

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case Nos: 55311/2015, 77029/2015 & 82287/2015

In the matter between:

NEOTEL (PTY) LTD

Applicant for leave to appeal

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

AFFIDAVIT IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL



ME

I, the undersigned,

KENNEDY MEMANI

do hereby make oath and say:

1. I am the Director in Charge of the applicant for leave to appeal, Neotel (Pty) Ltd (Neotel). I am authorised to depose to this affidavit on behalf of Neotel.
2. The contents of this affidavit are within my personal knowledge, unless the context indicates otherwise, and are to the best of my belief true. Where I make legal submissions, I do so on the advice of Neotel's legal representatives.
3. On 26 February 2016, this Court handed down its judgment in the four review applications of *Telkom and Others v Dr Stephen Mncube NO and Others*. Neotel was one of the respondents in each application.
4. Neotel has now applied for leave to appeal to the Supreme Court of Appeal (SCA) against a limited part of the judgment and order, as appears from the notice of application for leave to appeal to which this affidavit is attached.
5. I understand that it is very unusual to file an affidavit in an application for leave to appeal. However, it is necessary for Neotel to do so for two reasons.
 - 5.1. First, it is incumbent on Neotel to disclose to this Court that the matter is moot insofar as the transaction which led to this litigation is concerned.
 - 5.2. Second, Neotel wishes to demonstrate that, despite the fact that the transaction concerned is not being pursued, this is an appropriate case for leave to appeal to be granted in terms of sections 16(2)(a)(i) and

17(1)(a)(ii) of the Superior Courts Act 10 of 2013. I am advised that the SCA has recently made clear that the effect of those sections is that a High Court may, in appropriate circumstances, grant leave to appeal notwithstanding that the matter has become moot.

6. This affidavit accordingly addresses and is limited to these issues. To the extent necessary, Neotel will seek the leave of this Court to have this affidavit admitted.
7. I emphasise that it is not the purpose of this affidavit to address the merits of the proposed appeal. The grounds of appeal are set out in the notice to which this affidavit is attached and will be dealt with in argument.

THE MATTER IS MOOT WITH REGARD TO THE VODACOM / NEOTEL TRANSACTION

8. Underlying the present matters was a transaction between Vodacom (Pty) Ltd (Vodacom) and Neotel, entered into in March 2014. In terms of that transaction, Vodacom would acquire the entire issued share capital of, and all of its shareholders' loan claims against, Neotel. The transaction was subject to a number of conditions precedent including the approval of both the Independent Communications Authority of South Africa (ICASA) and the competition authorities.
9. On 2 July 2015, ICASA published notice of its decision to grant the approval required in relation to the transaction. This involved ICASA approving a transfer of control in respect of Neotel's various licences from its shareholders to Vodacom.

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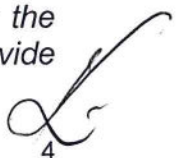
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10. Before this Court, four parties sought to review and set aside the ICASA decision. On 26 February 2016, this Court delivered its judgment, upholding the reviews.
11. On 1 March 2016, Vodacom Group Limited issued a SENS announcement confirming that *"the agreement between the parties has lapsed due to regulatory complexities in concluding the transaction as well as certain conditions not being fulfilled."* The SENS Announcement is attached as Annexure A. It reflected an agreement between the parties to the transaction, including Vodacom and Neotel, that the transaction would no longer proceed in any form. That remains the position.
12. In the circumstances, this matter is moot insofar as it affects the Vodacom/Neotel transaction and the ICASA approval granted in relation to that transaction, which approval was set aside by this Court.

LEAVE TO APPEAL SHOULD NEVERTHELESS BE GRANTED

13. I submit, however, that leave to appeal should nevertheless be granted to the SCA against this Court's order and its judgment at paragraphs 75 to 80 and 85.
14. I am advised that the SCA has recently made clear that a High Court is empowered, in appropriate circumstances, to grant leave to appeal in terms of sections 16(2)(a)(i) and 17(1)(a)(ii) of the Superior Courts Act 2013, even where a matter has become moot. It held as follows:

"After expressing its conclusion on prospects of success the High Court also said that it had no discretion once it reached that conclusion to grant leave to appeal. But it failed to consider the provisions of s17(1)(a)(ii) of the Superior Courts Act which provide


