership?

4.2 If so, is a transferee seeking ICASA's approval required to demonstrate at the outset of its application that it already has the requisite 30% BEE ownership in place?

[1] The Independent Communications Authority of South Africa

5 We refer to these questions as "*the BEE issues*". The High Court answered yes to both questions.[2]

6 The present appeal arises in unusual circumstances.

6.1 The appellant (Neotel) obtained permission from ICASA in terms of section 13(1) to transfer its ECS and ECNS licences to the eighth respondent (Vodacom) as part of a larger transaction.

6.2 Four of the present respondents then proceeded to challenge this decision by way of review in the High Court. They raised various grounds of review, including some related to the BEE issues.

6.3 The High Court upheld four of these grounds of review, including two related to the BEE issues. It set aside the approval granted by ICASA. Shortly thereafter, Neotel and Vodacom indicated that their transaction would be not be proceeding in any form.

6.4 Neotel nevertheless proceeded to apply for leave to appeal to this Court, but only in relation to the BEE issues. It recognised that the appeal was moot in relation to the Neotel-Vodacom transaction and would not alter the order granted by the High Court. However, it emphasised the importance of the BEE issues for the industry as a whole.

6.5 The High Court granted leave to appeal this Court in relation to the BEE issues.

[2] Vol 5, p832, paras 75 – 80, High Court Judgment.

6.6 It appears that no party opposes this appeal, including ICASA and those who first raised the grounds of review related to the BEE issues. The only other party participating in this appeal is MTN, which appears to support the appeal.

7 In these heads of argument, we make the following submissions:

7.1 First, this Court has a discretion regarding whether to determine the merits of this appeal despite the fact that (a) the appeal is moot insofar as the Neotel-Vodacom transaction is concerned; and (b) it will not result in any alteration of the High Court order. It should exercise that discretion and determine the merits of the appeal.

7.2 Second, the High Court erred in holding that the 30% BEE requirement applies to transfers of licences in terms of section 13(1) of the ECA. That requirement has not been incorporated by section 13(6) of the ECA.

7.3 Third, and alternatively, even if the 30% BEE requirement applies to transfers of licences, the High Court erred in holding that the 30% BEE equity has to be in place when an application is lodged with ICASA.

8 We deal with each of these issues in turn, after dealing briefly with the legal and factual background.

THE LEGAL AND FACTUAL BACKGROUND

The statutory scheme

9 Section 13 of the ECA was amended in 2014.[3] It deals with transfer existing broadcasting, ECS and ECNS licences and provides:

> *"13 Transfer of individual licences or change of ownership*
>
> *(1) An individual licence may not be let, sub-let, assigned, ceded or in any way transferred, and the control of an individual licence may not be assigned, ceded or in any way transferred, to any other person without the prior written permission of the Authority.*
>
> *(2) An application for permission to let, sub-let, assign, cede or in any way transfer an individual licence, or assign, cede or transfer control of an individual licence may be made to the Authority in the prescribed manner.*
>
> *(3) The Authority may by regulation, set a limit on, or restrict, the ownership or control of an individual licence, in order to-*
>
> *(a) promote the ownership and control of electronic communications services by historically disadvantaged groups and to promote broad-based black economic empowerment; or*
>
> *(b) promote competition in the ICT sector.*
>
> *(4) The Authority may, subject to Chapter 9, by regulation, set a limit on, or restrict, the ownership or control of an individual licence for broadcasting services in order to promote a diversity of views and opinions.*
>
> *(5) Regulations contemplated in subsection (3) and (4) must be made-*
>
> *(a) with due regard to the objectives of this Act, the related legislation and where applicable, any other relevant legislation; and*
>
> *(b) after the Authority has conducted an inquiry in terms of section 4B of the ICASA Act, which may include, but is not limited to, a market study.*
>
> *(6) The provisions of section 9 (2) to (6) apply, with the necessary changes, to this section."*

