IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No: CCT 52/2015

In the matter between:

KENNETH NKOSANA MAKATE Applicant

and

VODACOM (PTY) LIMITED Respondent

APPLICANT'S HEADS OF ARGUMENT

INTRODUCTION

1 This case concerns an action instituted by the applicant (Mr Makate) against the respondent (Vodacom).

2 There is essentially no dispute that:

2.1 Mr Makate was employed by Vodacom as a trainee accountant in the accounts department.

2.2 Despite having no technical background or expertise, Mr Makate conceived an idea, which was then developed by Vodacom into a highly lucrative product known as "*Please Call Me*".

2.3 The "*Please Call Me"* product has produced literally billions of rand of revenue for Vodacom.

2.4 Despite this, Mr Makate has never been paid any remuneration at all by Vodacom in this regard.

3 Mr Makate accordingly launched an action in the High Court against Vodacom. He contended that he had entered into an oral agreement with Vodacom regarding the use of his idea and that he was accordingly entitled to be remunerated by Vodacom.

4 The High Court dismissed Mr Makate's action against Vodacom. It did so despite the fact that:

4.1 The Court accepted the truth of Mr Makate's evidence and that of his witnesses on all material counts; and

4.2 The Court concluded that Mr Makate had proved, on a balance of probabilities, the existence of the oral agreement between Mr Makate and a director of Vodacom (Mr Geissler) relating to the use of the idea and for Mr Makate to be remunerated in this regard.

5 In what follows in these submissions, we address the following issues in turn.

6 First, we set out the factual background to this matter, with particular reference to the findings of fact and credibility made by the High Court in favour of Mr Makate.

7 Second, we address the question of ostensible authority. We demonstrate that:

7.1 The High Court erred in concluding that the issue had not been pleaded. The issue of ostensible authority was expressly

pleaded by Mr Makate in his particulars of claim.

7.2 The High Court erred as a matter of law in holding that the evidence did not suffice to establish ostensible authority. On the existing principles of our law, the evidence made clear that Mr Geissler had acted with the necessary ostensible authority to bind Vodacom.

7.3 In any event, the High Court ought, to the extent necessary, have developed the common law regarding ostensible authority in a manner consistent with the Constitution. It ought to have held that – at least in situations of unequal bargaining power or bad faith – there is room to take into account the conduct and statements of the agent in determining whether ostensible authority has been established.

8 Third, we address the question of prescription. We demonstrate that the High Court's conclusion that the claims had prescribed was incorrect.

8.1 First, Vodacom at no stage informed Mr Makate that the condition for him to be remunerated – commercial viability – had been satisfied. Indeed it actively prevented him from

determining the position. This meant that the claim could not have prescribed.

8.2 Second, and alternatively, even if prescription commenced running in 2001, this case involves a "*continuous wrong*". This is because Vodacom continued to derive (and still derives) further revenue from the "*Please Call Me"* product and remained (and still remains) obliged to pay Mr Makate a revenue share in this regard. Accordingly, on any basis at least the amounts due to Mr Makate after 14 July 2005 and into the future could simply not have prescribed.

9 Finally, we address the question of leave to appeal

10 In view of the application lodged by Vodacom on 9 July 2015 to supplement the consolidated record with the transcript of the evidence, we shall refer in the footnotes to both the consolidated record and the transcript for the sake of convenience.

RELEVANT FACTUAL BACKGROUND

11 Mr Makate started working for Vodacom as a trainee accountant in

February 1995.[1] He studied through UNISA and served his articles at Vodacom. He graduated in 2000.[2]

12 In 2000, Mr Makate's direct head was Mr Muchenje, the head of Financial Income Control.[3] The Managing Director of Vodacom was Mr Mthembu. The Director of Product Development and Management was Mr Geissler.

13 Despite having no technical expertise, Mr Makate conceived an idea which was developed by Vodacom into the "*Please Call Me*". In essence, "*Please Call Me*" allows a cellphone user who has run out of airtime to send a message to another cellphone user asking the latter to call the former. This product has generated millions of calls every day for Vodacom. It has resulted in profits for Vodacom running into literally billions of rands. Mr Makate developed the idea out of a long distance romantic relationship with the woman who is now his wife, who was frequently unable to contact him because she could not afford to buy airtime.[4] He realised that his idea could

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[1] Volume 2 of Consolidated Record, p.97: Judgment p.2, par.3, lines 3-4;
Volume 2 of Consolidated Record, p.122 – 123: Judgment, p.27-28, par.49, lines 2-3

[2] Volume 3 of Consolidated Record, p.197: Transcript bundle 4, p.377, lines 10-20

[3] Volume 3 of Consolidated Record, p.204: Transcript bundle 4, p.382, lines 20-25

[4] Volume 2 of Consolidated Record, p.97: Judgment p.2, par.3, lines 5-6
Volume 3 of Consolidated Record, p.211: Transcript bundle 4, p.386, lines 8-24

be used in many different contexts, including by those who were unemployed and members of the community at large who were unable to afford airtime.[5]

14 Mr Makate wrote his idea out on paper[6] and took it to work with him. He told his direct head, Mr Muchenje, about the idea and that he wanted to make money from it. Mr Muchenje urged him to speak to Mr Geissler, the director, about it and assured him that he was the person to negotiate with. Mr Makate duly met with Mr Geissler who represented that he could negotiate with Mr Makate on behalf of Vodacom.[7]

15 The High Court held that it had been established on the probabilities that Mr Makate and Mr Geissler reached an oral agreement.[8] The essential aspects of the agreement found by the High Court were as follows:[9]

15.1 Mr Makate would hand over to Vodacom the details of the idea

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[5] Volume 3 of Consolidated Record, p.213: Transcript bundle 4, p.387, lines 20-25

[6] Volume 3 of Consolidated Record, p.218: Transcript bundle 4, p.391, lines 8-10

[7] Volume 3 of Consolidated Record, p. 230: Transcript bundle 3, p.396, lines 15-25; Transcript bundle 3, p.256, lines 4-10

[8] Volume 2 of Consolidated Record, p.162: Judgment p.67, par.127

[9] Volume 3 of Consolidated Record, p.230: Transcript bundle 4, p.396, lines 15-25

Volume 3 of Consolidated Record, p.231: Transcript bundle 4, p.397, lines 1-10

Volume 7 of Consolidated Record, p.584-585: Transcript bundle 4, p.399, lines 22-25 and p.400, line 1

for testing;

15.2 If the idea proved technically and commercially successful, Vodacom would pay Mr Makate an amount to be negotiated, but which represented a share of the revenue generated by the product;

15.3 If there was a dispute about remuneration, this would be determined by the CEO, then Mr Knott-Craig.

16 The product was thereafter rapidly developed by Vodacom. It was launched early in 2001. Its launch was announced in a publication called "Talk Time" which is an internal newsletter for Vodacom. The announcement stated, inter alia, that:

> *"Vodacom has launched a new product 'Call Me', thanks to Kenneth Makate from our finance department. Kenneth suggested the service to the product development team, which immediately took up the idea. 'Call Me' is a world first and allows Vodago prepaid users to send a free text message to other Vodacom customers requesting that they call them back".*[10]

17 The managing director of Vodacom, Mr Mthembu, is also reported as describing Mr Makate's invention in glowing terms.[11]

[10] Volume 1 of Consolidated Record, p.34

[11] Volume 1 of Consolidated Record, p.34

18 Despite all of this, Mr Makate received no compensation from Vodacom. His attempts to obtain compensation where met by Vodacom – particularly Mr Geissler and Mr Knott-Craig – rounding on him.

18.1 First, Mr Geissler and Vodacom accused Mr Makate of stealing the idea for "*Please Call Me*" from MTN, thus seeking to avoid the agreement. Mr Knott-Craig was ultimately forced to concede in evidence that this allegation was false. Vodacom's own Product Description refuted this allegation.[12]

18.2 Second, Mr Knott-Craig told Mr Geissler that Mr Makate was "*too greedy*" and that he would receive nothing.[13]

18.3 Third, Mr Knott-Craig, in his 2009 biography added impudence to dishonesty, by falsely claiming that it was he (and not Mr Makate) who invented the idea for "*Please Call Me*". Remarkably, he was supported in that by no less a person than Mr Geissler. [14]

18.4 The High Court concluded in this regard that:

[12] Volume 3 of Consolidated Record, p.294-304

[13] Volume 3 of Consolidated Record, p.243: Transcript bundle 3, p.202, lines 1-6

[14] Volume 1 of Consolidated Record, p.39

> *"The probabilities rather point to an effort on the part of inter alios Mr Geissler and Mr Knott-Craig to, as it were, write the plaintiff out of the "Please Call Me" script for financial and other reasons, which, at least, the two of them could have come to explain. In my view, Mr Knott-Craig was not frank and honest about his knowledge of the plaintiff and his idea and its (ink to the 'Please Call Me' product."*[15]

Vodacom's attempt to undo the High Court's factual findings

19 The High Court concluded that Mr Makate had successfully proved the agreement between him and Mr Geissler:

> *"Considering all of the evidence, including the emails and the defendant's election not to call Mr Geissler, the plaintiff, in my view, has proven, on a balance of probabilities, that he entered into an agreement with Mr Geissler on the terms he testified to under oath."*[16]

20 It is apparent from Vodacom's statement of facts[17] that it seeks to contend that the High Court was incorrect to conclude that a agreement is established.

21 This will be addressed further should the need arise, but we submit that there is simply no basis to undo the High Court's factual findings on this score. The High Court reached its conclusion in a careful analysis of the evidence and emphasised that:

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[15] Volume 2 of Consolidated Record: Judgment, par. 93

[16] Volume 2 of Consolidated Record, p.162: Judgment p.67, par.127

[17] Volume 1 of Consolidated Record, p.58, par.31-32

21.1 Mr Muchenje, who testified for Mr Makate, impressed the Court as "*an honest witness who came to relate what he personally knew about the matter*". Despite a lengthy cross-examination, he did not contradict himself and his evidence was consistent with the general probabilities.

21.2 In respect of Mr Makate, the High Court conclude:

> *"[He] gave evidence in a reasonable manner. He too was subjected to a lengthy, skilful cross-examination. Notwithstanding, he retained his composure and, in my view, gave fair answers to questions. … The plaintiff stuck to his version, including to what he had said in chief concerning the terms of the agreement that he concluded with Mr Geissler (whom he alleged represented the defendant). The plaintiffs version regarding his idea and his communication with Mr Geissler concerning that idea, is also corroborated in material respects by the an article in the defendant's newsletter, "Talk Time", dated March 2001."*

21.3 In contrast to the favourable impression it gained of Mr Muchenje and Mr Makate, the High Court was highly critical of the testimony of Mr Knott-Craig – Vodacom's only witness. It held:

> *"I have difficulty with key aspects of Mr Knott-Craig's evidence. The areas of his evidence that perturb me in particular were concerning his knowledge or lack of knowledge of the idea behind the "Please Call Me" product, despite his position as Chief Executive Officer of the defendant and his reputation as someone who was 'hands- on'; the explanation given, in the part*

autobiography of his life, a book titled "A Second is Nothing", for the "Please Call Me" idea; and his evidence in court relating to it and then, his, what I consider, rather equivocal evidence regarding whether he had described the plaintiff as being greedy and had decided that the plaintiff should get nothing."

21.4 The High Court went on to conclude (quite correctly) that aspects of Mr Knott-Craig's evidence were "*circuitous*", "*clearly nonsensical*", not "*frank*" and "*hard to believe*".

21.5 Vodacom called no other witness. In particular, it did not call Mr Geissler and offered no explanation for its failure to do so. The High Court held in this regard:

"Since the defendant was disputing the plaintiff's evidence, in particular, about the conclusion of the agreement and its terms, it was really for the defendant to call Mr. Geissler. It was established in evidence that Mr Geissler was within South Africa and nothing suggested that he was unavailable. In my view, the defendant's failure to call Mr Geissler in the circumstances justifies an inference that he was not able to deny the version of Mr Muchenje and the plaintiff and/or that his credibility was seriously compromised and in order to avoid weakening the case that the defendant endeavoured to put up, inter alia, by means of the evidence of a single witness, Mr Knott-Craig, he was not called by the defendant."

22 We submit that the factual findings of the High Court in relation to the existence of the agreement are plainly correct. Moreover, they will not be lightly disturbed by this Court given that the High Court relied heavily and quite appropriately on its impression of the

witnesses. We further point out that the existence of other revenue share agreements concluded by Vodacom at the time, for example 'Cointel',[18] strengthens the probabilities in the Plaintiff's favour.

OSTENSIBLE AUTHORITY

23 As indicated, the High Court found that Mr Makate had concluded the agreement with Mr Geissler. However, it found that that Mr Makate had not succeeded in establishing that Mr Geissler had the necessary authority to bind Vodacom.

24 In this regard, it is trite that authority can be established in one of two ways.

24.1 First, via actual authority – whether express or implied.

24.2 Second, via ostensible authority, also known as estoppel. Our courts have explained the concept of ostensible authority as follows:

> *"A person who has not authorised another to conclude a juristic act on his or her behalf may, in appropriate circumstances, be estopped from denying that he or she had authorised the other so to act. The effect of a successful reliance on estoppel is that the person who*

[18] Volume 1 of Consolidated Record p.4, par.13: Applicant's Statement of Facts

> *has been estopped is liable as though he or she had authorised the other to act."*[19]

25 We deal below with the requirements that must be met to establish ostensible authority. Before doing so, however, we deal with the erroneous finding of the High Court that ostensible authority had not been properly pleaded.

The pleading issue

26 In most cases, the plaintiff relies on actual authority in his or her particulars of claim. Then, when met with a plea of lack of authority, the plaintiff replicates to plead ostensible authority/estoppel.

27 However, this case did not follow that route. From the moment it began, ostensible authority was immediately in issue.

28 Indeed, Mr Makate's particulars of claim did not rely upon actual authority on the part of Mr Geissler. Instead they relied expressly relied on Mr Geissler's ostensible authority. Paragraph 2.4 of the particulars of claim stated:

> *"At all times relevant during the negotiations and conclusion of the contract the parties were particulars represented by the persons whose particulars are set forth hereinafter:*

[19] South African Broadcasting Corporation v Coop 2006 (2) SA 217 (SCA) at para 63

- The Plaintiff was acting in person.