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*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. This is linked to the question of mootness. In that regard there is established jurisprudence in this Court that holds that even where an appeal has become moot the Court has a discretion 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. That jurisprudence should have been considered as a guide to whether, notwithstanding the High Court's view of an appeal's prospects of success, leave to appeal should have been granted. In my view it clearly pointed in favour of leave to appeal being granted."*¹

15. I understand further that the SCA has in a series of cases emphasised various factors relevant to the question of when it will be appropriate for moot cases to be decided on their merits. While full argument will be advanced at the hearing of this matter on this score, these factors include:

15.1. whether the matter deals with questions of law rather than fact and whether the legal issue is a discrete one;²

15.2. the importance of the questions of law, including their public importance;³

15.3. the extent of the authority on the legal issue;⁴

15.4. whether the question is bound to arise again;⁵

¹ *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* (867/15) [2016] ZASCA 17 (15 March 2016) at para 23.

² *RAF v Faria* 2014 (6) SA 19 (SCA) at para 22; *Qoboshiyane NO & Others v Avusa Publishing Eastern Cape (Pty) Ltd & others* 2013 (3) SA 315 (SCA) at para 5.

³ *ABSA Bank Ltd v Van Rensburg* 2014 (4) SA 626 (SCA) at para 8; *Qoboshiyane* at para 5.

⁴ *Midi Television (Pty) Limited t/a e-tv v Director of Public Prosecutions (Western Cape)* 2007 (5) SA 540 (SCA) at para 4.

⁵ *RAF v Faria* at para 23; *Midi Television* at para 4.

- 15.5. whether it is necessary to decide the appeal to provide future guidance;⁶ and
- 15.6. whether the determination of questions of law may provide legal certainty to the public⁷ and benefit others.⁸
16. I respectfully submit that a consideration of these factors demonstrates that leave to appeal should be granted notwithstanding that the matter is moot in relation to the Vodacom/Neotel transaction.
17. As appears from the notice of application for leave to appeal, the proposed appeal does not deal with all of the issues raised in the review applications and determined by this Court. It deals only with what this Court referred to as the “30% equity ownership issue” and which is dealt with in paragraphs 75 to 80 and 85 of this Court’s judgment.
18. The issue raised in the proposed appeal is therefore a narrow but important point of law. It involves primarily the interpretation of section 9(2) and section 13(6) of the Electronic Communications Act 36 of 2005 (the ECA).
19. The resolution of this legal issue has a direct effect on the powers of ICASA and the rights of licensees. It will determine under what circumstances ICASA is entitled to grant permission for a licence to be let, sub-let, assigned, ceded or in any way transferred, and for the control of the licence to be transferred. This will have serious consequences for the ICT sector, and will influence how

⁶ *Midi Television* at para 4.

⁷ *South African Congo Oil Co (Pty) Ltd v Identiguard International (Pty) Ltd* 2012 (5) SA 125 (SCA) at para 6.

⁸ *ABSA Bank Ltd v Van Rensburg* at para 8.



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licences are dealt with in this extremely competitive sector that plays a pivotal role in the economy.

20. This is the first time a court has pronounced on the interaction between sections 13(6) and 9(2) of the ECA. There is no other authority on the point.
21. If this Court's judgment does not go on appeal, it will remain as the only precedent on the point. It will be binding on ICASA in every application for regulatory approval under section 13(1) going forward. ICASA will not be at liberty to depart from it.
22. The determination of this point of law is essential to provide guidance to ICASA in order to regulate its future conduct when considering applications for permission for a licence to be let, sub-let, assigned, ceded or in any way transferred, or for the control of the licence to be transferred. The question of what BEE requirements must be satisfied will be relevant to each and every application before ICASA for transfers of licences, transfers of control of licences, the amendment of licences and other regulatory approvals. In other words, the issue will arise again and again – but in the absence of an appeal, this Court's judgment will determine how that issue is to be resolved.
23. I emphasise that the legal issue determined by this Court on the proper interpretation of sections 9(2) and 13(6) of the ECA will remain relevant and binding despite the fact that the 2015 Spectrum Regulations⁹ have subsequently come into force. This is because the 2015 Spectrum Regulations govern only the transfer of control and similar processes in relation to spectrum

⁹ Radio Frequency Spectrum Regulations, 2015 (General Notice 279 in *Government Gazette* 38641).

licences. However, this Court's findings apply to every transfer of control (or other regulatory permission) in respect of an individual ECS, ECNS and broadcasting licence. These licences are not affected by the 2015 Spectrum Regulations.

