IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE

CASE NO 516/2000

In the matter between

TELKOM SA LIMITED — **Appellant**

and

THE MEMBER OF THE EXECUTIVE COUNCIL FOR AGRICULTURAL AND ENVIRONMENT AFFAIRS: KWAZULU-NATAL — **First Respondent**
SARAH JANE ALLAN — **Second Respondent**
HB STRAUSS — **Third Respondent**
SPRAY FISHING (PROPRIETRY) LIMITED — **Fourth Respondent**
THE PRAWN FISHERIES AND DEVELOPMENT ASSOCIATION — **Fifth Respondent**

CORAM: **HOWIE, SCHUTZ, NAVSA JJA HEHER et LEWIS AJJA**

Date Heard: 20 August 2002

Delivered: 5 September 2002

Telecommunications - laying of undersea cable - fixed line operator obliged to obtain lease under Sea-shore Act, 1935.

J U D G M E N T

HOWIE JA

HOWIE JA

[1] The question in this appeal is whether the appellant may lawfully lay a telecommunications cable on the sea bed in the territorial waters off the coast of KwaZulu-Natal without the relevant portion of the sea having been let to it in terms of s 3(1)(m) of the Sea-shore Act, 21 of 1935. The appellant says it may. The first respondent, the Member of the Executive Council for Agriculture and Environmental Affairs: KwaZulu Natal and the 'competent authority' who may let under that Act if letting is necessary, says not. So does the fifth respondent, The Prawn Fisheries and Development Association.

[2] There is no need to detail the background facts and circumstances. It is enough to say that an undersea cable connection is essential to link the countrywide telecommunications system which the appellant is statutorily obliged to provide, and an international undersea telecommunications cable

network recently installed at very considerable cost to all the countries it serves. The relevant stretch of the international cable lies off the South African east coast. The function of the appellant's cable is to connect the international cable to an on-shore installation at Mtunzini. The existence of a connecting cable is therefore a matter of obvious major importance not only to the appellant but to the country.

[3] The first respondent's objection is that the appellant claims to need no lease. The fifth respondent's complaint is that the cable route chosen by the appellant is detrimental to its members' activities. The route crosses a major but geographically confined prawn fishing ground and it is said that inadequate consultation has been held with those with affected interests. The essence of the fifth respondent's problem is that not only may no fishing lawfully take place within 500 metres on either side of the cable but a trawler cannot simply raise and lower its nets just as it reaches or leaves the

prohibited strip. For technical reasons that procedure has to begin well before reaching the one kilometre-wide restricted zone and terminate a good distance further on. The resultant effect would be a substantial diminution of the productive fishing waters and a material disruption of the catching process.

[4] In proceedings before the High Court at Durban Hugo J made the following order:

> 'It is declared that it is unlawful for the proposed SAT-3/WASC/SAFE telecommunication cable to be laid off the coast of KwaZulu-Natal until and unless the area of the bed of the sea to be occupied by the cable has been let to the applicant or to such other party or parties as may be laying the cable in terms of section 3 of the Sea-shore Act 21 of 1935.'

With the leave of the learned Judge the appellant appeals.

[5] When the appeal was argued we were informed that what the order refers to as 'the proposed ... cable to be laid' has in fact by now been laid. Why that happened we were not told. The respondents did not suggest that

the appellant was in contempt of the order and the fifth respondent, in particular, did not submit that its right to contend for a different cable route had been prejudiced. The matter was brought before the Court below as one of great urgency and all that need be said in this respect is that if the appellant is wrong it will have to comply with the Sea-Shore Act and, conceivably, use another route.

[6] The main provisions of the Sea-shore Act that are pertinent for present purposes are these. Section 2 declares the President to be the owner of the sea-shore and the sea. In s 1 'sea-shore' is defined as being 'the water and the land between the low-water mark and the high-water mark' (those 'marks' being also defined but the definitions being presently irrelevant) and 'sea' is defined as:

> '... the water and bed of the sea below the low-water mark and within the territorial waters of the Republic, including the water and the bed of any tidal river and of any tidal lagoon.'

[7] In terms of s 1, if the Act applies to a province there is a 'competent authority' in such province to whom the administration of the Act is assigned.