- The Defendant was represented by Mr Muchenje and Mr P Geissler (hereinafter referred to as the representatives) who were then occupying the positions of the Head of Finance Division and the Director of Product Development respectively, in the employ of the Defendant. The Representatives were acting within the course and scope of employ with the Defendant. The Representatives had ostensible authority to negotiate and to contract for and/or on behalf of the Defendant."[20]

29 In its plea, Vodacom not only denied this allegation, but amplified its denial as follows:

"In amplification of such denial, the Defendant denies that:

3.2.1 its representatives referred to in paragraph 2.4.2 hereof, had actual or "ostensible authority (express or implied) to conclude the agreement alleged on its behalf;

3.2.2 the Defendant represented to the Plaintiff that its representatives had authority to conclude the alleged agreement on its behalf…"[21]

30 Despite this, the High Court held that the question of ostensible authority was not properly raised on the pleadings. It held that "*the plaintiff ought to have made the necessary allegations to found his reliance on ostensible authority*"[22] and explained its reasoning as follows:

"The mere allegation in the particulars of claim, that Mr Geissler had "ostensible authority', was not enough. The

[20] Volume 4 of Consolidated Record, p.311: Particulars of Claim p.7, par.2.4 (emphasis added)

[21] Volume 4 of Consolidated Record, p.347 - 348: Plea p.5-6, par.3.1-3.2

[22] Volume 2 of Consolidated Record, p.177: Judgment, p.82, par.156

plaintiff had to plead an estoppel in the replication. If the plaintiff was aware at the outset of the true facts, namely, that there was no actual authority and that he was relying on ostensible authority, he should have pleaded the facts, as represented to him, to found such authority, in his particulars of claim. If he was not aware that Mr Geissler had no actual authority and had pleaded actual authority and the defendant had, in turn, pleaded the true facts (i.e. a denial of actual authority), the plaintiff may then have relied on estoppel in his replication. But it was essential for the plaintiff to have pleaded the facts as represented to him, if he was aware of those facts. The estoppel, which is not a cause of action, should then have been pleaded in a replication, in response to the defendant's plea."[23]

31 We submit that the High Court's approach is incorrect. For a start, the High Court confused and conflated two separate questions:

31.1 What allegations must a plaintiff plead in order to render the question of ostensible authority a triable issue for purposes of trial?

31.2 What facts must a plaintiff then prove at trial to establish ostensible authority?

32 The High Court judgment relied on two decisions of the SCA – *Northern Metropolitan*[24] and *NBS*.[25] But neither of those decisions

[23] Volume 2 of Consolidated Record, p.179-180: Judgment, p.84-85, par.157. [There are two paragraphs number 157 in the judgment – this is the second one.]

[24] Northern Metropolitan Local Council v Company Unique Finance (Pty) Ltd and Others 2012 (5) SA 323 (SCA)

supports or justifies the approach taken by the High Court on the question of pleading.

32.1 In *Northern Metropolitan*, the Court set out at para 28 what facts the party alleging ostensible authority "*had to prove".* Similarly, in *NBS*, the Court set out at para 26 what facts the party alleging ostensible authority *"had to prove*".

32.2 In other words neither of these judgments held or even suggested that it was necessary for a party alleging ostensible authority to allege each of these aspects in the relevant pleadings. Rather, they dealt with what had to be proved at trial. On this basis alone the High Court's approach was incorrect.

33 In any event, as we have demonstrated above, the issue of ostensible authority was squarely raised in the particulars of claim and Vodacom understood this by pertinently denying the allegation in its plea.

34 Thus, the most that could be said was that the particulars of claim lacked sufficient particularity and that the basis for the "*ostensible*

[25] NBS Bank Ltd v Cape Produce Co (Pty) Ltd and Others 2002 (1) SA 396 (SCA)

authority" should have been set out in the particulars.[26] However, this alleged lack of particularity cannot not avail Vodacom given that:

34.1 Vodacom did not take an exception in terms of Rule 23 to the particulars of claim on the grounds that they lacked averments necessary to sustain a cause of action or were vague and embarrassing.

34.2 Instead, it filed the plea set out above in which it specifically denied this allegation.

34.3 Vodacom moreover sought and obtained further particulars in terms of Rule 21 from Mr Makate in regard to the ostensible authority alleged. It at no stage sought to compel further particulars on the basis that these were inadequate.

35 Hence, as matters stood at the time that the trial commenced, the only triable issue on the authority of Mr Geissler was whether or not he had ostensible authority. The High Court's conclusion to the

[26] Indeed, it was for that reason and to and cure any difficulty on this question of particularity that, late in the trial, Mr Makate brought an application for leave to amend which amplified the pleading of the ostensible authority issue. Vodacom opposed this application but notably did not contend for any prejudice. Despite this, the High Court refused the application for leave to amend.

contrary was incorrect.[27]

36 The High Court failed to take account of Mr Makate's right under section 34 of the Constitution to have his dispute with Vodacom "*decided in a fair public hearing before a court*".

36.1 As this Court explained in *Giddey*, when applying a rule of court it is essential to consider the impact on the section 34 right to a fair hearing and a court that fails to do so "*will not have properly applied the Rules at all*".[28]

36.2 More recently, in *Mukaddam*[29] this Court relied on section 34 of the Constitution in concluding that:

> *"Flexibility in applying requirements of procedure is common in our courts…. Rigidity has no place in the operation of court procedures."*

36.3 This approach must apply equally to questions of pleading:

> *"The object of pleading is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within those limits the court has a wide discretion. For*

[27] In any event, an application by the Plaintiff to amend his particulars of claim to incorporate the evidence which had been lead was refused erroneously by the Trial Court. See: Volume 6 of Consolidated Record, p.483-510: Applicant's Application for Amendment

[28] Giddey NO v JC Barnard & Partners 2007 (5) SA 525 (CC) at para 16

[29] Mukaddam v Pioneer Foods (Pty) Ltd 2013 (5) SA 89 (CC) at para 39. See also: PFE International and Others v Industrial Development Corporation of South Africa Ltd 2013 (1) SA 1 (CC) at para 39

pleadings are made for the court, not the court for pleadings."[30]

36.4 Yet the High Court prevented Mr Makate from having his case on ostensible authority determined, even though the issue had been expressly pleaded and even though Vodacom was fully alive to this, meaning that no question of prejudice could arise.

The evidence on ostensible authority

37 Notwithstanding its conclusion on the pleading issue, the High Court proceeded to consider whether the evidence met the legal requirements for ostensible authority.[31] It held that the evidence did not establish this.

38 Importantly, the High Court did not so by rejecting the evidence on which Mr Makate relied. Instead, it apparently accepted this evidence as correct, but concluded that as a matter of law it did not suffice to meet the legal requirements concerned.

39 In doing so, we submit that the High Court misunderstood the legal principles concerned. We begin by recounting the relevant facts

[30] Robinson v Randfontein Estates GM Co Ltd 1925 AD 173 at 198. See also: Shill v Milner 1937 AD 101 at 105. Both judgments were cited with approval by Froneman J in his separate concurring judgment in F v Minister of Safety & Security 2012 (1) SA 536 (CC) at para 28.

[31] Volume 2 of Consolidated Record, p.184-190: Judgment, p.89-95, par. 165 - 175

and then deal with the legal requirements.

40 Mr Geissler was appointed by Vodacom as a Director. This was reflected on the Vodacom letterheads. He was not merely a Director but the "Director for Product Development".[32]

41 Mr Makate initially contemplated submitting his memorandum to a list of Vodacom officers, including Mr Knott-Craig and Mr Geissler.[33] However, Mr Muchenje (the head of the Finance Division) dissuaded him from doing so and told him to submit it to Mr Geissler instead.[34]

42 Mr. Muchenje assured Mr Makate that Mr Geissler was the "*right man*" to go to and one that can enter into an agreement with him, He did so after having discussed the idea and the issue of remuneration with Mr. Geissler.[35]

43 Mr Makate was then summoned, on the recommendation of Mr Muchenje, to Mr Geissler's office, to discuss his innovation and to broker a commercial transaction on remuneration. Mr Muchenje

[32] Volume 3 of Consolidated Record, p.207: Transcript bundle 3, p.200, lines 19-21

[33] Volume 1 of Consolidated Record, p.30-33

[34] Volume 3 of Consolidated Record, p.227: Transcript bundle 4, p.394, lines 6-12

[35] Volume 3 of Consolidated Record, p.282: Transcript bundle 2, page 193, line 13 and onwards

testified as follows:

> *"…so the commitment that was made by Mr. Geissler, was that he would, once the product had been tested and proven to be commercially viable, he would come back and finalise with Mr. Makate on this issue of remuneration."*

There is thus not the slightest doubt that Mr Geissler "held out" that he had the requisite authority.[36]

44 In the eyes of the staff of Vodacom, Mr Geissler was clothed with the perception of authority.

44.1 This is demonstrated by Mr Muchenje's insistence that Mr Makate should deal with Mr Geissler.

44.2 Mr Muchenje himself was fully cognisant of the reputation of Mr. Geissler, ultimately caused by his aura of authority. Mr. Muchenje said as follows under cross-examination on the "reputation" of Mr. Geissler:[37]

> *"He (meaning Makate) came to me not only because I was his mentor and so on, but I could pick up the phone and call Phillip Geissler. Phillip Geissler was feared at Vodacom. He was the security guy, checking on cameras on people etcetera, so he was the guy that was checking*

[36] Volume 3 of Consolidated Record, p.279: Transcript bundle 4, p.325, lines 17-25; Transcript bundle 4, p.326, line 24-25 and p.327, line 2

Volume 2 of Consolidated Record, p.113: Judgment, p.18, par.33, line 4

Volume 2 of Consolidated Record, p.117: Judgment, p.22, par.38

Volume 3 of Consolidated Record, p.231: Transcript bundle 4, p.397, lines 17-22

[37] Volume 3 of Consolidated Record, p.279: Transcript bundle 4, page 325, line 3

to make sure everything was fine and so on, so people are afraid of him. I was one of the few people that would speak to him. So I guess that Mr. Makate also was a bit intimidated but I spoke with Mr. Geissler myself yes."

44.3 Mr Geissler plainly had close contact with Mr Knott-Craig and free access to him.[38] He was after all the close confidante to whom Mr Knott-Craig turned for confirmation of his false claim of inventorship of Please Call Me. According to Mr Knott-Craig, Mr Geissler was standing next to him on the balcony when he came up with the idea.[39]

44.4 At the time during which Mr Makate and Mr Geissler were negotiating, Mr Geissler clearly discussed the matter with Mr Knott-Craig, Mr Sopteriades and numerous other individuals.[40]

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[38] Volume 3 of Consolidated Record, p.231: Transcript bundle 4, p.397, lines 17-22
Volume 3 of Consolidated Record, p.207: Transcript bundle 3, p.200, lines 23-24
Volume 1 of Consolidated Record, p.38: Applicant's Statement of Facts "KM5"
Volume 2 of Consolidated Record, p.139-140

[39] Volume 1 of Consolidated Record, p.38

[40] Volume 3 of Consolidated Record, p.286; Volume 3 of Consolidated Record, p.294-304
Volume 3 of Consolidated Record, p.230: Transcript bundle 4, p.396, lines 15-25
Volume 3 of Consolidated Record, p.231: Transcript bundle 4, p.397, lines 1-10 and 21-22
Volume 3 of Consolidated Record, p.234: Transcript bundle 4, p.398, line 15
Volume 7 of Consolidated Record, p. 583: Transcript bundle 4, p.400, line 8 and lines 22-25
Transcript bundle 4, p.401, lines 1-15
Volume 3 of Consolidated Record, p.286
Volume 3 of Consolidated Record, p.294-304
Volume 3 of Consolidated Record, p.230: Transcript bundle 4, p.396
Volume 3 of Consolidated Record, p.231: Transcript bundle 4, p.397, lines 1-10 and 21-22
Volume 3 of Consolidated Record, p.234: Transcript bundle 4, p.398

45 In light of all the facts and circumstances, Mr Makate believed that Mr Geissler had the authority to deal with him.

> *"Like I am saying, in my mind this was just to relay to Alan (meaning Knott-Craig) what the deal was. At no point did Mr. Geissler indicate or give me the impression that he never had authority to make this deal."*[41]

46 The perception of Mr Geissler's authority in this area was subsequently confirmed by the fact that Mr Geissler issued a circular to staff at different branches[42] countrywide that the product would be launched and that he awaited their feedback.

47 In general directors (at least certain of them) had the power to conclude agreements with distribution channels. For example Mr Blackburn could conclude agreements with the Defendant's distribution channels, an issue known to the Plaintiff.[43]

48 Significantly, Mr Muchenje testified to the corporate culture which

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Volume 7 of Consolidated Record, p.583: Transcript bundle 4, p.400, lines 23-25

Transcript bundle 4, p.401, lines 1-15

Consolidated Record volume 2, p.111-112: Judgment p.16-17, par.31

[41] Volume 3 of Consolidated Record, p.283: Transcript bundle 6, page 586, line 23

[42] Volume 3 of Consolidated Record, p.241: Transcript bundle 2, page 198, lines 1-14

[43] Volume 2 of Consolidated Record, p.114: Judgment, p.19, par.34

Transcript bundle 6, p.527, line 15

prevailed at Vodacom at the time – namely that because of the pace of development, a lot of reliance was placed on trust because certain things had to be done urgently in order to "*get the market early*". This meant that sometimes the paperwork would not be finalised in time.[44]

49 This was also subsequently confirmed by events. Vodacom launched the product and advised all staff that it was doing so.[45] Yet it did so without Board approval which only took place on 15 March 2001.[46]

The existing test for ostensible authority

50 The High Court effectively discounted all of these facts, bar one, on the question of ostensible authority. It found that the "*high watermark*" of Mr Makate's case on this issue was that Vodacom had appointed Mr Geissler to its board and that he was a full director with that title and with the designation "*Director of Product Development*".[47]

51 We submit that in doing so, the High Court misunderstood the

[44] Volume 2 of Consolidated Record, p.113-114: Judgment, p.18-19, par.34

[45] Volume 7 of Consolidated Record, p.681

[46] Volume 1 of Consolidated Record, p.35-37

[47] Volume 2 of Consolidated Record, Judgment, par. 166 - 173

position in our law.

52 The existing principles of our law relating to ostensible authority appear from a series of cases decided in the SCA, particularly *NBS,*[48] *SABC*[49] and *Northern Metropolitan.*[50]

52.1 In *NBS*, the Court upheld a claim based on ostensible authority. It held as follows:[51]

> *"When the enquiry becomes focused upon ostensible authority, evidence about the internal controls of the bank is largely irrelevant, despite the fact that the bureaucratic mind believes that things may not happen, do not happen, and finally, cannot happen, unless the regulations are complied with. The outsider does not think that way. Nor does the law…..*
>
> *What emerges from the evidence is not a nude appointment, but an appointment with all its trappings, set in a context…*
>
> *All in all the NBS created a façade (I use that word only because I am concentrating on outward appearances) of regularity and order that made it possible for Assante, for a time, to pursue his dishonest schemes. And it is in the totality of the appearances that the representation is to be found…."*

52.2 In *SABC*, the Court upheld a claim based on ostensible

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[48] NBS Bank Ltd v Cape Produce Co (Pty) Ltd and Others 2002 (1) SA 396 (SCA)

[49] South African Broadcasting Corporation v Co-op & Others 2006 (2) SA 217 (SCA)

[50] Northern Metropolitan Local Council v Company Unique Finance (Pty) Ltd and Others 2012 (5) SA 323 (SCA)

[51] At paras 31 - 33

authorities by employees of the SABC. It held:[52]

> *"As in the NBS Bank case … the plaintiffs' case was not limited to the appointment of the various relevant officers who acted on the SABC's behalf It included their senior status, the trappings of their appointment, the manner in which they went about their dealings with the plaintiffs, the use of official documents and processes, the apparent approval of subordinate and related organisations … and the conduct of CEOs who were Board members.*
>
> *As in the NBS Bank case, the SABC created a façade of regularity and approval and it is in the totality of the appearances that the representations relied on are to be found."*

52.3 In the last of the three cases, *Northern Metropolitan*, the court rejected the claim of ostensible authority. The Court found that the Council had not created "*a facade of regularity and approval*" in respect to the authority of such a person, unlike the situation pertaining in the SABC and the NBS cases.