24. While the need to increase levels of empowerment is unquestionable, this Court's judgment has serious practical implications for Neotel and all other stakeholders in the ICT sector.

24.1. It will severely constrain the potential for transactions in the ICT sector.

24.2. Most licence holders in the sector do not currently meet the 30% BEE equity ownership threshold concerned. The effect of this Court's judgment is that wherever another party wishes to obtain control of the licences concerned, that party will have to arrive at ICASA's door with an increased 30% shareholding even before any transaction to acquire control of the licence-holder (and thus the licences) is completed. This is an onerous task.

24.3. It is an especially onerous task in the context of a company such as Neotel. Neotel currently has 19% BEE ownership but its BEE shareholders wish to exit Neotel. Neotel is heavily indebted. The effect of this Court's judgment is that any party acquiring Neotel would not only have to deal with Neotel's heavy indebtedness but would have to find a new BEE shareholder who could, in advance of making an application to ICASA, be prepared to guarantee taking up 30% of Neotel.

24.4. Finding a BEE shareholder of this type is extremely difficult. Shareholders are unlikely to receive significant returns on their investment for a significant period because investment in fixed networks is a very long-term commitment. As such, any new BEE investor may not be able to fund any debt that it takes on to acquire its stake in Neotel through returns generated from the Neotel business. The effect of this Court's judgment is therefore to severely constrain Neotel's options for entering into future transactions.

25. In all the circumstances, I submit that it is clear that the legal issue that is the subject of the proposed appeal is one of enormous public impact and importance. It is appropriate that the SCA pronounce on this issue given that, in the absence of such an SCA pronouncement, it is this Court's determination that will remain binding indefinitely into the future.

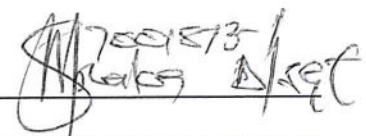
CONCLUSION

26. I therefore respectfully pray that leave to appeal is granted to the SCA.


DEPONENT

The Deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to or solemnly affirmed before me at Sandton on this the 18 day of March 2016, the regulations contained in Government Notice No. R1258 of 21 July 1972, as amended, and Government Notice No. R1648 of 19 August 1977, as amended, having been complied with.




COMMISSIONER OF OATHS
Full Names: Mogale Mphahlele
Capacity: Magistrate
Designation: Circuit Office
Address: 502 Summit
Manor Road

ANNEXURE A

Vodacom Group Limited
(Incorporated in the Republic of South Africa)
Registration number: 1993/005461/06
(ISIN: ZAE000132577 Share Code: VOD)
(ISIN: US92858D2009 ADR Code: VDMCY)
("Vodacom")

NEOTEL - VOLUNTARY UPDATE ANNOUNCEMENT

Shareholders are referred to the announcements of 8 and 10 December 2015 regarding the entering into of a modified transaction which contemplated Vodacom (Pty) Limited ("Vodacom South Africa") acquiring, *inter alia*, the majority of Neotel (Pty) Limited's ("Neotel") assets related to its fixed line business as a going concern, excluding, Neotel's licenses (spectrum, ECN, ECNS). Contemporaneously, Neotel would offer a roaming arrangement to all the mobile network operators including Vodacom South Africa (the "Roaming Offer") (collectively this then became known as the "Restructured Transaction").

Vodacom South Africa and Neotel have confirmed that the agreement between the parties has lapsed due to regulatory complexities in concluding the transaction as well as certain conditions not being fulfilled. Accordingly, the parties have agreed that the proposed restructured transaction can no longer be progressed.

Shareholders are advised that Vodacom South Africa will continue to invest in the development of its own high-speed communication infrastructure to stimulate greater competition in the fixed telecommunications sector and support both its business services offerings and its consumer business.

Midrand
1 March 2016

Sponsor: UBS South Africa (Pty) Limited
ADR depository bank: Deutsche Bank Trust Company Americas