[8] Section 3 is headed 'Letting of sea-shores and the sea' and ss (1) empowers the relevant authority on such conditions as he may deem expedient, to let any portion of the sea-shore and the sea for various purposes, including the laying of cables. Subsection (5) requires, before any lease is entered into, publication in the Provincial Gazette and a newspaper in 'the neighbourhood' in which the relevant portion of the sea is situated, of a notice stating the proposal to let, the place and times at which the proposed lease can be inspected and the fact that objections may be lodged. In terms of ss (6) an objection must be considered by the authority before he enters into a lease. Accordingly, if a lease is necessary in the present case, the fifth respondent's right and opportunity to object are clear.

S 12A makes it an offence to use the sea as defined without a lease. Finally, s 13(e) exempts from the application of the Act

> 'the provisions of the Post Office Act, 1958 ... or any powers or rights conferred upon the Postmaster-General by or under the said Act.'

[9] The appellant's assertion that it needs no lease is based exclusively on the provisions of s 70 of the Telecommunications Act, 103 of 1996. Although this Act is not referred to in s 13(e) of the Sea-shore Act the contention for the appellant is that s 70 is a re-enactment of the repealed s 80 of the Post Office Act, 1958 ('the Post Office Act'). Accordingly, so runs the argument, s 12 of the Interpretation Act, 33 of 1957, requires that the reference in s 13(e) of the provisions of the Post Office Act be read as including a reference to s 70 of the Telecommunications Act. Of course, if s 70 cannot carry the day the Sea-shore Act will govern the position.

[10] Section 70 reads:

'**Entry upon and construction of lines across any lands.-** (1) A fixed line operator may, for the purposes of provision of its telecommunications services, enter upon any land, including any street, road, footpath or land reserved for public purposes, and any railway, and construct and maintain a telecommunications facility upon, under, over, along or across any land, street, road, footpath or waterway or any railway, and alter or remove the same, and may for that purpose attach wires, stays or any other kind of support to any building or other structure.

(2) In taking any action in terms of subsection (1), due regard must be had to the environmental policy of the Republic.'

'Telecommunication facility' is defined as including a cable.

[11] Before considering the language of this section it is appropriate to provide the relevant legislative context.

[12] A provision substantially similar to s 70 was first enacted as s 82 of the Post Office Administration and Shipping Combinations Discouragement Act, 10 of 1911. It read:

'Right of Entry and to Construct Lines across any Lands, etc -.

The Postmaster-General may, for the purposes of this Act, enter upon any lands belonging to any person, including streets, roads, footpaths, or lands for public purposes, and any railway, and may construct and maintain a telegraph line or any work upon, under, over, along, or across any land, street, road, footpath, or waterway, or any railway, and may alter or remove the same; and may, for the

purpose, attach wires, stays, or any other kind of support to any building or other structure.'

[13] The Postmaster-General was appointed by the Governor-General and was the administrative head of the national Department of Posts and Telegraphs.

[14] 'Telegraph line' was defined as including any 'wire, pipe ... or other tube, thing, or means whatever' for effecting telegraphic communications.

[15] The English version of the 1911 Act was the signed text but counsel for the appellant laid emphasis on certain aspects of the Dutch version of s 82 which read as follows:

'82. De Postmeester-generaal kan, voor de doeleinden van deze Wet, de grond van derde personen betreden, met inbegrip van straten, wegen, voetpaden of terreinen, die voor openbare doeleinden bestemd zijn en voor spoorwegen; hij kan voorts telegraaflijnen of werken aanleggen op, onder, boven, langs of over enige grond, straat, weg, voetpad of waterscheiding, of spoorweg, en kan deze veranderen of wegnemen en voor dat doel draden, touwen of andere tot steun dienende middelen aan een gebouw of ander werk bevestigen.'

[16] In the Dutch version, as can be seen, the 'entry' provision was focused on the property of third parties. One infers that the first and second parties were respectively the Postmaster-General and the owner on whose land construction occurred, and so third parties were, presumably, those whose land was traversed to look for a construction site or to reach such site. This was consistent with the clear demarcation that was drawn between the 'entry' provision and the 'construction' provision by using a semi-colon after 'spoorwegen' and the words 'hij kan voorts ...'. Moreover 'grond', in either provision, has a wider meaning than 'lands'. In addition, 'waterscheiding' was a wholly incorrect translation of 'waterway'. A 'waterscheiding' is a watershed and the latter, far from denoting water, means, in fact, the high ground separating rivers which run in opposite directions. As support for the appellant's case, therefore, the Dutch rendition was something of a mixed bag.

