



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA  
JUDGMENT**

**Reportable**

Case no: 401/2022

In the matter between:

**VODACOM (PTY) LTD**

**APPELLANT**

and

**KENNETH NKOSANA MAKATE**

**FIRST RESPONDENT**

**SHAMEEL JOOSUB NO**

**SECOND RESPONDENT**

**Neutral citation:** *Vodacom (Pty) Ltd v Makate and Another* (Case no 401/2022)  
[2024] ZASCA 14 (06 FEBRUARY 2024)

**Coram:** MOCUMIE, SCHIPPERS and MOTHLE JJA and NHLANGULELA and  
KATHREE-SETILOANE AJJA

**Heard:** 09 May 2023

**Delivered:** This judgment was handed down electronically by circulation to the parties' legal representatives via e-mail, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down are deemed to be delivered on 06 February 2024.

**Summary:** Interpretation of the order of the Constitutional Court – assessment of equitable compensation in a 'special contract' – test for reviewability of determination of a Chief Executive Officer (CEO) as a deadlock breaker – test as formulated in *Bekker v RSA Factors* (*Bekker* test) distinct from the test for reviewability under the Promotion of Administrative Justice Act 3 of 2000 – requirements to satisfy the *Bekker*

test – high court did not apply the second leg of the *Bekker* test – order of the high court remitting the determination to the CEO with a list of directives not sought – *Bekker* test amplified with the *caveat* in *Dublin v Diner – Dean v Prince*: reasonableness, fairness and *bona fides*.

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## ORDER

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

- 1 Save to the extent set out below, the appeal is dismissed with costs including those of three counsel where so employed.
- 2 The order of the high court is set aside and substituted with the following:
  - (a) The decision of the First Respondent delivered on 9 January 2019, determining the compensation to be paid to the Applicant by the Second Respondent, is reviewed and set aside;
  - (b) The decision referred to in paragraph 1 is substituted with a decision that the applicant is entitled to be paid 5% – 7.5% of the total revenue of the PCM product from March 2001 to date of judgment by the Second Respondent, together with the mora interest thereon, alternatively interest in terms of Section 2A(5) of the Prescribed Rate of Interest Act, 55 of 1975 as amended, and that the total revenue of the PCM product shall be that set out in Model 9A, 9B & 9BB submitted to the First Respondent by the Applicant (Annexure “NM30” – “NM32” to the Supplementary Founding Affidavit)
  - (c) It is directed that first respondent represented by the second respondent shall bear the costs of the negotiations referred to in the Constitutional Court Judgment, which costs shall include:
    - (i) Drafting of the submissions;
    - (ii) Preparation for and the hearing before the first respondent;
    - (iii) Reservation, preparation and qualifying fees of experts, involved in the negotiations and hearing on an attorney and own client scale.
  - (d) The costs of this application are to be paid, jointly and severally, by the first and second respondents, the one absolving the other.’

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## JUDGMENT

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### **Mocumie JA (Mothle JA and Nhlangulela AJA concurring)**

#### **Introduction**

[1] This is an appeal against the judgment and order of Gauteng Division of the High Court, Pretoria (the high court). The order reads:

'(1) The application to strike out is dismissed with no order as to costs.

(2) The determination by the CEO is referred back to the First Respondent who is obliged to make a fresh determination with the following directives:

(a) The Applicant is entitled to be paid 5% of the total voice revenue generated from the PCM product from March 2001 to March 2021 by the Second Respondent;

(b) That total voice revenue includes PCM revenue derived from prepaid, contract (both in bundle and out bundle) and interconnect (MTR) fees as set out in the Second Respondent's annual financial statements as well as the information provided in Annexure 16(a)-16 (r) produced by the Second Respondent (CL021-1 to CL021-21) and collated in Annexure NM29 (CL034-1 to CL034-2).