53 In each of these cases, reference with approval was made to a leading case in the English Court of Appeal – *Hely-Hutchinson*.[53]

53.1 In his judgment in *Hely-Hutchinson* case Lord Denning referred importantly to the fact that a Court should have regard to the "*holding out*" of the party alleged to have ostensible

[52] At paras 74-75

[53] *Hely-Hutchinson v Brayhead Ltd & Another* 1968(1) QB 549 (CA)

authority.[54]

53.2 Lord Pearson delivered a concurring judgment and commented about difficult issues relating to ostensible authority.[55]

53.3 *Hely-Hutchinson* is therefore authority for the proposition that the "*holding out*" or "*representations*" of the agent are not to be disregarded. Indeed they are in many cases the only express or implied representations which are made.

54 It is no doubt for this reason that the SCA in the *NBS* case not only

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[54] He held:

> *"But sometimes ostensible authority exceeds actual authority. For instance when the board appoint the managing director, they may expressly limit his authority by saying he is not to order goods worth more than £500 without the sanction of the board. In that case his actual authority is subject to the £500 limitation, but his ostensible authority includes all the usual authority if a managing director. The company is bound by his ostensible authority in his dealings with those who do not know of the limitation. He may himself do the "holding out". Thus, if he orders goods worth a £1000 and signs himself "managing director for and on behalf of the company' the company is bound to the other party who does not know of the £500 limitation*." (emphasis added)

[55] He held:

> "*There is, however, an awkward question arising in such cases how the representation which creates the ostensible authority is made by the principle to the outside contractor. There is this difficulty. I agree entirely with what Diplock LJ said[55] that such representation has to be made by a person or persons having actual authority to manage the business. But suppose for convenience that such persons are the board of directors. Now there is not usually any direct communication in such cases between the board of directors and the outside contractor. The actual communication is made immediately and directly, whether it be express or implied, by the agent to the outside contractor. It is, therefore, necessary in order to make a case of ostensible authority to show in some way that such communication which is made directly by the agent is made ultimately by the responsible parties, the board of directors. That may be shown by inference from the conduct of the board of directors in a particular case by, for instance, placing the agent in a position where he can hold himself out as their agent and acquiescing in his activities, so that it can be said that they have an effect caused the representation to be made. They are responsible for it and in the contemplation of law, they are to be taken to have made the representation to the outside contractor.*" (emphasis added)

had regard to the appointment of Assante as a manager as a "*nude appointment*", but also had regard to the trappings of his appointment and, crucially, his representations. The SCA went on to hold that the NBS created a facade. The NBS in that case sought to argue that the respondent's case rested upon "*the mere appointment*" of Assante. Dismissing this argument the court held that "*The importance of such a posting is not to be diminished.*". The following dictum is telling:

> *"And for those who may know that for some acts, for instance, 'wholesale' borrowing, even he might need the confirmation of higher authority, they are entitled to assume that he knows his own limits and will respect them, so that when he speaks, he speaks with the full authority of the bank."*[56]

55 Thus, the SCA held that in order to prove ostensible authority, a representation by words or conduct is necessary which is to be made by the NBS and not merely by Assante. The same point about the representation not being made merely by the agent was made in *Northern Metropolitan*[57] and *Glofinco*.[58]

56 This makes clear that the High Court was simply wrong to effectively discount the representations made by Vodacom through

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[56] *NBS* at para 29 (emphasis added)

[57] Northern Metropolitan at para 28

[58] *Glofinco v ABSA Bank Ltd t/a United Bank* 2002 (6) SA 470 (SCA) at para 13

its representatives, Mr Geissler and Mr Muchenje. In the context of the full facts and circumstances and the aura created around Mr Geissler, there was a representation that Mr Geissler had the necessary authority.

57 Moreover, Mr Makate's evidence is quite clear. When he came up with the idea, he wanted to make money off it.[59] It is simply inconceivable that he would have agreed to hand it over and forgo approaching another party,[60] if he had understood that Mr Geissler had no authority to contract with him on behalf of Vodacom. [61]

58 The requirements of ostensible authority are therefore satisfied. There was:

58.1 The necessary representation by words or conduct that Mr Geissler was entitled to contract on behalf of Vodacom, which Vodacom understood would be relied on by Mr Makate;

58.2 There was reasonable reliance by Mr Makate on that representation; and

58.3 There was consequent prejudice to Mr Makate.

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[59] Volume 3 of Consolidated Record, p.220: Transcript bundle 4, p.392, lines 4-7

[60] Volume 2 of Consolidated Record, p.117: Judgment, p.22, par.40

[61] Volume 2 of Consolidated Record, p.117: Judgment, p.22, par.40

59 As we have explained, the High Court appears to have adopted a different approach to the existing test laid down by our courts. In determining the ostensible authority issue, the High Court apparently held that the law required it to take no account at all of the conduct and statements of Mr Muchenje and Mr Geissler. That legal approach is incorrect and raises an arguable point of law of general public importance, in terms of section 167(3)(b)(ii) of the Constitution.

The development of the common law

60 For the reasons just set out, on the facts accepted by the High Court and using the correct existing common law test, Mr Makate's claim ought to have succeeded.

61 But if for any reason this Court concludes that the existing common law test is too narrow for this to occur, this Court should then develop the common law regarding ostensible authority to the extent necessary. That development should involve developing the principles of ostensible authority as follows:

61.1 First, a court dealing with a party's claim of ostensible authority should consider whether that party was at a

significant disadvantage in relation to the bargaining power between the contracting parties and between the negotiating persons.

61.2 Second, the court should consider whether the party resisting the claim of ostensible is acting in bad faith.

61.3 Third, in the event that either of these requirements is satisfied, the court should far more readily rely on and enforce the representations made by the agent said to have exercised the ostensible authority.

62 In considering the power and duty to develop the common law, we can do no better than point to this Court's recent judgment in *DE v RH*. There this Court held as follows:

> *"Without doubt it is open to courts to develop the common law. This is a power they have always had.−Today the power must be exercised in accordance with the provisions of section 39(2) of the Constitution which requires that common law be developed in a manner that promotes the spirit, purport and objects of the Bill of Rights. This entails developing the common law in accordance with extant public policy. In Du Plessis[1] Kentridge AJ quoted the case of Salituro with approval:*
>
> > *'Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless there are significant constraints on the power of the [J]udiciary to change*

the law. . . . In a constitutional democracy such as ours it is the Legislature and not the courts which has the major responsibility for law reform. . . . The [J]udiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.'

This dictum shows that courts have the duty to develop the common law whenever that is warranted.

Public policy is now infused with constitutional values and norms. In Barkhuizen this Court said:

'Public policy represents the legal convictions of the community; it represents those values that are held most dear by the society. Determining the content of public policy was once fraught with difficulties. That is no longer the case. Since the advent of our constitutional democracy, public policy is now deeply rooted in our Constitution and the values which underlie it. . . .

What public policy is . . . must now be determined by reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights.'"

63 We emphasise too that, unlike *Everfresh*,[62] this is a case where the potential need for the development of the common law was raised on the pleadings. In the particulars of claim, Mr Makate pleaded:

"12.2 In interpreting the agreement between the parties, the Court should have regard to the following:

12.2.1 That the above honourable Court is mandated, by Section 39(2) of the Constitution …. to develop the common law, including the law of contract with constitutional values.

[62] Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd 2012 (1) SA 256 (CC)

12.2.2 That this is a proper case for the Honourable Court to infuse the law of contract with the constitutional values of ubuntu and good faith.

12.3 The Plaintiff pleads that this a proper case to infuse such values by virtue of the following;

12.3.1 During none of the negotiations leading up to and/or after the conclusion of the agreement was the Plaintiff given any legal assistance;

12.3.2 The Plaintiff is a layman with no contractual experience juxtaposed against those, acting for the defendant, who were well versed in the essentiality and that dryer of essentialia and naturalia of enforceable legal commercial contracts

12.3.3 The Plaintiff had no legal technical [or] financial resources to rely on whereas the Defendant had virtually unlimited resources to draw on;

12.3.4 The Plaintiff was, at the relevant time, in an employee/employer relationship with the Defendant which further hampered his negotiating position;

12.3.5 The Defendant decided immediately after the negotiations were computed and product used to the defendant to circumvent and thwart the Defendant's obligations and not negotiate in good faith or at all. This mindset is manifested in biography of Mr Knott- Craig and reinforced by email [sent] to him by Mr Geissler."

64 We submit that this is a case which, if the claim of ostensible authority is not sustainable on the existing principles, cries out for

the development of the common law.

65 Mr Makate was a junior employee of relatively low level. He was negotiating with a director of his employer, a very large company, in relation to a product which would greatly benefit Vodacom's business. The disparity in bargaining power is palpable – both as between Mr Makate and Mr Geissler and as between Mr Makate and Vodacom.

66 This Court has already held in *Barkhuizen* that "*unequal bargaining power is indeed a factor that together with other factors plays a role in the consideration of public policy*" because of "*the potential injustice that may be caused by inequality of bargaining power*".

66.1 It has concluded that this was a relevant factor in determining whether a contractual term was contrary to public policy.[63]

66.2 That concern of "*potential injustice*" applies with considerable force in a case such as this, where the party contending for the agreement is in such a weak bargaining position and has to determine whether to rely on the assurances of his far more senior employees.

[63] Barkhuizen v Napier 2007 (5) SA 323 (CC) at para 59

67 This Court has similarly recognised in *Everfresh* that:

> *"[I]t is highly desirable and in fact necessary to infuse the law of contract with constitutional values, including values of ubuntu, which inspire much of our constitutional compact. On a number of occasions in the past this court has had regard to the meaning and content of the concept of ubuntu. It emphasises the communal nature of society and 'carries in it the ideas of humaneness, social justice and fairness' and envelopes 'the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity'."*[64]

67.1 In the present case, Mr Geissler misled Mr Makate regarding his authority and induced him to enter the agreement. The agreement involved reciprocal obligations: Mr Makate would give Vodacom the idea to use and Vodacom would compensate him.

67.2 Mr Makate fulfilled his obligations under the agreement and Vodacom benefitted (and still benefits) handsomely. Vodacom has never denied, and obviously cannot deny that Mr Geissler had actual- or implied authority to at least accept Mr Makate's performance of his obligation.

67.3 But when Mr Makate sought to obtain the remuneration concerned, Mr Knott-Craig stated that Mr Makate was "*greedy*"

[64] Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd 2012 (1) SA 256 (CC) at para 71 (emphasis added)

and that Mr Makate would not get a cent.[65]

67.4 As the High Court correctly found, Mr Geissler and Mr Knott-Craig then engaged in an effort to "*write the Plaintiff out of the 'Please Call Me' script for financial and other reasons".*[66]

67.5 This conduct – by Vodacom and two of its most senior officials – is quite extraordinary. It is self-evidently completely at odds with the notion of ubuntu and the principle of good faith it embraces.

68 The conclusion of the High Court means that Vodacom was and is able to use Mr Makate's idea to bring in very substantial revenues, while paying him nothing. This is by virtue of the fact that Mr Geissler, a very senior employee with vast advantage in bargaining power, misled Mr Makate and induced him to give up his idea on the basis of his understanding that there was a binding agreement.

69 That result, we submit, cannot sit comfortably with a common law that is in line with the values of our Constitution. To the extent that the doctrine of ostensible authority allows this to occur, it should be developed in the manner set out above.

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[65] This is what Mr Geissler told Mr Muchenje had been said. Mr Knott-Craig conceded in his evidence that he may well have said as much.

[66] Volume 2 of Consolidated Record, p.123: Judgment, p.28, par.50

70 Finally, we point out that this is an issue which plainly falls within this Court's jurisdiction.

70.1 In *Everfresh*, this Court held that whether "*a given principle of the common law of contract ought to be infused with constitutional values does raise a constitutional issue*". It thus falls under section 167(3)(b)(i) of the Constitution.

70.2 Moreover, and in any event, this issue raises an "*arguable point of law of general public importance which ought to be considered by [this] Court"* in terms of section 167(3)(b)(ii) of the Constitution. The laying down of the principles concerned will not only affect this case but will affect all cases where ostensible authority is at issue in a context which involves unequal bargaining power or the exercise of bad faith. This meets the test set out by this Court in *Paulsen.*[67]

Conclusion on ostensible authority

71 We therefore submit that the High Court's finding on the question of ostensible authority was not sustainable. The issue had been raised on the pleadings and the evidence accepted by the High

[67] Paulsen and Another v Slip Knot Investments 777 (Pty) Limited 2015 (3) SA 479 (CC) at paras 16 - 30

Court was sufficient to establish ostensible authority – whether on the correct existing test or the test as developed in accordance with the Constitution.

PRESCRIPTION

72 The second basis on which the High Court found against Mr Makate was prescription. It found that any claim or debt that had arisen had prescribed some three years after the end of 2001, in view of the fact that the debts upon which he relied arose and were due "*long before the end of 2001*".[68]

73 We submit that this finding was incorrect for two separate reasons.

Fulfilment of the condition of ongoing commercial viability

74 As indicated above, the High Court accepted that Mr Makate had, subject to the question of authority, established the existence of the agreement which he pleaded and testified too.

75 One of the conditions of the agreement was that the *Please Call Me*

[68] Volume 2 of Consolidated Record, p.192-193: Judgment, p.97-98, par.182-183

had to be financially and commercially viable.[69] This information was exclusively within the knowledge of the Vodacom. This was because the costs of implementing the *Please Call Me* concept had to be weighed against the revenue generated from it.

76 Mr Makate had to rely on Vodacom to disclose the information regarding revenue earn, expenditures incurred and profits derived to finalise negotiations for a percentage after he had proposed 15%.

77 Vodacom bore the onus in respect of prescription.[70] Yet it failed to prove the date on which Mr Makate had actual knowledge of all the facts, which would include sufficient knowledge of the commercial viability of the *Please Call Me* concept. Mr. Makate made this very point under cross examination.[71] But the High Court appear to have considered this issue.

78 It is clear from the contemporaneous documents that Mr Makate was unable to obtain this information and that even Vodacom itself professed uncertainty about the position until the eve of trial.