[3] Pursuant to the Electronic Communications Amendment Act 1 of 2014

10 Section 9 the ECA deals with applications for the granting of new licences. Section 9(2) to (6) provide as follows:

> *"(2) The Authority must give notice of the application in the Gazette and-*
>
> *(a) invite interested persons to apply and submit written representations in relation to the application within the period mentioned in the notice;*
>
> *(b) include the percentage of equity ownership to be held by persons from historically disadvantaged groups, which must not be less than 30%, or such other conditions or higher percentage as may be prescribed under section 4 (3) (k) of the ICASA Act;*
>
> *(c) set out the proposed licence conditions that will apply to the licence; and*
>
> *(d) give interested persons an opportunity to submit written responses to any representations submitted in terms of paragraph (a);*
>
> *(e) may conduct a public hearing in relation to any application for an individual licence;*
>
> *(3) The Authority may require an applicant or an interested party who has submitted written representations in terms of subsection (2) (a) to furnish the Authority, within the period specified by the Authority, with such further information as may be reasonably necessary in order to consider the application.*
>
> *(4) (a) Applications, representations, responses and other documents relating to an application which are submitted to the Authority are, subject to this subsection, open to public inspection during the normal office hours of the Authority.*
>
> *(b) The Authority must, at the request of any person and on payment of such fee as may be prescribed, furnish him or her with copies of documents requested by such person.*
>
> *(c) (i) The Authority may, at the request of an applicant or person who has submitted representations or responses, decide that-*
>
> *(aa) any document or information that is commercially sensitive; or*
>
> *(bb) any other matter reasonably justifying confidentiality, is not open to public inspection, if such document or information can be separated from the application, representations or other documents in question.*
>
> *(ii) for the purposes of this subsection, commercially sensitive document, information or other matter reasonably justifying confidentiality, excludes documents or information that should, as a matter of law be generally available to the public.*

(d) If the Authority refuses a request referred to in paragraph (c) (i), the applicant or person concerned may withdraw the document or information in question.

(5) The Authority must, after considering-

(a) any application for an individual licence made in terms of this Act; and

(b) any written representations made in terms of subsection (2) in relation to the application,

notify the applicant of its decision, the reasons for that decision and any licence conditions applicable and publish such information in the Gazette.

(6) Whenever the Authority grants an individual licence, the Authority-

(a) must do so on standard terms and conditions applicable to the type of licence, as prescribed in terms of section 8; and

(b) may impose such additional terms and conditions as may be prescribed in terms of section 8 (3) and make a designation contemplated in section 8 (4).”

11 Section 13(2) makes reference to a party applying “*in the prescribed manner*”. However, at the time of the Vodacom-Neotel transaction and the High Court judgment there were no regulations dealing with applications for the approval of “*transfer of control*” of a licence.[4]

11.1 This changed in March 2016 when ICASA amended its Processes and Procedures Regulations.[5]

11.2 There is no minimum 30% BEE requirement contained in these in their old or new form. Instead, the 2016 amendments introduced regulation 11(4) which provides that one of the criteria for the evaluating an

[4] The regulations in place were the 2010 Individual Licensing Processes and Procedures Regulations, which were published in GN R522 in Government Gazette 33293 of 14 June 2010. In keeping with section 13(1) of the ECA as originally enacted, they only dealt with transfers of licences per se, rather than transfers of control of licences.

[5] The 2016 amendments were published in GN 154 in Government Gazette 39871 of 30 March 2016.

application for transfer of control of a licence will be *"equity ownership by HDP's".*[6]

12 Lastly, for the sake of completeness, we point out that section 31(2A) of the ECA deals with transfers of control in respect of a further category of licences – that is Radio Frequency Spectrum licences.

12.1 It provides that transfers of control of Spectrum licences may not take place without the prior written approval of ICASA. However, the section does not incorporate by reference any other section, including sections 9(2) to 9(6).

12.2 Section 31(2A) was correctly not relied on by the High Court in relation to the BEE issues and is not relevant to the present appeal.

The proposed transaction and the application to ICASA

13 On 18 May 2014, an agreement was entered into between Neotel, its shareholders and Vodacom (the proposed transaction). In terms of the proposed transaction, Vodacom would acquire the entire issued share capital of Neotel.

14 A necessary consequence of this change in shareholding was that control of Neotel's ECS licence, ECNS licence and Radio Frequency Spectrum licences would be transferred from Neotel's shareholders to Vodacom.

6 Regulation 11(4)(c)

15 On 17 June 2014, Neotel and Vodacom applied to ICASA for the necessary permission to transfer control of Neotel's licences and proceed with the transaction in view of the provisions of sections 13(1) and 31(2A) of the ECA.

16 ICASA gave notice of the application in the Government Gazette. It invited and received written representations and conducted a two-day public hearing.

17 On 2 July 2015, ICASA approved the Application. The approval was, however, subject to two conditions. Only the first condition is relevant to the present appeal. It provided:

> *"[T]he Applicants must comply with the requirement for 30% (thirty percent) equity ownership of the individual licence that is the subject of the transfer of control application being held by persons from historically disadvantaged groups ("the BEE Requirement"), as contemplated in section 13(6) read with section 9(2)(b) of the EC Act. The Authority, however, recognises that that it may not be practicable for Applicants to comply with the BEE Requirement from the onset. Therefore the Authority would like to determine the reasonable period within which the Applicants should ensure compliance with the BEE Requirement".*[7]

18 ICASA proceeded to invite interested parties to make written submissions on what would be a reasonable period for compliance with the BEE requirement.[8]

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[7] v 1, p 52-53, para 4a, Annexure AIK1

[8] v 1, p 54, paras 6 – 10, Annexure AIK1

The High Court applications

19 ICASA's approval decision was challenged in four review applications brought by Telkom, MTN, Cell C and Dimension Data. Those review applications were heard together by the High Court.