[17] For present purposes, however, it is unnecessary to decide which text had to prevail, for the 1911 Act was repealed by the Post Office Act in which the successor to the old s 82 was s 80. Section 80 read thus:

> 'The Postmaster-General may for the purposes of this Act enter upon any land, including any street, road, footpath or land reserved for public purposes and any railway, and construct and maintain a telegraph line or any work upon, under, over, along or across any land, street, road, footpath or waterway or any railway and alter or remove the same, and may for that purpose attach wires, stays or any other kind of support to any building or other structure'.

In the English version 'lands' had now become 'land' and in the Afrikaans text the legislature used 'grond' for 'land', omitted reference to third parties and 'waterway' was rendered as 'waterweg'. A reasonable measure of linguistic uniformity had therefore been achieved.

[18] Under the Post Office Act the status and function of the Postmaster-General were the same as before and 'telegraph line' bore the identical meaning to that which it did in the 1911 statute.

[19] Act 113 of 1976 changed the Post Office Act in various respects. Among other things it altered 'telegraph line' to 'telecommunications line' and it effected two amendments to s 78 (a section not yet discussed). The one amendment is of specific importance for present purposes and I shall come to it later. The other, of general historic interest, was this. In the long title of the 1976 Act - a long title of considerable length - there was no mention of any newly available public amenity or any matter involving major innovation. However, in an insertion in s 78 there was reference (almost surreptitious) to 'the transmission of images or other visible signs, with or without attendant sounds'. For such transmission the Postmaster-General had to have the approval of the Minister of National Education, granted after consultation with the South African Broadcasting Corporation. Statutorily unmentionable as it apparently was, television had at last arrived in South Africa.

[20] 1991 brought extensive changes to the legislation pertaining to postal and telecommunications services. Act 85 of 1991 laid down that a postal company would provide the one kind of service and a telecommunications company the other. Section 80 of the Post Office Act was amended appropriately to refer, not to the Postmaster-General but to 'the telecommunications company'. The companies were State-owned.

[21] Finally, there came the Telecommunications Act, 103 of 1996. It repealed many provisions of the Post Office Act, including s 80. The replacement for that section was s 70 of the 1996 Act on which, as mentioned, the appellant essentially bases its case. The section refers not to the telecommunications company but a 'fixed-line operator' and as at the time of the proceedings in the Court below that expression was defined to mean 'Telkom and any other person who provides a licensed telecommunication service by means of a telecommunication system

consisting mainly of fixed lines ...'. In terms of the 1996 Act, therefore, there could, notionally, be fixed line operators that were neither State-owned nor State-controlled.

[22] A survey of the relevant context must now turn to another successively re-enacted provision which was discussed during argument and on which the respondents to a greater or lesser extent relied.

[23] In the 1911 Act s 80 was headed **'Postmaster-General to have Exclusive Privilege in Respect of Telegraphs'** and subsection (1) read (as far as is relevant):

> 'The Postmaster-General shall have the exclusive privilege of constructing and maintaining telegraph lines and of transmitting telegrams or other communications by telegraph within the Union or the territorial waters thereof and of performing all the incidental services of receiving, collecting, or delivering telegrams or other such communications: Provided that -
>
> (a) ...
>
> (b) the Postmaster-General may construct, maintain, or lease telegraph lines for private use or may, by licence, authorize any person to construct, maintain, and work private telegraph lines within the Union or its territorial waters and may prescribe the fees and conditions therefor.'

Section 78 of the Post Office Act - to which section I have already referred - was to all intents and purposes identical. Section 78 stood until repealed by the Telecommunications Act.

[24] It was argued for the respondents that s 78 empowered the Postmaster-General to construct telegraph lines by way of cables under the sea, which power, until that repeal, was not affected by anything in the Sea-shore Act, whether as originally enacted or subsequently amended. Accordingly, so it was submitted, there could never have been any legislative intention that the power conferred by s 80 of the Post Office Act, and consequently s 70 of the Telecommunications Act, would encompass submarine cable-laying.

[25] It is appropriate to mention at this point that, initially, s 13(e) of the Sea-shore Act did not exempt the Postmaster-General at all. It merely

exempted the holders of licences granted by him under s 80(1) of the 1911 Act, which I have just quoted. It was only much later, in a 1984 amendment to s 13(e), that the rights and powers of the Postmaster-General were exempted from the operation of the Sea-shore Act. It was suggested on behalf of the respondents that the need for this grant of relief for the Postmaster-General was occasioned by a possibly inadvertent 1976 amendment of s 78. (I have already mentioned the 1976 amending legislation with reference to the advent of television.) By that amendment the opening words of s 78 became:

> 'Subject to the provisions of any other Act of Parliament, the Postmaster-General shall have the exclusive privilege ...'