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[69] Volume 3 of Consolidated Record, p.231: Transcript bundle 4, p.397, lines 1-2

[70] Gericke v Sack 1978 (1) SA 821 (A) at 827D – G

[71] Volume 1 of Consolidated Record, p.17, par.45.1: Applicant's Statement of Facts
Volume 3 of Consolidated Record, p.267 : Transcript bundle 7, p.624, lines 1-5

79 On 29 January 2001, Vodacom's Finance Director, Mr van der Watt wrote to Vodacom's Managing Director, Mr Mthembu about the financial implications of the *Please Call Me* concept.

79.1 He commented:

> *"There is potential for increase in revenue however the risk of changing call patterns is unknown, to what extent the service will set off the potential losses cannot be determined."*

79.2 He recommended a plan to gather information to understand the calling patterns to assist in removing uncertainty.

79.3 Mr Mtembhu agreed and instructed him to proceed as recommended and to advise Mr Geissler accordingly.

80 Vodacom maintained until the eve of the trial that it was impossible for it to provide documentation or statements reflecting the profits earned from the *Please Call Me* concept.

80.1 As late as 19 January 2008 (only a few months before summons was issued) Mr Makate's attorney asked Vodacom: "*Whether or not Vodacom (Pty) Ltd is earning income from the direct and/or indirect use of the products from whatsoever source*?"[72] Vodacom's response was simply to deny any

[72] Volume 3 of Consolidated Record, p.287

agreement with Mr Makate.[73]

80.2 On 23 September 2011 (more than three years after summons had been issued), Spilg J granted Mr Makate an interlocutory order compelling Vodacom to provide oral evidence regarding the number of calls and SMS's received since 2000 and whether a record could be extrapolated from the Defendant's database of annual revenue generated as a result of induced calls.[74] In that application, Mr Farrah (Vodacom's Managing Executive of Legal Affairs) deposed to an affidavit stating that:

> *"the Defendant has not and never had the capability or capacity to determine whether or not a call was induced by a Please Call Me - request"*
>
> and
>
> *"Due to these contingencies the Defendant has no records in its possession relating to the number of 'induced calls'."*[75]

80.3 In a meeting of the two expert witnesses on 19 July 2013 (five years after summons had been issued), Vodacom's expert witness[76] still maintained that Vodacom "*decided not to track revenues because there were many factors that could have*

[73] Volume 3 of Consolidated Record, p.288

[74] The interlocutory was not persisted with as the parties agreed to separate merits and quantum.

[75] Volume 3 of Consolidated Record, p.293

[76] Who was ultimately not called

made the results unreliable".[77] He went in to add that Vodacom "*assumed*" that the concept led to an increase in revenue but "*We have not explicitly calculated if this occurred for the reasons given above*".[78]

81 On the basis of Vodacom's own version therefore, one of the conditions of the agreement remained unfulfilled because it was impossible to determine. Thus, Mr Makate could not have hoped to have sufficient knowledge of the facts to institute the action.

82 Of course, in reality, Vodacom's steadfast assertion was false.

82.1 This is demonstrated by Mr Zatkovich's evidence that it was indeed possible to determine the success of product. [79]

82.2 It is also demonstrated by Mr Knott-Craig's autobiography, published in 2009 (after summons had been issued) which stated that "*This concept generated hundreds of millions in revenue.*" [80]

83 In the circumstances, Mr Makate's claim could not have prescribed

[77] Volume 1 of Consolidated Record, p.41

[78] Volume 1 of Consolidated Record, p.45

[79] Volume 3 of Consolidated Record, p.268: Transcript bundle 1, p.79, lines 3-25

[80] Volume 1 of Consolidated Record, p.38

for two reasons.

84 First, section 12(2) of the Prescription Act provides that:

> *"If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt."*

85 This applies to Vodacom's stance here.

86 Second, section 12(3) of the Prescription Act provides that:

> *"A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.*

87 Even if it is assumed in Vodacom's favour that it did not "wilfully" prevent Mr Makate from coming to know of the existence of the debt, Vodacom certainly did not establish that Mr Makate had the necessary knowledge or that he could have acquired it with reasonable care. Still less did Vodacom establish <u>when</u> Mr Makate had the necessary knowledge. In this regard, it is trite that the onus to do so rested on Vodacom.[81]

88 On this basis alone, the High Court's conclusion that the claim had

[81] Gericke v Sack 1978 (1) SA 821 (A) at 827D – G

prescribed was not sustainable.

An ongoing wrong

89 Even if all of the above is left aside, the High Court's conclusion was still wrong as a matter of law.

90 Mr Makate's claim, in essence, was a claim for a share of the revenues which Vodacom derived and continues to derive from his idea. The agreement pleaded was that he was entitled to negotiate in order to determine a "*reasonable ongoing remuneration … for the use of the product by the defendant*".[82]

91 It is plain therefore that the agreement accepted by the High Court did not involve a single lump sum payment at the commencement of the agreement. This would have been impossible as neither Mr Makate nor Vodacom would have known what the future revenues would be.

92 What this means is that this was not a case where a single debt became due and prescribed. On the contrary, this case involved a series of debts which came into existence and will still come into

[82] Volume 4 of Consolidated Record, p.313-315, par.5.4.1.1, 5.4.1.3, 5.4.1.5

existence and which have different prescription dates.

93 This approach has been recognised by the SCA in *Barnett v Minister of Land Affairs*.[83] In that judgment, it held:

> *"[T]he answer to the prescription defence is, in my view, to be found in the concept which has become well-recognised in the context of prescription, namely that of a continuous wrong. In accordance with this concept, a distinction is drawn between a single, completed wrongful act - with or without continuing injurious effects, such as a blow against the head - on the one hand, and a continuous wrong in the course of being committed, on the other. While the former gives rise to a single debt, the approach with regard to a continuous wrong is essentially that it results in a series of debts arising from moment to moment, as long as the wrongful conduct endures (see eg Slomowitz v Vereeniging Town Council 1966 (3) SA 317 (A); Mbuyisa v Minister of Police, Transkei 1995 (2) SA 362 (Tk) (1995 (9) BCLR 1099); Unilever Bestfoods Robertsons (Pty) Ltd and Others v Soomar and Another 2007 (2) SA 347 (SCA) in para [15]).";*[84]

94 It is also demonstrated by the decision of the Appellate Division in *Slomowitz.*

94.1 There the plaintiff sued a municipality for damages. The plaintiff alleged that the municipality had wrongfully closed a road in February 1960 and kept it closed until 17 December 1964.

[83] Barnett v Minister of Land Affairs 2007 (6) SA 313 (SCA) at para 20

[84] Emphasis added

94.2 Summons was issued on 24 March 1964 and a plea of prescription was raised on the basis that an action had to be brought within six months of the cause of action arising[85] and therefore that the entire claim had to be dismissed.

94.3 The Court held:

> *"The present is not, in my opinion, a case where the injurious effects of a completed wrongful act (e.g. a single blow with a weapon) have continued, but is one of continuance of the wrongful act itself. Moreover, it throughout lay within the power of defendant to terminate its thus continuing wrongful act by re-opening the road as, indeed, it ultimately did on 17th December, 1963."*[86]

94.4 The Court therefore concluded that the plaintiff's claim had only prescribed in relation to the damages suffered more than six months before the issue of summons. However, the plaintiff's claim for the period 25 September 1963 onwards (within the six month period) had not prescribed.[87]

95 Similarly, in the present case, what is at issue is a continuous wrong. Vodacom has consistently breached its agreement with Mr Makate by failing to negotiate and pay him a share of its ongoing revenues derived from the concept. Every month that passes as

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[85] Under section 172 (1) of the Transvaal Local Government Ordinance, 17 of 1939

[86] At 331 F-G

[87] At 332G-H

Vodacom earns more revenue from this concept, a fresh breach occurs and a fresh debt comes into existence. As in *Slomowitz,* Vodacom could have put an end to its unlawful conduct – but it has chosen not to do so.

96 Thus, at very best for Vodacom, the only claims which could even possibly have prescribed are the claims for the amounts due three years prior to the issuing summons on 14 July 2008. In other words, Mr Makate's claims for amounts due after 14 July 2005 and into the future could not have prescribed.

97 On this basis alone, the High Court judgment was simply incorrect.

The jurisdiction of this Court on the prescription issues

98 The issues related to prescription are constitutional issues.

98.1 This Court has repeatedly recognised that the erroneous interpretation and application of laws which give effect to fundamental rights or values are inevitably constitutional matters.[88] It has similarly held that any failure to give effect to the Bill of Rights in interpreting any legislation is a

[88] Fraser v Absa Bank Ltd (NDPP as Amicus Curiae) 2007 (3) SA 484 (CC) at para 38(e)

constitutional matter.[89]

98.2 This Court has also repeatedly held that laws which limit the time within which action can be instituted tend to limit the right of access to court under section 34 of the Constitution.[90] This applies to the Prescription Act.

98.3 While the Prescription Act is a constitutionally permissible limitation, it must always be interpreted and applied in a manner that takes into account its impact on section 34 rights. The approach of the High Court fails to do so. It interprets and applies the Act too strictly and in doing so denies Mr Makate his section 34 right of access to Court.

99 At the very least, the prescription issues are issues connected to the required decision on the question of ostensible authority, which falls within this Court's jurisdiction for the reasons set out above.[91]

LEAVE TO APPEAL

100 In the preceding sections, we have explained why each of the

[89] Fraser v Absa Bank Ltd (NDPP as Amicus Curiae) 2007 (3) SA 484 (CC) at para 38(d)

[90] Road Accident Fund and Another v Mdeyide 2011 (2) SA 26 (CC) at paras 10 and 55 to 62; Mohlomi v Minister of Defence 1997 (1) SA 124 (CC) paras 11-15

[91] See: Loureiro and Others v iMvula Quality Protection (Pty) Ltd 2014 (3) SA 394 (CC) at para 36

issues raised falls within this Court's jurisdiction.

101 That leaves only the question of the interests of justice. We submit that for the following reasons it is in the interests of justice for leave to appeal to be granted.

102 First, the appeal has excellent prospects of success, as is made clear by these heads of argument.

103 Second, while this case is of extraordinary importance to Mr Makate, its significance goes further. It has assumed a public dimension as there have been understandable public concerns about the manner in which Vodacom bullied and misled Mr Makate, one of its employees, and then left him without a remedy.

104 Third, the issues raised in this case – particularly the test for ostensible authority – are of general public importance in that they will affect other future cases.

105 Fourth, while the effect of section 34 of the Constitution was not pleaded squarely in the Court below, Mr Makate did expressly plead and argue the need to develop the common law of contract in light of section 39(2) of the Constitution. In this regard, he also squarely

pleaded the relevant facts in this regard, including the unequal bargaining power of the parties.

CONCLUSION

106 We therefore submit that:

106.1 Leave to appeal should be granted;

106.2 The appeal should be upheld; and

106.3 An order should be granted in terms of the prayers in the particulars of claim.

107 We submit further that Mr Makate is entitled to his costs in the High Court and this Court, including the costs of two counsel.

CEDRIC PUCKRIN SC

GILBERT MARCUS SC

REINARD MICHAU SC

STEVEN BUDLENDER

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Pretoria and Johannesburg

10 July 2015

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No: CCT 52/2015

In the matter between:

KENNETH NKOSANA MAKATE Applicant

and

VODACOM (PTY) LIMITED Respondent

APPLICANT'S TABLE OF AUTHORITIES

Barkhuizen v Napier 2007 (5) SA 323 (CC)

Barnett v Minister of Land Affairs 2007 (6) SA 313 (SCA)

Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd 2012 (1) SA 256 (CC)

F v Minister of Safety & Security 2012 (1) SA 536 (CC)

Fraser v Absa Bank Ltd (NDPP as Amicus Curiae) 2007 (3) SA 484 (CC)

Gericke v Sack 1978 (1) SA 821 (A)

Giddey NO v JC Barnard & Partners 2007 (5) SA 525 (CC)

Glofinco v ABSA Bank Ltd t/a United Bank 2002 (6) SA 470 (SCA)

Loureiro and Others v iMvula Quality Protection (Pty) Ltd 2014 (3) SA 394 (CC)

Mohlomi v Minister of Defence 1997 (1) SA 124 (CC)

Mukaddam v Pioneer Foods (Pty) Ltd 2013 (5) SA 89 (CC)

NBS Bank Ltd v Cape Produce Co (Pty) Ltd and Others 2002 (1) SA 396 (SCA)

Northern Metropolitan Local Council v Company Unique Finance (Pty) Ltd and Others 2012 (5) SA 323 (SCA)

Paulsen and Another v Slip Knot Investments 777 (Pty) Limited 2015 (3) SA 479 (CC)

PFE International and Others v Industrial Development Corporation of South Africa Ltd 2013 (1) SA 1 (CC)

Road Accident Fund and Another v Mdeyide 2011 (2) SA 26 (CC)

Robinson v Randfontein Estates GM Co Ltd 1925 AD 173

Shill v Milner 1937 AD 101

South African Broadcasting Corporation v Co-op & Others 2006 (2) SA 217 (SCA)

Foreign Authority

Hely-Hutchinson v Brayhead Ltd & Another 1968(1) QB 549 (CA)

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT 52/2015

In the matter between:

NKOSANA KENNETH MAKATE Applicant

and

VODACOM (PTY) LIMITED Respondent

RESPONDENT'S HEADS OF ARGUMENT

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1 Nomenclature

1.1 The applicant, Mr Makate, is referred to as "the plaintiff"; the respondent, Vodacom (Pty) Ltd, is referred to as "the defendant".

2 The nature of the present application

2.1 This is an application for leave to appeal to the Constitutional Court against a judgment of the Honourable Mr Justice Coppin in the South Gauteng High Court ("the court a quo"), dismissing the plaintiff's claims against the defendant with costs.[1]

2.2 In exercising its discretion whether to grant or refuse leave to appeal, this Honourable Court will take into account:

2.2.1 the applicant's prospects of success, and

2.2.2 independent of the applicant's prospects of success, whether it is in the interests of justice to grant leave to appeal. [2]

3 The factual matrix

The broad factual matrix of the case is set out in paragraphs 1 – 8 of the judgment a quo.[3] A more detailed summary of the evidence is set out in paragraphs 9 – 72 of the judgment a quo.[4]

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[1] Vol 2 pp 96-195

[2] *Fraser v Naude and Others* 1999 (1) SA 1 (CC) at para 7

3.1 In order to focus on the correct factual and legal issues, it is necessary to keep the following aspects of the factual matrix in mind:

3.1.1 The plaintiff's "idea" was to generate more custom for a mobile phone network by allowing customers without airtime to send a "missed call" to persons with airtime, thereby possibly inducing the latter to call back and so generate more business for the network. This idea was set out in the plaintiff's memorandum dated 21 November 2000.[5]

3.1.2 The plaintiff's memorandum did not contain any technical means of implementing the idea;

3.1.3 It also did not propose that the "please call me" (PCM) signal be carried in a way other than over the mobile voice and data network; on the contrary.