20 Some of the grounds of review raised did not relate to the BEE issues at all. These included grounds of review related to ICASA's failure to properly deal with competition issues and a perception of bias due to ICASA's meetings with Vodacom.

21 The correct interpretation of the effect of section 13(6) of the ECA, read with section 9(2) of the ECA, was however relevant to two of the review grounds before the High Court:

21.1 Telkom contended that the section 9(2) notice published by ICASA was defective because it did not set out the BEE percentage required to be held by Neotel and Vodacom. Telkom argued that ICASA had failed to comply with the peremptory requirement in section 9(2) and therefore the decision was unlawful.[9]

21.2 Cell C and Dimension Data both argued that the decision to grant the approval with a condition was unlawful. They contended that the requirement in section 9(2) was mandatory, and ICASA was therefore not permitted to impose a condition permitting compliance at a future date.[10]

[9] Vol 1, p42 – 43, paras 137 – 138, Telkom's Founding Affidavit.

[10] Vol 1, p253 – 254, para 280 - 281, Cell C's Founding Affidavit; vol 2, p 279, para 12, Dimension Data Founding Affidavit

22 ICASA's position on the BEE issues was as follows:

22.1 In respect of Telkom's ground of review, ICASA contended that the requirements of section 9(2) in respect of the notice were not peremptory in the context of section 13 applications for transfer of control. ICASA argued that the provisions of section 9(2) applied to applications for transfer of control under section 13 "*with the necessary changes*". It contended that "*[t]he effect of these words is that the requirements of section 9(2) to (6) do not automatically apply to applications for transfer of control*" and that "*certain requirements do not apply to applications for transfer of control*". The notice was therefore fully compliant.[11]

22.2 In respect of Cell C and Dimension Data's ground of review, ICASA argued that on a proper construction of the ECA, "*ICASA has a discretion to determine a reasonable period within which the BEE requirement should be fulfilled*."[12] ICASA contended that to the extent that section 9(2)(b) was applicable, it took the view that it had no discretion to lower the stipulated percentage threshold but that it "*has a discretion to direct compliance therewith by a future date*."[13]

23 The position of Neotel and Vodacom was that:

23.1 The notice complied with sections 13(6) and 9(2) of the ECA;[14]

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[11] Vol 2, p303, para 7.3, p322 – 323, paras 57 – 58, ICASA's Answering Affidavit.

[12] Vol 2, p308, para 8.5, ICASA's Answering Affidavit.

[13] Vol 2, p359, para 172.1, ICASA's Answering Affidavit.

[14] Vol 3, p 416 – 419, paras 84 – 87, Neotel and Vodacom Answering Affidavit

23.2 ICASA had the power to impose conditions as part of its approval;[15] and

23.3 In any event, the BEE requirements set out in section 9(2)(b) of the ECA did not apply at all to applications for permission to transfer control in terms of section 13(1) of the ECA. Instead, section 13(6) only incorporated the procedures set out in sections 9(2) to (6).[16]

The High Court judgment

24 The High Court upheld two grounds of review unrelated to the BEE issue. These concerned:

24.1 perception of bias in relation to ICASA;[17] and

24.2 ICASA's failure to properly deal with competition issues.[18]

25 The High Court then dealt with the BEE issues at paragraphs 75 – 80 of its judgment.[19] It upheld both grounds of review relating to the BEE issues, though it classified them as single ground of review.

25.1 It held that section 13(6) incorporated the 30% BEE requirement in section 9(2)(b) and made this a mandatory requirement for approval of an application for transfer of control:

> *"If the intention was to differentiate between an application referred to in section 9(1) and an application for permission in terms of section 13(1) with regard to the 30% equity ownership*

[15] Vol 3, p420 – 422, paras 136 – 143, Neotel and Vodacom Answering Affidavit

[16] Vol 3, p423 – 425, paras 148 – 150, Neotel and Vodacom Answering Affidavit

[17] Vol 5, p 811 – 825, paras 47 – 65, High Court Judgment

[18] Vol 5, p 825 – 830, paras 67 – 74, High Court Judgment

[19] Vol 5, p 831 – 834, High Court Judgment

requirement, any reference thereto in section 13(6) could and would have been omitted. On the contrary, it has been included. … [T]hat requirement is peremptory."[20]

25.2 It held therefore that the notice issued by ICASA to announce the application process was invalid because "*no reference to equity ownership was included, let alone a reference to the minimum requirement of 30%".*[21]

25.3 It held also that this was compounded by ICASA's decision to allow Neotel and Vodacom a reasonable period to comply with the 30% BEE requirement:

"This means that compliance with a statutory requirement has been postponed sine die. It also implies that for the interim any percentage equity ownership would be sufficient and acceptable. I find it difficult to reconcile such a condition with the clear language of section 9(2)(b) and the fact that the 30% minimum requirement appears to be peremptory. In my view the language of section 9(2)(b) presupposes that an applicant must arrive at ICASA's door with a minimum of 30% BEE shareholding. An applicant does not have an opportunity to garner the necessary shareholding after the application has been made, let alone after the application has been approved."[22]