It was the respondent's argument that this unwarrantedly subjected the Postmaster-General's powers to the operation of the Sea-shore Act, from

which constraints he had then to be rescued by way of the 1984 amendment to s 13(e) of the last-mentioned statute.

[26] In my view, however, the 1976 introduction of new opening words to s 78 of the Post Office Act was no mistake. The reason is this. Despite the pre-1976 reference in s 78, and its forerunner, to the territorial waters - and especially the Postmaster-General's power in proviso (b), which, on the face of the language, appeared to enable him to effect or license construction in those waters - the fact is that the 1976 amendment to s 78 went on to change the pre-existing provision substantially. The exclusive privilege was now:

> 'of constructing, maintaining or using, or of authorizing any person to construct, maintain or use, any telecommunications line not confined to a single piece of land, or to pieces of land which are contiguous to each other and owned by the same person, for the sending, conveying, transmitting or receiving of sounds, images, signs, signals, communications or other information, and of transmitting telegrams over any such telecommunications line within the Republic or the territorial waters thereof, and of performing all the incidental services of receiving, collecting or delivering telegrams.' (My emphasis.)

The Postmaster-General's power in respect of the territorial waters was by this amendment clearly limited to transmission within those waters, with no longer any power, if indeed it did exist before, to 'construct' in those waters. There was, in the circumstances, every reason to subject the Postmaster-General's powers - at least in this specific respect - to the operation of the Sea-shore Act. Hence the new opening words of the section. And here was the opportunity, if the legislature intended to include the construction power to be included in what was then s 80 of the Post Office Act, to express that intention plainly. It failed to do so, both in s 80 and in s 70 of the Telecommunications Act.

[27] The only change when s 78 was amended in 1991 was the replacement of 'Postmaster-General' with 'telecommunications company'. In 1996 the section was repealed and no counterpart, whether to the pre-1976 version or the post-1976 version, was enacted.

[28] It must necessarily follow that whatever telecommunications lines or cables were laid in the territorial waters in the past the true legal position is that they ought to have been laid either pursuant to the pre-1976 telecommunications legislation, assuming it indeed gave the Postmaster-General the necessary power, or pursuant to the Postmaster-General's compliance with the requirements of the Sea-shore Act. The papers are altogether bereft of evidence as to what course the Postmaster-General actually did take.

[29] The inevitable conclusion as regards the contextual position is that neither s 70 of the 1996 Telecommunications Act nor its precursors were ever intended to deal with the undersea situation.

[30] Turning to the purpose of s 70, the laying of a submarine cable, whether in terms of the pre-1976 telecommunications legislation or the Sea-Shore Act, can never be beset by the obvious problems which confront

cable-laying on land. The sea in the territorial waters is, through the President, in effect all State-owned. There are no different categories of property and, with only one owner, no boundaries. By contrast, to lay cables on land would require permission or servitudes from a huge number and variety of owners. Hence the need for an all-embracing permission such as is contained in s 70. This does not mean that the appellant may not experience difficulty in securing leases as easily, or on the same terms, from the respective competent authorities in the maritime provinces but that consideration does not bear upon the interpretation of this section. The provision it contains has been substantially to the same effect since 1911, that is to say even after the administration of the Sea-shore Act ceased being under the control of a Minister of State and came under provincial control. In other words it reads the same way now as it read when there was only a single controlling authority.

[31] This brings me the language of s 70 in somewhat more detail. This is a subject which, quite naturally, could have been discussed first but, in my opinion, falls to be dealt with even more easily once context and purpose have been examined.

[32] The argument for the appellant is that 'land' in the section includes the sea-bed, a suggested interpretation which, it is said, is reinforced by the word 'any'. Enlarging upon this submission, counsel for the appellant said that 'land' was, essentially, the earth's crust and it made no material difference whether any particular portion of that crust was above or beneath the sea.