3.1.4 It also did not propose an explicit message to call back the sender of the message.

3.1.5 It also did not contain or even recommend any technical or commercial feasibility and viability exercise.

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[3] Vol 2 pp 96-100

[4] Vol 2 pp 100-132

[5] Vol 4 pp 328-329

3.1.6 Hence, the plaintiff's idea was a far cry from the product ultimately marketed by the defendant. Indeed, the plaintiff's idea did not comprise any product at all; the PCM product was developed by the technical and commercial expertise of many persons in the defendant's employ over a period of months and at a cost of between R1,5 million to R6 million, and incorporated-

(a) a technical solution to send the PCM signal outside the voice and data network (and so avoided overloading that network) via a USSD system;

(b) an explicit request to the addressee to call back the sender of the message;

(c) the features of a marketable product;

(d) the feature (which later became a permanent feature) for the PCM message to be sent without any cost.[6]

3.2 The plaintiff's idea was a business idea to enable users without airtime to induce users with airtime to use the network by calling back. A similar service had independently been devised by MTN before Vodacom had established the commercial viability of the business idea and was reflected in the similar product launched by MTN around the same time as the Vodacom

[6] Vol 7 p 621 line 21 – p 622 line 20 (Knott-Craig)

PCM.[7] It was in opening admitted that MTN had instructed their attorneys to apply for a patent for their product on 16 November 2000 (ie before the plaintiff approached Vodacom), and that a provisional patent application for the MTN product was lodged on 22 January 2001. It was common cause that Vodacom and MTN had a practice of closely monitoring each other's innovations so that they would not lose any competitive advantage.[8]

3.3 Mr Knott-Craig's idea was focussed on how to reduce the load on, and cost to, the network by the use of "Scotch calls" and (by incorporating an explicit message to call back) so to convert a call-back message service into a product.[9] The plaintiff's and Mr Knott-Craig's focus were therefore different and not mutually exclusive. Together they could have given rise to the PCM product. Indeed Mr Knott-Craig stated that the plaintiff may have conveyed his idea to Mr Geissler, and that that may have prompted Mr Geissler to have pointed out to Mr Knott-Craig that security guards were making Scotch calls to each other.[10] All that Mr Knott-Craig said is that, when he conceived of the need to turn Scotch calls into a product, he was unaware of the plaintiff having had his idea.[11]

[7] Vol 2 p 103 para 17 (Judgment) and vol 1 p 56 para 22 (Vodacom statement of facts).

[8] Vol 2 p 106 para 26 (Judgment).

[9] Vol 7 p 630 lines 3-21 (Knott-Craig)

[10] Vol 7 p 633 line 1 – p 635 line 23 (Knott-Craig)

[11] Vol 7 p 632 lines 9 - 25

3.4 The Plaintiff's idea which contributed to the final product was an idea which was already known to MTN prior to the plaintiff's disclosure of his idea,[12] and publicly implemented by MTN early in 2001.[13] Thus, in the event, the plaintiff's idea was not a new one.

3.5 It is also apparent that, within the defendant, the plaintiff was openly and repeatedly given credit for the contribution of his idea on 19 December 2000,[14] 9 February 2001[15] and March 2001.[16]

3.6 It is therefore a phantom question to ask whether the PCM product was the plaintiff's or Mr Knott-Craig's, or other technical and commercial persons' "idea"; the PCM product followed on a process in which many people participated.

3.7 The issue in the case was not whose idea the PCM product was; the real issue (amongst other issues) was : did Mr Geissler undertake to monetarily reward the plaintiff and, if so, did he have the authority to do so?

4 The nature of the plaintiff's claim

4.1 The plaintiff based his claim solely on an alleged contract. No cause of action other than contract was pleaded or canvassed in evidence.

[12] Opening address of plaintiff's counsel, Transcript bundle Vol 1A p 2 line 22 – p 3 line 21

[13] Transcript bundle Vol 1A p 61 lines 16-18

[14] Vol 4 p 333 lines 32-40

[15] Vol 4 p 327 lines 6-7

[16] Vol 4 p 326 lines 21 – 30

4.2 It was apparent why the plaintiff, whose case was being funded by professional litigants,[17] sought to found his claim solely on contract, and then solely on a contractual claim to be entitled for all time to share in revenue generated by calls induced by his idea. First, it purports to found a massive claim, far in excess of any measure of damages for loss which might have been recoverable in delict or enrichment. Secondly, it purports to overcome the prescription of any claim which became due in 2001. This also explains why the claim in contract was, over time, sought to be buttressed with new allegations to render it valid and enforceable.

4.3 It should further be kept in mind that, in the court a quo the plaintiff ultimately pursued only one of the remedies prayed for, namely the remedy prayed for in the alternative to prayer 4, ie an order directing the defendant "to commence with bona fide negotiations to determine a reasonable remuneration payable to the plaintiff for the use by the defendant for the product known as 'please call me'."[18]

4.4 Although an order under Rule 33(4) for separation of issues was not formally made, the trial a quo was conducted on the basis that all issues, except the monetary amount of the plaintiff's claim, fell to be decided at the

[17] Vol 10 p 1042 line 8 – p 1048 line 10

[18] Vol 4 p 324 lines 20-12; Vol 2 p 97 lines 6-13 (Judgment) [Prayer 1 sought compliance with the contractual term alleged in the alternative prayer 4.]

hearing, and all paragraphs in the particulars of claim and plea were regarded as relevant to the issues to be decided.[19]

5 The broad issues

5.1 The issues for decision a quo were:

5.1.1 whether the plaintiff had proved the contract on which he based his claim;

5.1.2 if so, whether the person or persons alleged to have concluded such contract on behalf of the defendant, had authority to do so;

5.1.3 if so, whether the plaintiff's claim had prescribed;

5.1.4 in any event, whether the plaintiff was entitled to the relief claimed.

5.2 The court a quo dealt with these issues as follows

5.2.1 The court a quo decided the issue referred to in paragraph 5.1.1 in favour of the plaintiff (without deciding on what terms the contract had been concluded).[20]

5.2.2 The court a quo decided the issue referred to in paragraph 5.1.2 in favour of the defendant. The plaintiff's counsel abandoned any

[19] [Pre-trial bundle p 5 para J. The pre-trial bundle is not part of the record.]

[20] Vol 2 p 162 lines 9-12 (Judgment para 127) [The terms to which the plaintiff "testified to under oath" differed at different stages of his evidence.]

reliance on actual authority.[21] The court a quo found that ostensible authority was not properly pleaded,[22] and, in any event, had not been proved.[23]

5.2.3 The court a quo decided that, in any event, any claim which the plaintiff may have had, had prescribed.[24]

5.2.4 In view of the findings referred to in 5.2.2 and 5.2.3 above, the court a quo did not find it necessary to make any finding on the defence that, in any event, the plaintiff would not be entitled to the relief claimed by him.[25] Nevertheless, if the plaintiff managed to overcome the defences raised on the issues referred to above, he would also have to overcome the defence referred to in this paragraph 5.2.4.

6 The interests of justice do not justify leave to appeal

6.1 Elsewhere in these heads of argument we show that the plaintiff has no reasonable prospects of success. In this section we show that independent of

[21] Vol 9 p 842 lines 12-15 (Counsel's address)

[22] Vol 2 p 164 line 21 – p 184 line 10 (Judgment paras 135-164)

[23] Vol 2 p 184 line 11 – p 189 line 9 (Judgment paras 165-174)

[24] Vol 2 p 190 line 3 – p 194 line 2 (Judgment paras 176-184)

[25] Vol 2 p 194 lines 3 – 9 (Judgment para 185)

his poor prospects of success, it is not in the interests of justice for leave to appeal to be granted.[26] This is so for several reasons.

6.2 First, the "constitutional issues" on which the plaintiff now seeks leave to appeal were never raised as constitutional issues before the High Court.

6.2.1 The only constitutional issue raised by the plaintiff, in his amended particulars of claim, was an allegation concerning the development of the common law under section 39(2) of the Constitution in relation to the interpretation of the contract alleged by the plaintiff.[27] The relevant allegations in the pleadings expressly presupposed a finding that the contract had been concluded by Vodacom and so could have no bearing whatsoever on issue of the authority of Geissler to bind Vodacom.[28]

6.2.2 The "constitutional point" appears to have been raised in relation to an argument about the enforceability of the alleged agreement to negotiate in good faith. In this regard no such issue arises in the present application for leave to appeal: there is no dispute that an agreement to negotiate, coupled with a deadlock-breaking

[26] It is trite that an applicant for leave to appeal to this Court must show both that s/he has reasonable prospects of success and that it is in the interests of justice for leave to be granted: *Fraser v Naude and Others* 1999 (1) SA 1 (CC) at para 7

[27] This was the issue described in the amended particulars as "the Constitutional point". See Vol 4 p 321 line 1 – p 323 line 18

[28] Vol 4 p 321 para 12.1

mechanism, is enforceable.[29] So the only "constitutional issue" raised by the plaintiff in the court a quo is not an issue before this court.

6.2.3 In his application for leave to appeal to this Court, the plaintiff introduced a new "constitutional issue" which had never been raised before the High Court or even in the application for leave to appeal to the Supreme Court of Appeal.[30] This was a complaint about a violation of his fundamental right to property.[31] He no longer appears to place any reliance on this complaint in his heads of argument.

6.2.4 Instead the plaintiff attempts to give the present application a constitutional dimension by raising two constitutional issues which he admits "were not pleaded squarely in the High Court".[32] In truth, they were not pleaded at all, nor raised before the High Court nor in the application for leave to appeal to the Supreme Court of Appeal.[33] The first issue is "the need to lay down a principle that the law regarding ostensible authority must take into account the

[29] *Southernport Developments (Pty) Ltd v Transnet Ltd* 2005 (2) SA 202 (SCA) esp at para 17. Thus the dictum in *Everfresh* supra at para 72 does not find application.

[30] [Application to Supreme Court of Appeal paras 1 – 29]

[31] [Paragraph 53 of application for leave to appeal to Constitutional Court]

[32] [Para 67.1 of application for leave to appeal to the Constitutional Court]

[33] [Application to Supreme Court of Appeal paras 1 – 29]

fact that the parties are in an unequal bargaining position",[34] and the second is an attempt to turn the prescription issue into a constitutional issue.

(a) We deal below with the unfairness of the attempt to turn the issue of ostensible authority into a section 39(2) issue. For present purposes we emphasize that this was never pleaded by the plaintiff or argued before the High Court.

(b) In relation to the prescription issue, it suffices to note that the plaintiff at no stage suggested before the High Court (or in the application for leave to appeal to the SCA) that there was any constitutional issue relevant to Vodacom's special plea of prescription.

6.2.5 There is a third "constitutional issue" that the plaintiff now seeks to introduce for the first time before this Court. It is the contention that by holding the plaintiff to his pleadings, the High Court infringed his fundamental rights under section 34 of the Constitution. As we point out below, this contention is baseless. For present purposes we merely point out that the plaintiff did not suggest that there was any constitutional right to a fair trial at issue when he belatedly attempted to move his application for amendment

[34] [Para 67.2 of application for leave to appeal to the Constitutional Court]

after both parties had closed their cases, nor did he suggest in his application for leave to appeal to the SCA that the refusal of his application for amendment implicated his fundamental right to a fair trial.

6.2.6 So the plaintiff is asking this court to sit as Court of first and last instance in relation to all the central issues in his application for leave to appeal. This is something which this Court has repeatedly characterised as undesirable, particularly in cases concerning the development of the common law. [35]

6.3 Second, the belated attempt by the plaintiff to constitutionalise his case, is not only undesirable in relation to the orderly development of the law, it is also unfair to Vodacom because the plaintiff invites this Court to find in his favour on issues which were neither argued, **nor pleaded**, before the High Court.

6.3.1 This Court has emphasized that issues brought to it on appeal must have been properly pleaded and that it cannot be expected to trawl through a record in the hope of finding a way to assist an applicant

[35] *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) at para 67; *Crown Restaurant CC v Gold Reef City Theme Park (Pty) Ltd* 2008 (4) SA 16 (CC); *Satchwell v President of the Republic of South Africa and Another* 2003 (4) SA 266 (CC) at para 6; *Dormehl v Minister of Justice and Others* 2000 (2) SA 987 (CC) at para 5; *Christian Education South Africa v Minister of Education* 1999 (2) SA 83 (CC) at para 12; *Bruce and Another v Fleecytex Johannesburg CC and Others* 1998 (2) SA 1143 (CC) at para 8.

outside of his or her pleaded case.[36] It would plainly not be in the interests of justice to allow the plaintiff to subject this Court and Vodacom to the process of engaging with a claim based on a constitutional development of the law of ostensible authority that was never pleaded or pursued in the High Court.

6.3.2 The course of action adopted by the plaintiff is not only inconvenient to this Court and Vodacom, it is highly prejudicial to Vodacom because Vodacom was never called upon to meet a case for the constitutional development of the common law rules relating to ostensible authority so as to overcome inequalities in bargaining power. So Vodacom was not alerted to the need to lead evidence in this regard, for example

(a) evidence of the prevalence in the commercial world of formal delegation policies like its own;

(b) evidence of the organisational rationale for such policies; and

(c) evidence of the role played by such policies in preventing bribery and corruption.

6.4 To saddle a company with promises made by unauthorised employees can never be justified by invoking a principle of good faith or Ubuntu in

[36] See for example *Minister of Local Govt, WC v Lagoonbay Lifestyle Estate (Pty) Ltd* 2014 (1) SA 521 (CC) at para 35; *Khumalo and Another v MEC for Education, KwaZulu-Natal* 2014 (5) SA 579 (CC) at paras 90-91.

abstracto. This was also never the case the defendant was called upon to meet.

6.5 Third, there is no unfairness to the plaintiff in failing to accommodate his contractual claim against Vodacom in circumstances where it is common cause that no-one was authorised to bind Vodacom, because, if Geissler did in fact purport on behalf of Vodacom to conclude a contract with the plaintiff on the terms alleged by him (a contention which Vodacom denies and which we address below), the law does justice to parties in the position of the plaintiff by affording them alternative remedies -

6.5.1 against the self-proclaimed agent (on the plaintiff's case Geissler) for any breach of warranty of his/her authority to bind the notional principal;

6.5.2 against the notional principal in delict for any misrepresentation or unlawful trade to recover any loss that s/he has suffered as a result of any unlawful use of his/her idea; and

6.5.3 against the notional principal for any unjust enrichment to recover any amount by which the notional principal has been enriched at his/her expense.

6.5.4 As we have pointed out above, contrary to the contention of the plaintiff this is not a case where "Vodacom benefitted (and still

benefits) handsomely" from the idea of Mr Makate, still less that Mr Makate's idea "resulted in profits for Vodacom running into literally billions of rands."[37] The plaintiff's idea which was communicated to Vodacom in November 2000 was an idea which was already in the public domain by early 2001 when MTN launched its comparable product. Thus, even a properly founded claim, against the proper defendant, would have been a claim of limited ambit.