26 The High Court therefore proceeded to review and set aside ICASA's decision in its entirety.[23]

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[20] Vol 5, p 834 – 835, para 80, High Court Judgment

[21] Vol 5, p 834 – 835, para 80, High Court Judgment

[22] Vol 5, p 834 – 835, para 80, High Court Judgment (emphasis added)

[23] Vol 5, p 837, High Court Judgment

THE PRELIMINARY ISSUES

27 The present appeal can have no impact on ICASA's approval of the Neotel-Vodacom transaction which gave rise to the High Court review proceedings. This is for two reasons:

27.1 As has been publicly announced, the Neotel and Vodacom transaction is not proceeding in any form.[24]

27.2 In any event, this appeal is limited to the BEE issues and does not concern the remaining two grounds of review that were upheld by the High Court. In the circumstances, even if this Court upholds its appeal in respect of the BEE issues, this will not result in any alteration of the High Court order.

28 The question then is whether it is permissible and appropriate for this Court to reach the merits of this appeal. We submit that it is for the reasons that follow.

Is it permissible for this Court to determine the merits of the appeal?

29 Section 16(2)(a)(i) of the Superior Courts Act[25] provides that when *"the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.*"

[24] Indeed, we are instructed that Neotel has now entered into a separate transaction with Liquid Telecomm. The parties have applied to ICASA for approval of that transaction in compliance with sections 13(1) and 31(2A) of the ECA. The application is presently pending.

[25] Act 10 of 2013

30 This Court has repeatedly made clear that this provision and its predecessor confer a discretion on this Court. As this Court explained in *Nambiti Technologies*:

> *"The court has a discretion, notwithstanding that an appeal has become moot, to hear and dispose of it on its merits. The usual ground for exercising that discretion in favour of dealing with it on the merits is that the case raises a discrete issue of public importance that will have an effect on future matters."*[26]

31 In *Minister of Justice v SALC*, this Court reiterated this principle and added that it was linked to section 17(1)(a)(ii) of the Superior Courts Act. That section provides that leave to appeal may be granted, notwithstanding the court's view of the prospects of success, where there are nonetheless "*compelling reasons"* why an appeal should be heard.[27]

32 It is therefore plain that this Court has the power – in appropriate cases – to determine the merits of an appeal where the appeal is moot between the parties but will impact on future matters.

33 Neotel submits that this is a case that meets the requirements for the exercise of this Court's discretion. As we explain in more detail below:

33.1 The BEE issues are discrete legal issues of public importance, which are independent of the facts of the case. They will have an effect on numerous future matters before ICASA.

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[26] Tshwane City v Nambiti Technologies (Pty) Ltd 2016 (2) SA 494 (SCA) at para 6 (emphasis added)

[27] Minister of Justice and Constitutional Development and Others v Southern Africa Litigation Centre and Others 2016 (3) SA 317 (SCA) at para 23

33.2 If this Court does not deal with the merits of the appeal in the present case, ICASA will be bound to follow the High Court's approach in all future applications for transfer of control. This will likely mean that this Court will be perpetually precluded from determining the correctness of the High Court's approach.

34 Before turning to do so, it is necessary to deal with a further but related obstacle. This arises from the fact that, because the appeal is confined to the BEE issues, it will not result in any alteration of the order granted by the High Court.

34.1 This Court has repeatedly made clear that an appeal lies against the order of a lower court, rather than its reasons. As this Court reiterated most recently in *Medox v SARS*:

> *"It is trite that an appeal is directed at the order of the court of first instance and not the reasons for the order. In Tecmed Africa (Pty) Ltd v Minister of Health & another [2012] 4 All SA 149 (SCA) Ponnan JA put it thus at para 17:*
>
> > *'. . . appeals, do not lie against the reasons for judgment but against the substantive order of a lower court. Thus, whether or not a court of appeal agrees with a lower court's reasoning would be of no consequence if the result would remain the same.'*[28]

34.2 This principle appears to date back to at least the 1936 decision in *Molteno Bros v South African Railways and Harbours*. In that matter, the Court held:

> *"As the notice of appeal now stands, there is no intention to reverse the order given in the Court below and therefore this Court has no jurisdiction to hear the appeal."*[29]

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[28] Medox Limited v Commissioner for the South African Revenue Service 2015 (6) SA 310 (SCA) at para 10

[29] Molteno Bros v South African Railways and Harbours 1936 AD 408 at 413.

35 It is undoubtedly sensible and in keeping with our constitutional scheme that in the overwhelming majority of cases, this Court would decline to hear an appeal where the appellant seeks no variation in the order of the High Court.