[33] That there may (apart from, say, an island or shoal) be land in the sea, receives some support from s 5(2) of the Sea-shore Act (not relied on by the appellant) which says that 'any land in the sea or on the sea-shore' may be reclaimed. However, at best for the appellant this must mean land which is

close enough to the sea-shore to be reclaimable at all. One might add that, in Afrikaans, a ship which has run aground 'het aan die grond geraak' but again the context signifies land or 'grond' close to the coast. What one is really concerned with in this case is the contention that 'land' includes the bed of the sea anywhere in the territorial waters which, in terms of s 4 of the Maritime Zones Act, 15 of 1994, extend 12 nautical miles from the coast.

[34] I do not think that the argument is advanced by the word 'any'. That word does not serve to convert into land that which, in ordinary parlance, is not land. In other words it does not extend the meaning of 'land'. What it does do is to exclude any exception to what in any case is land. The question therefore remains whether 'land' has the extended meaning for which the appellant contends.

[35] The section maintains, although not as rigidly as in the Dutch version of 1911, the dichotomy between what I might term the 'entry' provision and

the 'construction' provision. But this indicates no more, as already mentioned, than that a fixed line operator may enter landed property either to assess if it is suitable for construction (in this case cable-laying), or to cross it to get to land that is suitable. Despite the dichotomy, it is plain that such an operator must, in order to lay a cable on or over a particular piece of land, first 'enter upon' it.

[36] There is no evidence as to the cable-laying process at sea but if the description by the appellant's counsel during argument is accurate, that the cable is played out from a sea-going vessel (whether proceeding landwards or seawards), it causes unbearable strain upon the ordinary meaning of the language of the section to hold that lowering a cable to the sea bed (or diving to the sea floor to affix it) amounts to 'entry upon land'.

[37] The appellant's case is not improved by the argument (even if it were tenable) that construction need not be preceded by entry upon the land where

construction occurs. Although 'any land' in the 'entry' provision includes streets, roads and so forth, and 'any land' in the 'construction' provision is in addition to streets, roads etc, it is unquestionably so that 'land' means the same thing in both clauses, and nothing in them or the rest of the section justifies the interpretation of ' land' as including the bottom of the ocean.

[38] Some play, but not much, was made of the word 'waterway' as supporting a submarine connotation. That word does not enhance the case. The ordinary meaning of 'waterway' is a channel or canal or river, and, when used in a harbour or marine context, a channel which is, for self-evident navigational reasons, somehow demarcated. It involves linguistic distortion to interpret 'waterway' as including any undefined portion of the open sea.

[39] Finally, the appellant's suggested interpretation of 'land' would empower multiple fixed line operators to lay undersea cables without let or hindrance. This situation would seriously erode the State's control and

management in respect of marine and submarine operations which it has, down the years, exercised either under the telecommunications legislation or the Sea-shore Act. No acceptable reason suggests itself why the State would wish or need to relinquish that control. It was argued for the appellant that there was no reason for the legislature to have provided in the Telecommunications Act for a complex regulatory scheme for fixed-line operators within the Republic when it already had s 70, or for it to leave the regulation of cable-laying in respect of the territorial waters to the various authorities in the maritime provinces by way of a lease. I disagree. In enacting the Telecommunications Act the legislature must be taken to have realized that it had, in 1976, removed the provision in respect of the territorial waters equivalent to the original s 78 of 1958, despite retaining the exclusive privilege, first of the Postmaster-General and subsequently of the appellant. A reading of all the relevant earlier and current legislation leaves

no room for any interpretation other than that the provisions of the Sea-shore Act alone must now govern the regulation of undersea cable-laying.

[40] For all these reasons, I conclude that s 70 of the Telecommunications Act, 1996 does not empower the appellant to lay a submarine cable without a lease under the Sea-Shore Act. The appeal must consequently fail.

[41] As to costs, the appellant sought to avoid liability to pay for the entire record. Its contention was that the appeal concerned a point of law, for the resolution of which the whole record was unnecessary. The proceedings in the Court below, however, involved an application by the appellant and a counter-application by the fifth respondent. The counter application succeeded, hence this appeal. The application also succeeded and the first and fifth respondents were ordered to pay the costs of it jointly and severally. The fifth respondent cross-appealed against that costs order and, for the proper presentation of its case in that respect, caused the full record

to be prepared. It was justified in doing so. It was only later that the appellant abandoned the costs order in question. It seems to me, therefore, that the appeal costs payable by the appellant should not be limited as contended for.

[42] The appeal is dismissed, with costs, including, in the case of the first respondent, the costs of two counsel.

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CT HOWIE
JUDGE OF APPEAL

CONCURRED:

Schutz JA
Navsa JA
Heher AJA
Lewis AJA