7 No authority contractually to bind the defendant

7.1 In the amended particulars of claim, the plaintiff appears to have relied on actual authority of Mr Muchenje and Mr Geissler to contract on behalf of the defendant.[38] But reliance on actual authority (whether before conclusion of the alleged agreement, or thereafter by way of ratification) was expressly abandoned during the trial; the plaintiff relied solely on ostensible authority of Geissler contractually to bind the defendant.[39]

[37] Plaintiff's heads of argument p 5 para 13 and p 35 para 67.2.

[38] Vol 4 pp 310/11 paras 2.1 and 24.2. (Reliance on any conduct or authority of Mr Muchenje was no longer pursued at the trial).

[39] Vol 9 p 842 lines 12-15 (Counsel's address)

7.2 Ostensible authority not pleaded

7.2.1 Ostensible authority has six requisites.[40] The facts founding each of these requisites are material,[41] and therefore have to be pleaded.[42] Indeed, the cases on ostensible authority[43] at length debate whether all of these requisites have been proved precisely because these requisites are material facts which have to be pleaded and proved. It is a fallacy to argue that cases which decide whether these requisites were proved do not demonstrate also that they have to be pleaded: all material facts of any cause of action or defence or confession and avoidance have to be pleaded.

7.2.2 In his amended particulars of claim the plaintiff relied on cryptic references to the concepts of actual authority to contract; the delictual concept of "course and scope of employment" and "ostensible authority" to contract. No facts were alleged to support the allegation of "ostensible authority" and no replication to the plea (which had placed authority to contract in dispute) was delivered before the trial.

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[40] *NBS Bank Ltd v Cape Produce Co (Pty) Ltd* 2002 (1) SA 396 (SCA) at para 26; reaffirmed in *Northern Metropolitan Local Council v Company Unique Finance (Pty) Ltd* 2012 (5) SA 323 (SCA) at para 28; *Glofinco v Absa Bank Ltd* 2002 (6) 470 (SCA) at para 12

[41] The claim will fail if such facts are not proved (Herbstein & Van Winsen *The Civil Practice of the High Courts of South Africa* (5th Ed) p 565 note 41 and cases there cited.

[42] Uniform Rule 18(4), Herbstein & Van Winsen, op cit, pp 565/6; *Absa Bank Ltd v IW Blumberg and Wilkinson* 1997 (3) SA 669 (SCA) at 676E – 677H.

[43] *NBS Bank Ltd* supra; *Northern Metropolitan* supra; *Glofinco* supra; *SABC v Co-op* 2006 (2) SA 217 (SCA)

7.2.3 Estoppel could only have been raised by way of replication : it is "a shield, not a sword".[44] The plaintiff's counsel positively elected not to do so (see below).

7.2.4 What happened during the trial in regard to the pleading of ostensible authority is comprehensively set out, with extracts from the record, in the affidavit of Cohen.[45] These events can be summarised as follows.

(a) First, on 2 August 2013, during argument on an absolution application, the defendant specifically argued that the plaintiff had failed to deliver any replication and plead an estoppel founding ostensible authority.[46] The court also pertinently asked the plaintiff's counsel where the facts founding ostensible authority had been pleaded.[47] The response (given to resist the application for absolution) was not to refer to the plea and the further particulars as the plaintiff now does.[48] Rather, senior counsel for the plaintiff stated that this problem could be cured by a simple amendment to the pleadings introducing a replication

[44] *Union Government v National Bank of South Africa Ltd* 1921 AD 121 at 128; *Mann v Sydney Hunt Motors (Pty) Ltd* 1958 (2) SA 102 (GWLD) at 106G – 107H; *Rosen v Barclays National Bank Ltd* 1984 (3) SA 974 (W) at 983 G-I; Amler *Precedents of Pleadings* 16th Ed p 22

[45] Vol 6 pp 513-528 read with pp 540-544

[46] Vol 6 p 515 line 12 – p 517 line 10 (Also at Vol 9 p 843 line 20 – p 845 line 5)

[47] Vol 6 p 517 lines 13-15 (Also Vol 9 p 846 lines 16-17)

[48] Plaintiff's heads of argument p 16 para 33 – p 17 para 34.3.

and expressly undertook to move such an amendment if the court ruled against the plaintiff on the pleadings dispute.[49]

(b) Second, on 5 August 2013, the day the application for absolution was refused, the plaintiff served a notice of intention to amend his pleadings by introducing a replication[50] wherein several matters were incorporated,[51] one of which in paragraph B3 thereof, was to replicate to the amendment to the defendant's plea raising the defence of purported cancellation of the alleged contract;[52] and another of which in paragraphs B1 and B2 thereof, was to replicate an estoppel founding ostensible authority.[53] This replication bore no resemblance to the case of ostensible authority now advanced by the plaintiff. In particular

(i) It did not rely on section 39(2) of the Constitution

(ii) It made no suggestion that Vodacom had clothed Geissler with authority by virtue of his position as director of product development, or in any other respects, and

[49] Vol 6 p 518 lines 4-14 (Also Vol 9 p 847 lines 11-13)

[50] Vol 6 p 518 lines 15-21 (Also Vol 9 p 848 line 2 – p 850 line 16)

[51] Vol 6 pp 540-544

[52] Vol 6 p 542 lines 16-18. This replication appears at Vol 4 pp 371/2. It was handed up to the court at the end of the plaintiff's case Vol 9 p 862 lines 1-5. See also Vol 10 p 972 line 19 – p 973 line 4

[53] Vol 6 pp 541 line 8 – p 542 line 15

(iii) Instead it alleged that the plaintiff had relied on a series of representations as to the authority of Geissler allegedly made by Geissler himself and Muchenje

(c) The defendant objected to the proposed replication of ostensible authority[54] because its introduction at that stage of the trial would obviously have required the recall of the plaintiff and Mr Muchenje for cross-examination on *inter alia* the alleged representation of authority by the defendant and the plaintiff's alleged reliance thereon.[55]

(d) The plaintiff elected not to apply for the amendment in paragraphs B1 and B2 relating to ostensible authority.[56] The plaintiff was warned that if he did not then move for the amendment to replicate ostensible authority, he could not conduct the trial on the basis that ostensible authority was not an issue, and then seek to amend his pleadings later as if it had been an issue when the evidence was given[57] and that the defendant objected to any evidence on issues not pleaded.[58] The plaintiff

[54] Vol 6 p 519 lines 13-17

[55] Vol 9 p 860 line 24 – p 861 line 6

[56] Vol 6 p 520 lines 1-10

[57] Vol 6 p 520 line 11 – p 526 line 5; see also Vol 9 p 847 line 24 – p 854 line 10; p 855 line 20 – p 856 line 25

[58] Vol 9 p 858 lines 7-9

elected not to move that amendment,[59] and the trial proceeded on that basis.

(e) Third, on 8 August 2013 at the completion of the evidence, and postponement for argument, the plaintiff withdrew the proposed amendment of replicating ostensible authority.[60]

(f) Fourth, in October 2013 (some two months after completion of the evidence), the plaintiff gave notice of intention to amend its pleadings inter alia to raise yet a new version of ostensible authority by way of replication.[61]

(g) In these circumstances, the court a quo correctly refused the application to introduce (a new version of) a replication of estoppel at argument stage on 30 October 2013.[62]

7.3 Ostensible authority in any event not proved

7.3.1 The court a quo held that, even if it were wrong in refusing the amendment, the plaintiff had failed to prove-

(a) a representation by the defendant;[63]

[59] Vol 6 p 526 lines 6 - 11

[60] Vol 6 p 526 line 12 – p 527 line 2

[61] Vol 6 pp 496-501

[62] Vol 2 p 164 para 134 – p 184 para 164, esp. at pp 177 para 156 – 184 para 164.

[63] Vol 2 p 184 para 165 – p 185 para 166

(b) any reliance by the plaintiff on any representation of the defendant;[64]

(c) that it was reasonable for the plaintiff to have relied on any of the alleged representations (even if they had been found to have been representations of the defendant) to induce him to believe that Mr Geissler had the alleged authority;[65]

(d) that it was reasonable to have expected of the defendant to foresee that the plaintiff would rely on any of the alleged representations (even if they were regarded as representations of the defendant) and thereby be misled about Mr Geissler's authority;[66]

It further held that any representation by Mr Geissler about his own authority is not sufficient to found an estoppel.[67] All these findings were amply supported by the evidence, and are clearly correct.[68]

7.3.2

[64] Vol 2 pp 185/6 para 167; p 188 para 173

[65] Vol 2 p 196 para 168; p 187 para 170/171

[66] Vol 2 p 189 para 174

[67] Vol 2 p 186 para 169

[68] *NBS Bank Ltd v Cape Produce Co (Pty) Ltd* 2002 (1) SA 396 (SCA) at 411 H-I; *Glofinco v Absa Bank Ltd* 2002 (6) SA 470 (SCA) at para 13

(a) In his statement of facts, sub nomine "Facts on the Issue of Authority",[69] the plaintiff does not raise factual contentions which could support an estoppel of ostensible authority.

(b) On the facts, Mr Geissler was a director of the defendant, but this gave him no authority to act otherwise than collectively with other directors, and gave him no authority to bind the defendant to commercial or any agreements. Employees (such as Mr Blackburn), who were also directors, could obviously do what they were employed to do. Mr Geissler was also an employee of the defendant (which is why he is referred to as an executive director) who obviously had the powers to do what he was employed to do. This has nothing to do with Mr Geissler's "authority" to do things that he was not employed to do, such as entering into agreements with employees, let alone agreements to reward employees contrary to company policy. In the plaintiff's statement of facts, vague references are made to Mr Geissler's "authority" without indicating precisely what powers, other than to do the job he was employed to do, this "authority" was supposed to comprise.[70]

[69] Vol 1 pp 21-25 paras 54-64

[70] Vol 1 p 21 para 55; p 22 paras 57 and 58; p 23 paras 61 and 62; p 24 para 62.3 (where it is contended that Geissler had the "authority" at least to agree to the principle "of remuneration")

(c) It also does not assist the plaintiff to contend that the defendant "implemented the agreement (by launching the product …)" without the Board approval. The operational decision to launch the product (shortly afterwards approved by the Board) came after the alleged agreement, and in any event could not have constituted any representation about the authority of Mr Geissler to conclude a remuneration agreement with the plaintiff (of which the Board in any event was not even aware).[71]

(d) Hence, there is nothing in the statement of facts to have supported an estoppel of ostensible authority (even if had been pleaded).

7.3.3 To the aforegoing may be added the following additional facts which are further destructive of the requisites of an estoppel of ostensible authority:

(a) The plaintiff originally addressed his memorandum setting out his idea *inter alios* to Mr Knott-Craig (Group CEO), Mr Crouse (Group Financial Director) Mr Mthembu (defendant's managing director) whom he regarded as the "ultimate authority" of the defendant.[72] He therefore at least regarded them as the persons

[71] Vol 9 p 874 lines 18-24; p 889 lines 18-24

[72] Vol 1 p 31; Vol 3 p 227 lines 6-12; Vol 9 p 877 lines 9-25

who had authority to enter into any agreement for remuneration (which he sought) for his idea.

(b) The executives at decision making level (eg the CEO and the boards of the relevant companies in the defendant group of companies) did not even know about the alleged agreement between Geissler and the plaintiff, or any similar agreement, let alone make any representation about Geissler's authority to conclude it. [This also puts paid to any ratification argument.][73]

(c) The evidence of Mr Muchenje and the unrebutted evidence of Mr Knott-Craig precluded proof of any representation by the defendant that Mr Geissler had the authority contractually to bind the defendant as alleged by the plaintiff.

(i) First, it was against the policy and practice of the defendant to offer employees remuneration other than from only four sources: their salary; a bonus for a particular year; income from "phantom shares" and a CEO excellence award.[74]

(ii) Secondly, the defendant did not enter into agreements whereby it shared its revenue with anyone, let alone with employees. Such an agreement would be unheard of, since it

[73] Vol 2 p 189, judgment para 175

[74] Vol 9 p 872 line 21 – p 873 line 2; Vol 9 p 866 line 4 – p 871 line 8 (Knott-Craig)

would be equivalent to issuing a preferent share entitling the holder to a share of gross revenue. (The evidence relating to service providers sharing part of the revenue which they generate, for ongoing services, from their trading with the public, is an irrelevance; the defendant did not share its revenue, generated by itself, with anyone).[75]

(iii) Thirdly, the defendant would not deal with an employee as if he were an outsider; an employee could not have an arms-length commercial contract in addition to his employment contract. To acquire a commercial arms-length contract, the plaintiff would have had to resign his employment and taken his chances of obtaining a reward for selling an "idea" without any technological solution, to the defendant - which he elected not to do. The plaintiff knew this: he knew that there was no precedent for the unique contract which he sought.[76] No-one, not Mr Geissler, not Mr Knott-Craig, nor any other official, had the authority to contract with an employee as if he were an outsider, and no-one had the authority to contract with an employee to share in the defendant's revenue. And no-one had the authority to

[75] Vol 9 p 895 line 11 – p 897 line 21; Vol 10 p 1025 lines 15-19

[76] Vol 9 p 876 lines 2-12; Vol 10 p 1017 line 25 – 1018 line 13

represent, and no-one represented, that Mr Geissler had the authority to conclude an agreement with an employee as if he were an outsider.

(iv) Fourthly, even if the plaintiff could have been dealt with as if he were an outsider (as he contended for) there were several reasons why any conduct on behalf of the defendant could not have amounted to a representation that Mr Geissler had authority to conclude an agreement as proposed by the plaintiff:

- The defendant had a formal delegation policy (of which the plaintiff was aware) which did not confer such authority on Mr Geissler.[77] Indeed, if Mr Geissler (or anyone, including the CEO) had purported to make a promise as alleged to the plaintiff, he would have been dismissed.[78]

- The defendant contracted with outsiders only for services of an ongoing nature; and the plaintiff's "idea" did not comprise such ongoing service.[79]

[77] Vol 3 p 276 lines 1-24; Vol 9 p 939; Vol 7 p 640 line 9 – p 643 line 25

[78] Vol 9 p 892 lines 9-16; p 895 lines 11-25 (Knott-Craig)

[79] Vol 7 p 644 lines 18-25 (Knott-Craig)

- The defendant's agreements with outsiders had to be in writing; the plaintiff never concluded a written agreement, or even obtained written confirmation of his alleged oral agreement.[80]

- The defendant's agreements with outsiders had to be approved by the legal department; the plaintiff's alleged agreement was not approved by the legal department.[81]

- Unbudgeted expenditure had to be approved by the board of directors; the plaintiff's alleged agreement was not even known to, let alone approved by, the board of directors.[82]

(d) In the result, all the policies and practices of the defendant militated against conveying any representation that Mr Geissler would have authority to enter into an agreement as alleged by the plaintiff.