35.1 As this Court explained in *Radio Pretoria*:

> *"Courts of appeal often have to deal with congested court rolls. They do not give advice gratuitously. They decide real disputes and do not speculate or theorise".*[30]

35.2 While this was said in the context of dismissing an appeal on the grounds of mootness, it applies with the same force to appeals against the reasons of a lower court, rather than against a lower court's order.

36 However, we respectfully submit that there is no jurisdictional bar to this Court deciding an appeal which would not result in the variation of an order, where this this is in accordance with the interests of justice due to the truly exceptional nature of the case.

37 As this Court has made clear, its jurisdiction derives from the Constitution rather than a statute as was previously the case.[31]

37.1 Section 168(3) of the Constitution provides that this Court "*may decide appeals in any matter arising from the High Court of South Africa"*.[32]

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[30] Radio Pretoria v Chairman, ICASA 2005 (1) SA 47 (SCA) at para 41

[31] NUMSA and others v Fry's Metals (Pty) Ltd 2005 (5) SA 433 (SCA) at para 11.

[32] Save for the exceptions relating to competition and labour matters, which are not presently relevant.

37.2 Section 173 provides that this Court has the inherent power to regulate its own process, taking into account the interests of justice.

37.3 In line with these provisions, this Court has now made clear that the overriding consideration in relation to whether a matter is appealable to this Court is now "*the interests of justice*". As this Court explained in *Philani-Ma-Afrika*:

> *"It is clear from such cases as S v Western Areas Ltd and Others 2005 (5) SA 214 (SCA) in paras 25 and 26 at 226A - E that what is of paramount importance in deciding whether a judgment is appealable is the interests of justice."*[33]

37.4 It is for this reason that this Court has recognised that, in exceptional cases, it is permitted to determine appeals in matters previously thought to be unappealable. It has recognised this, for example, in respect of an appeal against an order granting leave to execute[34] and an appeal against a refusal to order discovery of certain documents.[35]

38 In accordance with these principles, we submit that there is no jurisdictional bar to this Court – in exceptional cases – dealing with the merits of an appeal where the appellant's success would not result in an alteration of the order of the lower court.

39 Indeed, this is inextricably linked to this Court's discretion to decide an appeal even where it is moot as between the parties. In such circumstances, while this

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[33] Philani-Ma-Afrika and Others v Mailula and Others 2010 (2) SA 573 (SCA) at para 20

[34] Ibid.

[35] Nova Property Group Holdings v Cobbett 2016 (4) SA 317 (SCA) at paras 8 - 11

Court might well alter the lower court's order, this alteration of the order will have no effect at all. Rather, the effect on the "*future matters*" which justifies this Court deciding the appeal will arise only from the difference between this Court's reasons and those of the lower court.

40 Three recent examples make this clear:

40.1 In *Absa v Keet,* this Court dealt with an appeal about a prescription issue, even though the parties had already settled their dispute. The ultimate variation of the High Court order had no practical effect, but this Court rightly decided the merits of the appeal on the grounds that it raised a discrete legal issue that would affect litigants beyond the confines of the case.[36]

40.2 In *Road Accident Fund v Faria,* this Court dealt with an appeal about the RAF's liability to the plaintiff. The RAF had already paid the plaintiff in error and accepted that it could not now legitimately recover the funds, meaning the variation of the order sought would have no effect. However, this Court rightly decided the merits of the appeal on the basis that it raised a discrete issue of statutory interpretation which would affect future cases. [37]

40.3 In *Centre for Child Law*, this Court deal with an appeal concerning an order compelling a party to produce certain documents in terms of Rule 35(12). The main litigation in regard to which the Rule 35(12) notice had

[36] Absa Bank Ltd v Keet 2015 (4) SA 474 (SCA) at paras 7 - 8

[37] Road Accident Fund v Faria 2014 (6) SA 19 (SCA) at paras 18 - 24

been issued had already been settled – meaning that the documents would never have to be produced. The order which was ultimately varied was rightly described by the lower court as having become "*utterly irrelevant*".[38] However, once again this Court rightly decided the merits of the appeal, holding that:

> *"The High Court considered that it was engaged in the proper interpretation of rule 35(12). On that score it has spoken and absent an appeal its judgment will in all probability continue to influence how litigants approach such an enquiry. If the High Court erred in its approach, as it appears that it indeed has, then future litigants are entitled to the benefit of this court's view on the issue on the basis that this would affect future matters.*[39]

41 We therefore submit that, if the interests of justice justify deciding a moot case because of its effect on future matters, this Court is similarly not deprived of its jurisdiction to decide an appeal merely because no variation of the order would result.

42 In what follows, we explain why the interests of justice indeed require this matter to be decided by this Court.

Is it appropriate for this Court to determine the merits of the appeal?

43 We submit that for the following reasons this matter is indeed an appropriate one for this Court to exercise its discretion set out above and to decide the merits of the appeal.