(e) The truth of the matter is, as all the evidence shows, that the plaintiff intended to obtain an unprecedented and unique agreement,[83] which he planned to obtain via the top executives in the group of the defendant, but was constrained to deal with Mr

[80] Vol 7 p 644 lines 10-12; Vol 10 p 967 lines 8-11

[81] Vol 7 p 644 lines 13-17; Vol 10 p 967 lines 2-7; Vol 10 p 960 lines 10-13

[82] Vol 7 p 641 lines 4 – 23; Vol 9 p 839 lines 10-24

[83] Vol 9 p 876 lines 2-12

Geissler; and that no-one (other than possibly, Mr Geissler himself) represented to the plaintiff that Mr Geissler had the authority to enter into such an agreement. Indeed the plaintiff's evidence never referred to any conduct other than Mr Muchenje's and Mr Geissler's conduct.

(f) And, finally, even the objective evidence of Mr Geissler's own conduct did not support any representation that Mr Geissler had any authority to conclude an agreement, as alleged, by the plaintiff. This is more fully dealt with in paragraph 9 below.

7.3.4 The cases invoked by the plaintiff do not assist him. The common factor in *Hely Hutchinson v Brayhead Ltd*,[84]*NBS Bank Ltd* and *Northern Metropolitan*,[85] *Glofinco*[86] and is that it was held that the ostensible authority had to relate to the kind of business that the particular official in his position would ordinarily contract with an outsider. This is the very antithesis of the "unique" contract the plaintiff sought in the present case.

[84] *Hely Hutchinson v Brayhead Ltd* 1967 (3) AELR 98 (CA) at p 102 B-E

[85] Supra at 412I in para 28; *northern Metropolitan*, supra at p 325 D-E para 30;

[86] Supra at 481 C-D and G in para 15 and p 481I in para 16; p 483 G-I in paras 19-22.

8 Prescription

8.1 The contractual debt which the plaintiff seeks to enforce ("the debt"), on his own version of the facts, arose in February 2001 and, in any event, before the end of 2001.

8.2 The summons in the action was served on 14 July 2008.[87]

8.3 In the absence of any replication (or even allegation) of suspension or interruption of prescription, the only question is whether the debt became due prior to 14 July 2005.

8.4

8.4.1 A contractual debt is generally due immediately upon conclusion of the contract, but where the debt is conditional it becomes due upon fulfilment of the condition.[88]

8.4.2 The plaintiff alleges in his statement of facts that his agreement with Mr Geissler was conditional upon "the technical feasibility and ongoing financial viability" of his idea.[89] [It was not conditional upon the precise amount of profit being determined.]

[87] Vol 2 p 191, judgment para 178

[88] Loubser Extinctive Prescription (1996) at p 53 para 4.3.2

[89] Vol 1 p 7 para 21; p 8 para 22. See also Vol 4 p 313 para 5.2 and p 316 para 6.

8.4.3 The PCM product was launched early in February 2001.[90] It was "a big success" from its first day in operation, as appears from the defendant's in-house magazine "Talk Time" published in March 2001.[91] The plaintiff (who remained in the defendant's employ until July 2003)[92] alleged that "any compensation would depend on the product being a commercial success", and affirmed that "the concept has been a resounding success since inception."[93] The plaintiff's own letters of demand show that the product developed was "a resounding success since inception",[94] and "successful since the launch",[95] and that the alleged condition was fulfilled as early as February 2001. The conditionality of the alleged agreement is thus no ground for the alleged debt not having become "due".

8.4.4 The plaintiff in his evidence conceded that the identity of his alleged debtor (the defendant) and the facts from which the alleged debt arose, were known to him since at least January 2001,[96] and that the reasons why he did not pursue his alleged claim then were that he was still an employee of the defendant and wished to

[90] Vol 7 p 557 lines 3 and 11

[91] Vol 7 p 558

[92] Vol 3 p 265 lines 6-12 (Makate); Vol 7 p 603 line 6 – p 605 line 1

[93] Vol 7 p 561 paras 2.2 and 2.3.1 (plaintiff's letter of demand dated 15 May 2007)

[94] Vol 7 p 561 line 10

[95] Vol 7 p 566 lines 10/11; Vol 10 p 1032 lines 6-15

[96] The plaintiff Vol 7 p 603 lines 6-21; pp 685-693 line 5 esp at p 690 lines 18-20; Vol 10 p 1028 lines 4-16.

complete his articles there; that he lacked financial resources; and that he suffered from depression.[97]

8.4.5 Hence prescription began to run in 2001, and certainly prior to 14 July 2005.[98]

8.5

8.5.1 It is relevant to recall that the only relief which the plaintiff ultimately pursued was for an order in terms of the alternative to prayer 4 in the amended particulars of claim,[99] namely an order "that the defendant be directed to commence with *bona fide* negotiations to determine a reasonable remuneration payable to the Plaintiff for or the use by the Defendant of the product known as "please call me"." (This would correlate to the allegations in paragraph 5.4 of the amended particulars of claim[100] and not to paragraph 2.1 thereof, as prayed for in prayer 1).[101]

8.6 This alleged obligation to negotiate is a "debt" as contemplated in sections 10, 11 and 12 of the Prescription Act, 69 of 1969.[102]

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[97] Vol 10 p 1027 line 14 – p 1028 line 7

[98] 3 years before the summons was served

[99] Vol 2 p 193 para 183

[100] Vol 4 p 324 lines 10-12

[101] Vol 4 paras 313-314 paragraph 5.4.1.1

[102] *Eskom v Stewarts & Lloyds of SA (Pty) Ltd* 1981 (3) SA 340 (AD) at 344 F-G; *Oertel en Andere NNO v Dinekteur van Plaaslike Bestuur en Andere* 1983 (1) SA 354 (AD) at 370B; *Durk & Magnum Financial Services CC (in liquidation) v Koster* 2010 (4) SA 499 at 506/7 paras 24-27

8.7 As pointed out above, on his own version, the plaintiff already in February 2001, knew that the alleged conditions had been fulfilled, and that the alleged debt to negotiate with him had become due. Hence the debt had prescribed long before the summons was served on 14 July 2008.

8.8 The plaintiff's reliance on a "continuous wrong" is misplaced. That concept applies to ongoing delicts or breach of statutory duties.[103] If it applied to contractual debts, claims for performance based on contractual obligations would never prescribe.

8.9 Nor is this a case of a failure to perform periodic contractual obligations. The only debt which the plaintiff (in the alternative prayer 4) seeks to enforce, is specific performance of the obligation to negotiate. That debt prescribed years before the summons was served.

8.10 The reliance on s 12(2) of the Prescription Act is also misplaced: this has not been pleaded, or canvassed in evidence, nor has any active suppression of facts been proved.

9 The alleged promise to pay in any event not proved

9.1

[103] *Slomowitz v Vereeniging Town Council* 1966 (3) SA 317 (AD) concerned an ongoing delict of unlawfully keeping a road closed, and the question was "when the cause(s) of such action(s) arose" under s 172(1) of Ordinance 17 of 1937 (T). *Barrett v Minister of Land Affairs* 2007 (6) SA 313 (SCA) similarly concerned the delictual ongoing wrongful occupation of government property.

9.1.1 The court a quo found that "the plaintiff, in my view, has proven, on a balance of probabilities, that he entered into an agreement with Mr Geissler on the terms he testified to under oath".[104]

9.1.2 However the plaintiff's testimony under oath about the terms upon which he and Mr Geissler allegedly agreed, was not consistent;[105] and the court a quo never made a finding on which of the plaintiff's versions on the terms of the alleged agreement was accepted as proven.

9.1.3 Moreover, the court a quo recognised that the plaintiff "confronted difficulty" in regard to certain areas of his evidence,[106] but simply accepted the plaintiff's evidence without finding how the plaintiff's evidence overcame these difficulties.

9.1.4 The mere fact that evidence is not directly contradicted by another witness, does not make it credible nor sufficient to sustain a finding, on a balance of probability, that the evidence proves the *facta probanda*.[107] For the reasons given below, the plaintiff's evidence on the conclusion and terms of the alleged agreement was so full of

[104] Vol 2 p 162; judgment para 127.

[105] See para 10.8.1 below

[106] Vol 2 pp 135-136; judgment p 76

[107] *SFW Group Ltd v Martell et Cie* 2003 (1) SA 11 (SCA) at para 5; *Pezzutto v Dreyer* 1921 (3) SA 379 (AD) at 391 E-F

contradictions with his own extra-curial statements and so against the probabilities that it should have been rejected.

9.1.5 It is moreover apparent why the plaintiff proffered such improbable evidence: he realised, or was advised, that the agreement, as earlier alleged by him, contained no enforceable promise of payment; and he therefore belatedly added thereto a term that the parties would negotiate for a reasonable reward for him, and that, failing agreement thereon, Mr Knott-Craig would decide on the amount of such remuneration. As shown below, these two terms were complete after-thoughts.

9.2 On the plaintiff's version the alleged agreement on which he relied had six characteristics:

- First, the promise to make payment to the plaintiff ("the payment term");
- Second, the payment would be a share of revenue generated by calls induced by the plaintiff's idea ("the revenue share term");
- Third, disclosure of his idea by the plaintiff was conditional upon a promise of payment ("the disclosure condition");
- Fourth, the undertaking to negotiate on the revenue share ("the undertaking to negotiate");

- Fifth, that, failing agreement on the amount of the plaintiff's revenue share, it would be determined by Mr Knott-Craig ("the determination term"); and

- Sixth, the plaintiff's proposal (not always alleged as a term) for his revenue share was 15% ("the 15% proposal").[108]

The above terms are collectively referred to below as "the alleged material terms".

9.3

9.3.1 The reliable evidence of past events is usually a contemporaneous record thereof.

9.3.2 The contemporaneous record of what passed between the plaintiff and Mr Geissler consists of the emails which passed, at the time of the alleged agreement between them. These fully appear (in reverse order) in the Record.[109]

9.3.3 Not one of the aforesaid six characteristics appear in any of these emails. To the contrary, the high-watermark of these emails is the plaintiff's email of 30 January 2001 to the effect that "I <u>think</u> we <u>should start talking about 'REWARDS</u>,"[110] and Geissler's response:

[108] Vol 7 p 669 line 10 – p 670 line 10; Vol 3 p 267 lines 10-22

[109] Vol 4 p 333 line 40 – p 331 line 1

[110] Vol 4 p 332 lines 19-20

"As for rewards. All staff are (sic) expected to assist the company to achieve its goals. That is part of normal business. As for you and your assistance. Once the product is launched (and assuming its successful) I will speak to Alan. You have my word." What this response shows is that (far from misleading the plaintiff about his authority) Geissler made clear that the aspect of any reward for the plaintiff needed to be dealt with at a higher level than his own, because staff were not ordinarily rewarded for assisting the company (and even then it did not mean that Mr Knott-Craig had the authority to, or would be willing to, deal with that aspect).

9.3.4 The plaintiff could give no, or no satisfactory, explanation for the aforesaid omissions.[111]

9.4 Further cogent evidence is the failure of the plaintiff to respond to a communication disputing the basis for a claim[112] when he could have been expected to do so.[113] This omission persisted from the end of January 2000 to the time the plaintiff left the employ of the defendant in July 2003, and thereafter for another four years until the plaintiff's first letter of demand.[114]

[111] Vol 7 p 670 line 20 – p 675 line 25

[112] Vol 4 p 332 lines 1 - 13

[113] *McWilliams v First Consolidated Holdings (Pty) Ltd* 1982 (2) SA 1 (AD) at p 10 E-H

[114] Vol 8 p 808 lines 12-23

9.5 Further cogent evidence consists of the plaintiff's failure to mention various alleged terms in his version of the alleged agreement set out in the successive letters of demand written by him.

9.5.1 The plaintiff's first letter of demand, dated 16 May 2007[115] does not mention any of the alleged material terms. [This letter alleges only that "I demanded to discuss business that would ensure that there was a financial benefit that accrues to me for my idea;"[116] and that "a promise was made to discuss business with me in a form of compensation, depending on the success of my idea"[117] (emphasis added).

9.5.2 The plaintiff's second letter of demand dated 11 July 2007[118] does not mention the revenue share terms, nor the disclosure condition, nor the undertaking to negotiate, nor the determination term, and mentions the 15% proposal only in the alternative, and then in the form of two claims for 15 cents per call.[119] [This letter alleges only that "Prior to the official launch, I insisted to talk business with Mr Geissler and a promise was then made to me that I will be

[115] Vol 7 pp 560-563

[116] Vol 7 p 561 lines 4-6

[117] Vol 7 p 562 lines 21 and 22

[118] Vol 7 p 566

[119] Vol 7 p 566 lines 31-35

compensated for my idea depending on the commercial success thereof."][120]

9.5.3 The plaintiff's third letter of demand, written by R Masilo Attorneys and dated 19 January 2008[121] makes no mention of the revenue share term, nor of the determination term, nor of the 15% proposal.

9.5.4 The plaintiff's fourth letter of demand (admitted to have been drafted on the plaintiff's instructions, but not delivered)[122] dated 12 March 2008,[123] makes no mention of the disclosure condition, the undertaking to negotiate or the determination term.

9.5.5 The plaintiff's fifth extra-curial version of the alleged agreement is his "open letter" dated 8 July 2008.[124] It does not refer to any of the alleged material terms. [It stated : "I was emphatically promised that once my concept has proved to be commercially viable, you would consider my simple and straight forward request, ie to be allowed to share in the success of my innovation"[125] (emphasis added).

[120] Vol 7 p 566 lines 18-20

[121] Vol 7 pp 567-572

[122] Vol 5 pp 460-465; Vol 8 p 735 line 6 – p 736 line 14

[123] Vol 7 pp 573-579

[124] Vol 7 p 581

[125] Vol 7 p 581 lines 7-9

9.5.6 Nor could the plaintiff give a satisfactory explanation for these omissions.[126]

9.6 The amendment to the particulars of claim, dated 14 March 2012,[127] introduced two wholly new terms, belatedly added to overcome the problem of vagueness and unenforceability of the alleged agreement, even in the terms hitherto alleged by the plaintiff. The first new term was that the undertaking to negotiate to agree on "a reasonable remuneration."[128] The second new term was that, should the parties fail to agree on a reasonable remuneration, the matter would be referred to Mr Knott-Craig (then the CEO of the defendant) for adjudication.[129] This was the first time, even in the four years since the summons had been issued, that this term had been alleged; the plaintiff could offer no explanation for this.[130]

In support of the allegations of all these alleged terms, the plaintiff claimed to rely on the emails annexed as V3 to the amended particulars of claim,[131] but these emails support none of the alleged terms.