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[38] Centre For Child Law v Hoërskool Fochville and Another 2016 (2) SA 121 (SCA) at para 9

[39] At para 14

44 First, the BEE issues are discrete legal issues involving the proper interpretation of section 13(6) of the ECA, read with section 9(2)(b). There were and are no factual disputes between the parties regarding the BEE issues.

45 Second, the appeal will have an effect on numerous future applications before ICASA.

45.1 As an organ of state, ICASA is bound to give effect to the High Court's interpretation of section 13(6) of the ECA.[40]

45.2 There are literally hundreds of ECNS and ECS licences that have been issued by ICASA. Every time one of these licences or control over one of these licenses is to be let, sub-let, assigned, ceded or in any way transferred, ICASA will have to decide whether to give its permission in terms of section 13(1). This is not an infrequent occurrence.

45.3 This means that if this appeal is not decided on its merits by this Court, ICASA will be bound to refuse each and every such application in terms of section 13(1), unless the party concerned meets the 30% BEE threshold and does so at the moment the application is brought.

46 Third, the BEE issues are of considerable public importance.

46.1 ICASA is a constitutionally mandated public body required to regulate electronic communications in the public interest.[41] The proper

[40] See sections 165(4) and (5) of the Constitution

[41] Section 192 of the Constitution; Section 2 of the Independent Communications Authority of South Africa Act 13 of 2000

interpretation of its statutory powers and obligations under the ECA is therefore a matter of public importance.

46.2 The determination of the questions of law raised in this appeal will provide legal certainty to participants in the ICT sector, and will benefit both existing participants and new participants seeking to enter the sector.

46.3 As Neotel has explained, the High Court's interpretation has serious practical implications for all stakeholders in the ICT sector and has the potential to undermine the transformative objects of the ECA. This is because it would severely constrain the potential for commercial transactions in the ICT sector.[42]

47 Lastly, if this Court does not decide the BEE issues in this matter, it is likely never to be able to decide them in the future.

47.1 As we have explained, if this Court does not decide the appeal, ICASA will be bound to follow the High Court's interpretation of section 13(6) of the ECA.

47.2 Thus, any party wishing to permission to transfer a licence will know that ICASA will be required to refuse the application unless the party concerned meets the 30% BEE threshold and does so at the moment the application is brought.

47.3 For the matter to reach this Court again, such party would have to deliberately apply to ICASA without meeting the 30% threshold (knowing

[42] Vol 5, p848, para 24, Neotel's affidavit in support of application for leave to appeal.

it would be refused), wait for the refusal and then review in the High Court. Moreover, the party would have to do so knowing that the High Court would follow the same interpretation of section 13(6) unless persuaded it were clearly wrong.

47.4 It is extraordinarily unlikely that any commercial party would ever adopt a route. It makes no commercial sense to lodge an application knowing of certain failure before ICASA and likely failure before the High Court, in the hope that the matter then finds its way back to this Court. Yet, that is the only way in which the BEE issues could return to this Court.

48 Given the public importance of this legal issue, its effect on future matters before ICASA and the scant likelihood of it ever reaching this Court again if this appeal is not now decided on the merits, we submit that it is in the interests of justice for this Court to decide the appeal.

49 We now turn to deal with the merits of the appeal.

SECTION 13(6) DOES NOT INCORPORATE THE BEE REQUIREMENT

50 Section 9 deals with the granting of <u>new</u> licences by ICASA. It is in this context that section 9(2)(b) requires ICASA to indicate by notice "*the percentage of equity ownership to be held by persons from historically disadvantaged groups, which must not be less than 30%, or such other conditions or higher percentage as may be prescribed*".

51 Section 9 is made relevant to transfers of existing licences by section 13(6).

51.1 That section makes use of the technique of "*incorporation by reference*", albeit within a statute rather than between two different statutes. This technique has been described as a "*method [that] saves space*" and a "*short cut in practical legislation*".[43]

51.2 Section 13(6) incorporates sections 9(2) to 9(6), "*with the necessary changes*" and applies them to transfer applications.

51.3 The ECA adopts the identical approach in respect of the amendment of licences (section 10(2)) and the renewal of licences (section 11(3)).

52 The question is what precisely section 13(6) incorporated from sections 9(2) to 9(6).

52.1 The High Court found that that the 30% minimum BEE obligation contained in section 9(2)(b) was incorporated and applied to transfers by section 13(6).[44]

52.2 We submit for the reasons that follow that this is not the effect of section 13(6). Rather, it incorporates by reference only the procedures set out in sections 9(2) to (6). Once this was so, the High Court was wrong to uphold the grounds of review relating to the BEE issues.

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[43] End Conscription Campaign v Minister of Defence 1993 (1) SA 589 (T) at 592H-I, citing Benyon, Statutory Interpretation (London, Butterworths (1984)) at 600 and Groeschel v Groeschel 1938 SWA 9 at 11.