9.7 The plaintiff's counsel, in his opening address, said:

[126] Vol 8 p 712 line 1 – p 748 line 25

[127] Vol 4 pp 309 - 342

[128] Vol 4 p 313 lines 17-20; para 5.4.1.1 and p 314 lines 9-12 para 5.4.1.3

[129] Vol 4 p 314 lines 1-6 para 5.4.1.2

[130] Vol 7 p 601 lines 6-16

[131] Vol 4 pp 330-333

> "… Mr Geissler's attitude was well, let us first see, one that the technical and financial viability of the system will be tested over a period of time and secondly if the system was so commercially viable as the plaintiff seemed to suggest, then he, the plaintiff would need to have good faith negotiations about the reward…"[132]
>
> "Mr Geissler had promised to the plaintiff that if the product was technically viable and was a success he would promise to speak to Mr Knott-Craig about an appropriate award [reward?] for the plaintiff."[133]

This is precisely what the contemporaneous emails recorded[134] and falls short of any undertaking by Mr Geissler to even negotiate with the plaintiff about remuneration.

9.8

9.8.1 The plaintiff's own evidence on what transpired between him and Mr Geissler differed from time to time. Indeed, the only common factor in the varying versions given by the plaintiff[135] is that any question of remuneration for contributing his idea would stand over until after its technical feasibility and economic viability had been tested and proven. And, even then, the question of monetary compensation for the plaintiff was a question to be "elevated to the executive level"[136] (which meant that it had, to begin with, to be

[132] Transcript bundle Vol 1 p 20 lines 10-14

[133] Transcript bundle Vol 1 p 21 lines 6-10

[134] Vol 4 p 331 lines 1-9

[135] See, for instance, Vol 7 p 586 lines 17-23; p 587 lines 1-5; p 588 lines 2-5; p 589 lines 4-6; p 590 lines 11-17; p 591 lines 9-13; p 592 lines 14-16; p 593 lines 1-8; p 594 lines 10-15. The plaintiff was predetermined to "Stick to the agreement with Geissler" (Vol 7 p 606 line 1 – p 608 line 22) and, although he was not in court when his witness testified, their evidence was obviously relayed to him (Vol 7 p 609 line 3 – p 619 line 23).

[136] Vol 7 p 586 line 20, but see Vol 7 p 593 lines 408. Thus, Geissler did not hold out that he could conclude an agreement with the plaintiff – which would not have been legally irrelevant in any event.

raised with Mr Knott-Craig). This is exactly what the contemporaneous email series[137] shows: no more than a promise by Mr Geissler to speak to Mr Knott-Craig, once the product had been launched and was successful.

9.8.2 Even on his own version [that he was given a promise by Mr Geissler to be remunerated; and that his remuneration would be a share of the revenue (generated by the defendant through use of the plaintiff's idea), and all that remained to negotiate was the size, ie the percentage, of his share of such revenue; and that, failing agreement thereon, Mr Knott-Craig would adjudicate thereon], there is no room for the term sought to be introduced, namely that the plaintiff would be entitled to a reasonable remuneration.

9.9

9.9.1 Mr Muchenje was not present when the plaintiff and Mr Geissler spoke about the plaintiff's idea; however on two aspects his evidence was relevant and added to the probabilities that an agreement, as alleged by the plaintiff, was not concluded.

9.9.2 Mr Muchenje said that <u>he</u> had no authority to make any promises relating to monetary compensation to the plaintiff,[138] and said that

[137] Vol 4 p 333 line 50 – p 330 line 1

[138] Vol 10 p 1002 lines 22-25

Mr Geissler, to Mr Muchenje's knowledge, also did not have such authority, and that, if the product developed from the plaintiff's idea proved successful, then Mr Geissler would seek the authority he needed to further engage and finalise negotiations with the plaintiff.[139] Mr Geissler may or may not have been able to obtain such authority.[140] And Mr Muchenje, who spoke to the plaintiff before and after the plaintiff's discussion with Mr Geissler, was not informed of any promise made by Mr Geissler to the plaintiff other than, as confirmed by Mr Geissler's email of 6 February 2001, that Mr Geissler will, if the idea is successful, speak to Mr Knott-Craig.[141]

9.9.3

(a) In summary, Mr Muchenje did not support the plaintiff's version that the alleged agreement-

(i) amounted to a promise to pay the plaintiff for his idea (ie "the payment term");

(ii) included the disclosure condition;

(iii) included the revenue share term;

[139] Vol 3 p 279 line 11 – p 281 line 1

[140] Vol 9 p 878 lines 1 – 11; Vol 3 p 280 line 3 – p 281 line 1 (Muchenje); Vol 10 p 999 line 16 – p 1001 line 11; p 1004 line 14 – p 1005 line 25 (Muchenje)

[141] Vol 4 p 331 lines 1 - 16

(iv) included the determination term;

(b) On the contrary, Mr Muchenje testified that the whole question of remuneration for the plaintiff would be left over for discussion until the technical feasibility of the plaintiff's idea had been proven,[142] and even then would have been required to be reduced to writing,[143] and approved by the legal department[144] - none of which occurred.

9.10 The evidence of Mr Knott-Craig, undisputed and supported by documentation referred to below, was to the effect that an employee had only four sources of possible remuneration from the defendant: his salary; an annual bonus; phantom shares; and an excellence award from the CEO.[145] No other reward to an employee was authorised; not Mr Geissler, nor Mr Knott-Craig, nor anyone else in the defendant (short of the board of directors and, in this case, the shareholders) could authorise any other payment to an employee. If Mr Geissler had done so, he would have been dismissed; if Mr Knott-Craig had done so, he would have lost his job.[146] This makes it extremely unlikely that Mr Geissler would have made any promise as alleged by the plaintiff. This applied to an undertaking to make payment to

[142] Vol 10 p 1004 lines 14-15; p 1005 lines 5-25

[143] Vol 10 p 961 lines 8-14

[144] Vol 10 p 960 line 10 – p 961 line 7

[145] Vol 7 p 639 lines 12-23

[146] Vol 7 p 656 lines 20-25

an employee, and applied equally to any undertaking purporting to bind the defendant to negotiate a reward to an employee.

9.11 The improbability of any undertaking to pay a reward, or to negotiate about paying a reward, to the plaintiff, is magnified by the fact that any such undertaking would have been against the defendant's policy in the following respects:

9.11.1 the defendant did not enter into agreements to share the defendant's revenue with anyone;[147]

9.11.2 the defendant did not enter into arms-length agreements with employees who remained employees, as if they were outsiders;[148]

9.11.3 the delegation of powers within the defendant did not allow Mr Geissler to enter into an agreement as alleged by the plaintiff;[149]

9.11.4 the defendant entered into contracts only in writing;[150]

9.11.5 the defendant's contracts had to be approved by the legal department;[151]

[147] Vol 7 p 649 lines 11-25; Vol 9 p 895 lines 11-25; p 896 line 15 – p 897 line 21; p 901 line 10 – p 902 line 25; Vol 10 p 1025 lines 15-29. The examples relied on by the plaintiff, eg Cointel, relate to Vodacom sharing in revenue generated by a third party service provider, and not a third party sharing in Vodacom's revenue.

[148] Vol 7 p 648 lines 12-23; p 651 lines 10 – 25; Vol 9 p 900 lines 7-21

[149] Vol 9 p 894 lines 9-19; Vol 10 p 1038 lines 16-25

[150] Vol 7 p 644 lines 10-12; Vol 10 p 967 lines 8-11

[151] Vol 7 p 637 lines 10-18; p 644 lines 13-17; Vol 10 p 957 lines 1-7

9.11.6 contracts not budgeted for required special board approval.[152]

It is extremely unlikely that Mr Geissler, at the risk of dismissal, would have breached all the above requirements. By the same token, it is extremely unlikely that the plaintiff could have suffered under the misapprehension that Mr Geissler had the authority to breach all these rules.[153] This is evidenced by the following. First, the plaintiff originally addressed his memorandum to senior executives.[154] Secondly, on his own evidence the plaintiff wanted a "unique" contract.[155] Thirdly, the plaintiff said he dealt with Mr Geissler on the alleged understanding that, if his idea proved feasible and viable, it would then be raised to executive level.[156] Fourthly, if the plaintiff did not already know it,[157] it is unlikely that Mr Muchenje and Mr Geissler would not have told him that Mr Geissler did not have the authority to conclude the alleged agreement (which is why Mr Geissler emailed that "I will speak to Alan".[158])

9.12 The court a quo held that because Mr Geissler was not called as a witness by the defendant to counter the plaintiff's version of the alleged contract, an inference was justified that he was "not able to deny the version of Mr

[152] Vol 7 p 637 lines 20-24

[153] Vol 9 p 874 lines 8-13 (Knott-Craig)

[154] Vol 7 p 554 lines 13-18; Vol 9 p 877 lines 9-11

[155] Vol 10 p 1018 lines 9-16 (Makate)

[156] Vol 7 p 586 line 17 – p 587 line 10 (Makate)

[157] Vol 9 p 874 lines 8-13 (Knott-Craig)

[158] Vol 4 p 331 lines 1-10

Muchenje and the plaintiff and/or that his credibility was seriously compromised…"[159]

This inference was not justified. First, Mr Muchenje did not support the plaintiff's version of the alleged agreement. Secondly, the onus to prove the alleged agreement was on the plaintiff; in view of all the probabilities against the plaintiff's version of the alleged agreement, an inference – if to be drawn at all[160] - could equally, and even more so, be drawn against the plaintiff for not calling Geissler as a witness to support his version. Thirdly, the "inference" – invoked by the plaintiff leads nowhere. Mr Geissler's evidence could not salvage the plaintiff's case:[161] the plaintiff's counsel, at absolution stage, conceded that Mr Geissler had no actual authority contractually to bind the defendant, and any representation by Mr Geissler about his own authority could not found any ostensible authority.[162]

10 The relief claimed

10.1 Quite apart from other issues (such as lack of authority and prescription), the plaintiff could never have succeeded in obtaining a declaratory order ordering the defendant to comply with unspecified terms. On the plaintiff's own version the contract that he sought specifically to enforce missed an

[159] Vol 2 p 137; judgment para 80 lines 19-21

[160] *Webranchek v LK Jacobs & Co Ltd* 1948 (4) SA 671 (AD) at 681-682

[161] *Raliphaswa v Mugivhi* 2008 (4) SA 154 (SCA) at 157I – 158B para 15.

[162] *NBS Bank Ltd v Cape Produce Co (Pty) Ltd*, supra at para 25

essential term: the quantum of his remuneration. That term, on the plaintiff's version, was still to be negotiated and, failing agreement, had to be determined by Mr Knott-Craig – a step which had not taken place. Therefore, prayer 1 would, on any basis, have had to be refused.

10.2 Prayers 2 and 3 were also not pursued. They comprised prayers for delivering a statement of account and debatement thereof.[163] In the absence of a statutory provision, or a contractual undertaking to deliver and debate an account, or a fiduciary relationship, there was no legal basis for prayers 2 and 3.[164] There is no such statutory basis, nor any fiduciary relationship, and the plaintiff disavowed any contractual undertaking to deliver and debate an account. The plaintiff thus correctly abandoned prayers 2 and 3.

10.3 The main prayer in prayer 4, for payment of "15% of the money that accrued to the Defendant from the induced calls", could not stand with the plaintiff's contention that he and Mr Geissler agreed that he would receive a share of revenue and that the quantum of that share, unless agreed, would be determined by Mr Knott-Craig. The plaintiff therefore correctly abandoned the main prayer of prayer 4.

10.4 This left only the alternative to prayer 4. Of course, the court a quo's finding of lack of actual or ostensible authority was fatal to any claim to bind

[163] Vol 4 p 324 lines 1-4

[164] *Absa Bank Bpk v Janse van Rensburg* 2002 (3) SA 701 (SCA) at para 16

the defendant to any commitment, including the alleged commitment to negotiate with the plaintiff or to pay any amount which Mr Knott-Craig may determine. The court a quo's finding on prescription was also fatal to the plaintiff's claim.

10.5 Quite apart from the basis referred to in 10.4 above, the plaintiff could, for the following reasons, in any event not have obtained the relief sought in the alternative prayer 4.

10.5.1 An agreement to agree (or to negotiate) is not valid or enforceable; there can be no valid agreement if a material term is dependent on the will or discretion of one of the parties.[165] *Aliter* if the agreement contains a "deadlock-breaking mechanism" or "dispute resolution mechanism"[166] where a third party (an arbitrator) decides upon terms on which the parties failed to agree, and so renders the agreement's terms certain and enforceable.[167]

10.5.2 But the plaintiff seeks something different from an order in terms of his own version of the alleged agreement, namely to negotiate and, failing agreement, that the dispute be referred to Mr Knott-Craig for determination. Instead the plaintiff seeks an order directing the

[165] *Premier, Free State v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) at 431 G-H; *Southernport Developments (Pty) Ltd v Transnet Ltd* 2005 (2) SA 202 (SCA) at paras 11 and 17; *Davids v Van Straaten* 2005 (4) SA 468 (C) at 482 A-B.

[166] "Dispute" here includes any failure to agree – *Southernport, supra at p 207-208 para 10*

[167] *Southernport*, supra at para 17 E-G

parties to commence bona fide negotiations to determine a reasonable remuneration (without an order that, in the event of a failure of agreement, the dispute be referred to Mr Knott-Craig for determination).

10.5.3 What the plaintiff seeks is to import an objective criterion of "reasonable remuneration" into the agreement and, so, ultimately, to render the court the party to determine the terms of the agreement. This deviates from his own evidence[168] and from his own version of the agreement in the following fundamental respects:

(a) it shifts the determination of the remuneration terms away from Mr Knott-Craig and back to the parties themselves;

(b) it seeks to invoke the machinery of the court in the place of the agreed machinery of Mr Knott-Craig's decision for the determination of the outstanding term – a procedure not agreed upon and which cannot be foisted on the court.[169] Indeed, the court cannot so re-write the agreement for the parties.[170]

[168] Vol 8 p 762 lines 17-22; but see Vol 8 p 763 lines 4-15

[169] *H Marks & Co (Pty) Ltd v The B-M Group (Pty) Ltd* 1996 (2)(SA 225 (AD) at 235 C-F

[170] *H Marks & Co*, supra; *Gillig v Sonnenberg* 1953 (4) SA 675 (T) at 679 B-C

11 Relief sought

For the above reasons, the defendant prays that the plaintiff's application for leave to appeal be dismissed, with costs, including the costs of four counsel.

SA CILLIERS SC

RA SOLOMON SC

M CHASKALSON SC

A MACMANUS

Respondent's Counsel

15 July 2015

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT 52/2015

In the matter between:

NKOSANA KENNETH MAKATE Applicant

and

VODACOM (PTY) LIMITED Respondent

RESPONDENT'S TABLE OF AUTHORITIES

Absa Bank Bpk v Janse van Rensburg 2002 (3) SA 701 (SCA)

Absa Bank Ltd v IW Blumberg and Wilkinson 1997 (3) SA 669 (SCA)

Barrett v Minister of Land Affairs 2007 (6) SA 313 (SCA)

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