[44] Vol. 5, p832, para 78 and 79.

The need to read section 13 as a whole

53 Section 13(6) provides that the provisions of section 9(2) to (6) apply, with the necessary changes, to "*this section*" – that is to section 13 as a whole.

54 Thus, in understanding what has been incorporated from sections 9(2) to (6), it is necessary to consider section 13 as a whole, rather than focussing on merely sections 13(1) or (2) as the High Court did. This is in any event required by the need to construe statutory provisions in their proper context.[45]

55 Section 13 already has its own provision dealing with BEE as applied to existing licences.

55.1 Section 13(3)(a) provides that ICASA "*may by regulation, set a limit on, or restrict, the ownership or control of an individual licence, in order to promote the ownership and control of electronic communications services by historically disadvantaged groups and to promote broad-based black economic empowerment*".

55.2 Section 13(5) in turn sets out the process that must be followed before these regulations can be introduced. It requires that this can only be done after an inquiry in terms of section 4B of the ICASA Act, which may include, but is not limited to, a market study.

[45] Eg : Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at para 19.

56 Once this is understood, it makes no sense to understand section 13(6) as incorporating the section 9(2)(b) BEE regime.

57 The two BEE regimes are fundamentally different.

57.1 Section 9(2)(b) provides for a minimum 30% BEE equity threshold. By contrast, section 13(3)(a) leaves it to the discretion of ICASA as to whether there is to be a BEE equity threshold at all and, if so, at what level.

57.2 Section 9(2)(b) entitles ICASA to raise the BEE threshold above 30% by merely making regulations. By contrast, section 13(5) permits ICASA to enact regulations setting a BEE threshold only after an inquiry in terms of section 4B of the ICASA Act.

58 It is therefore clear that section 9(2)(b) imposes a far more exacting set of BEE requirements than section 13(3) and that it confers on ICASA a wider power to impose even higher BEE requirements than is the case with sections 13(3) and (5).

59 This difference is unsurprising when the provisions are viewed in their proper context.

59.1 Section 9(2)(b) deals with new licences. Imposing or increasing a BEE requirement does not have any effect on a licensee's rights or expectations or existing business plans. For that reason a more exacting BEE requirement can comfortably be permitted.

59.2 By contrast, section 13 deals with existing licences. Imposing or increasing a BEE requirement may well affect a licensee's rights, expectations and existing business plans. The ability of ICASA to do so is therefore more tightly constrained.

59.3 But this means that one cannot interpret section 13(6) as incorporating the section 9(2)(b) BEE regime and applying it to existing licences as the High Court did. To do so produces two inconsistent BEE regimes in the same section of the Act and fails to take account of the difference between new and existing licences.

59.4 It also renders section 13(3) effectively superfluous.

The need to consider sections 10 and 11

60 Moreover, as we have explained, section 13(6) is replicated in section 10(2) of the ECA (dealing with amendments of licences) and section 11(3) of the ECA (dealing with renewals of licences).

61 If the 30% BEE requirement applies to transfers of existing licences via section 13(6) of the ECA, it also applies to every renewal or amendment of an existing licence. This means that there is an absolute bar against a licensee obtaining a renewal or amendment unless it has 30% BEE equity ownership in place.

62 Particularly in the context of amendments, this interpretation makes no sense at all. Many of the amendments contemplated in section 10 are amendments that

are made in the public interest, rather than in the interests of the licensee. For example:

62.1 Section 10(1)(b) allows ICASA to amend a licence for the purpose of ensuring fair competition between licensees;

62.2 Section 10(1)(d) allows ICASA to amend a licence to the extent necessitated by technological change or in the interest of orderly frequency management; and

62.3 Section 10(1)(e) allows ICASA to amend a licence where the licensee has been found guilty of violating a provision and and the amendment is to give effect to the decision of the Complaints and Compliance Committee in this regard.

63 It can scarcely be suggested that ICASA is precluded from making any of these amendments to licences just because the licensee has less than 30% BEE equity. Yet, that is the logical consequence of the High Court's approach.

Parliament would have made such a far-reaching effect on rights expressly clear

64 The effect of the High Court's order is that existing licensees are precluded from transferring their licences or control of their licences in any way unless they meet the 30% BEE threshold. For the reasons already given, they are then also precluded from amending or renewing their licences unless they meet the 30% threshold.

65 This is a far-reaching effect, particularly given that at the time that many of these licences were obtained, there was no 30% BEE requirement imposed on the licensees. In other words, it appears to involve the effective retrospective imposition of a 30% BEE requirement on existing licensees.

66 Our courts have repeatedly made clear that legislation is presumed not to affect pre-existing rights. Though this is merely a presumption, it can only be displaced by express language or necessary implication. As Innes CJ made clear in *Curtis*, in a passage cited repeatedly by our courts:

> "*The general rule is that, in the absence of express provision to the contrary, statutes should be considered as affecting future matters only; and more especially that they should if possible be so interpreted as not to take away rights actually vested at the time of their promulgation. The legislature is virtually omnipotent, but the courts will not find that it intended so inequitable a result as the destruction of existing rights unless forced to do so by language so clear as to admit of no other conclusion."*[46]

67 In the present case, section 13(6) does not require this effect on the rights of existing licensees either expressly or by necessary implication.

The section was intended to incorporate only procedural issues

68 It seems that what section 13(6) was intended to achieve was something different. Like sections 10(2) and 11(3), it was intended as a method of "*incorporating by reference*" the various procedural provisions of sections 9(2) to (6), so that Parliament did not have to repeat these in each of sections 9, 10, 11 and 13.

[46] Curtis v Johannesburg Municipality 1906 TS 308 at 311

69 Section 13(6) ensures that:

69.1 interested parties are afforded an opportunity to submit written representations to ICASA (section 9(2)(d));

69.2 ICASA is empowered to conduct public hearings (section 9(2)(e)) and to call for further written information (section 9(3));

69.3 a regime for confidential information is put in place (section 9(4));

69.4 ICASA is required to publish its decision and the reasons therefore (section 9(5)); and

69.5 ICASA is requires to comply with the standard terms and conditions concerned (section 9(6)).

70 Understood in this way, the provisions of section 13(6), (as well as sections 10(2) and 11(3)) are unremarkable and sensible. They ensure a uniform set of procedures to be adopted by ICASA in dealing with matters before it.

71 Moreover, understanding the sections in this way avoids the series of problems already highlighted. On this interpretation:

71.1 There is no difficulty with two inconsistent BEE regimes applying in the context of section 13;

71.2 No anomalies are created in the context of section 10 amendments; and

71.3 No interference with the rights of existing licensees takes place.

Conclusion

72 We therefore submit that section 13(6) does not incorporate the 30% BEE requirement contained in section 9(2)(b).

73 There was therefore no need for ICASA's notice to specify a BEE threshold to be achieved and no need for Vodacom to meet the 30% BEE threshold before the transfer application could succeed.

74 The High Court was therefore wrong to uphold the grounds of review related to the BEE issues.

ALTERNATVELY, AN APPLICANT NEED NOT 'ARRIVE AT ICASA'S DOOR' WITH THE BEE REQUIREMENT MET

75 If this Court upholds the contentions already set out, then no question arises as to when precisely the transferee must have the 30% BEE equity ownership in place.

76 However, if this Court were to uphold the High Court's reasoning in relation to the incorporation of the BEE requirement, then the timing issue arises.

77 The High Court held that the 30% threshold must be met even before an application under section 13(1) is made to ICASA:

> *"the language of section 9(2)(b) presupposes that an applicant must arrive at ICASA's door with a minimum of 30% BEE shareholding. An applicant does not have an opportunity to garner the necessary*

shareholding after the application has been made, let alone after the application has been approved." [47]

78 We submit it is not required in law that this threshold in section 9(2)(b) be met prior to submitting an application for approval to ICASA.

79 Rather, section 9(2)(b) of the ECA provides that in respect of new applications, ICASA must give notice of "*the percentage of equity ownership to be held by persons from historically disadvantaged groups, which must not be less than 30%*".

79.1 The language of section 9(2)(b) implies that the requirement is for future, as opposed to immediate, compliance. The section uses the language "*to be held*" which supports an interpretation that the HDP ownership requirement may be fulfilled at some specified future point.

79.2 The section does not state that the 30% BEE requirement must be satisfied before the licence is granted or transferred. Still less is there anything in the language or purpose of section 9(2)(b) which goes so far to preclude ICASA from affording a licensee a reasonable time to comply with the 30% BEE equity requirement.

80 Moreover, and in any event, it does not follow from the assessment that the 30% threshold is a peremptory requirement, that compliance with this threshold is required before an application can even be submitted to ICASA.

[47] Vol 5, p833, para 80, High Court Judgment.

80.1 An applicant for permission to transfer could well indicate that a transaction, including various BEE elements, is conditional on ICASA granting approval. Or ICASA could grant approval for the transfer but indicate that the approval will only come into force once the BEE requirement has been shown to be met.

80.2 This would prevent parties having to meet a BEE requirement in advance, in circumstances where they do not know whether the transaction will be allowed at all.

80.3 The High Court was therefore wrong to conclude that an applicant "*must arrive at ICASA's door*" with a minimum of 30% BEE shareholding.

CONCLUSION

81 We therefore submit that this Court should uphold the appeal and set aside the findings of the High Court on the BEE issues, as reflected in paragraphs 75 to 80 of its judgment.

82 In view of the fact that no party is opposing this application, no order should be made regarding costs.

STEVEN BUDLENDER

FRANCES HOBDEN

MUSATONDWA MUSANDIWA

Counsel for Neotel

Chambers, Sandton

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