(3) The First Respondent must determine the annual effective rate, which effective rate should be a blend between contract effective rate and prepaid effective rate, and in each case the respective rates are not to be less than the public ICASA effective rate:

3.1. The First Respondent must assume that the average call duration of the return calls is 2 minutes;

3.2. For the purposes of the First Respondent's determination it must not be less than the published ICASA effective rate;

3.3. For the purposes of the First Respondent's determination it must be assumed that the PCM count in Model 9A is correct. Model 9A is to be found on NM30, (CL035-1 to CL035-8 and CL036-1);

3.4. The Applicant is entitled to 27% of the number of PCM's sent daily as being revenue generated by the return calls to the PCM;

(4) The Applicant is also entitled to the time value of money calculated at 5% for each successive year that the Second Respondent owes to the Applicant and the capital amount or annual portion thereof;

(5) That the First Respondent must finalize his determination within one month of this order;

(6) Each party is to pay their own costs [in respect of] the negotiations referred to by the Constitutional Court.

(7) The costs of this application are to be paid on a party-and-party scale, which costs shall include the costs of two counsel.'

### **Factual matrix**

[2] The long history of close to two decades between the appellant, Vodacom (Pty) Ltd (Vodacom), and the first respondent, Mr Kenneth Nkosana Makate (Mr Makate), over the latter's invention of Please Call Me (PCM) is widely documented and needs no repeating. For purposes of the determination of the core issue in the appeal, it is necessary to restate the order issued by the Constitutional Court on 26 April 2016 (the operative order), from which the second respondent, the CEO of Vodacom, Mr Shameel Joosub (the CEO) derived his mandate. The order reads:

'(a) It is declared that Vodacom (Pty) Ltd is bound by the agreement concluded with Mr Kenneth Nkosana Makate and Mr Phillip Geissler.

(b) Vodacom is ordered to commence negotiations in good faith with Mr Makate for determining a reasonable compensation payable to him in terms of the agreement.

*(c) In the event of the parties failing to agree on the reasonable compensation, the matter must be submitted to Vodacom's Chief Executive Officer ('CEO') for determination of the amount within a reasonable time.*

(d) Vodacom is ordered to pay the costs of the action, including the costs of two counsel, if applicable, and the costs of the expert, Mr Zatkovich.' (Emphasis added.)

Although this order was intended to finally resolve Mr Makate's woes, it appears not to have achieved that purpose.

[3] The parties commenced with negotiations. When consensus on the amount of compensation to Mr Makate could not be reached, para (c) of the operative order was triggered. The determination of the CEO, in relevant part, reads:

10.25.1 2001 looking forward model: R51,5 million;

10.25.2 Employee model: R21,8 million;

10.25.3 TWL model: R38,1 million; and

10.25.4 Revenue share model: R42,2 million.

10.26 All models other than Model 2 produce a share of the revenue generated by the PCM idea. Model 1 is what the CEO would have had to rely on back in 2001, although the charge of 15c was never implemented. Model 3 produces a result based on the actual idea of PCM

for TWL customers. Model 4, which is similar to what Makate has suggested, produces a share in revenue based on incremental call revenue. I think it fair in all circumstances to average the highest two models being 1 and 4 and that is what I have decided to do on a present value basis.

10.27 I think it is clear from everything I have said that I found this to be a difficult exercise with many imponderables. No doubt it may be said that in various respects I have erred by being too generous or by being insufficiently generous. Nonetheless, my aim throughout has been to arrive at a fair outcome overall and I truly believe that on balance I have done so to the best of my abilities.'

The CEO accordingly awarded Mr Makate compensation for his PCM product in the amount of R47 million.

[4] Dissatisfied, Mr Makate instituted review proceedings, in the high court, against the amount of compensation that the CEO had determined Vodacom should pay him. The high court found in favour of Mr Makate but remitted the determination of the amount of compensation to be paid to Mr Makate to the CEO. This order was coupled with certain directives which the CEO was required to follow in his redetermination. Vodacom appeals against the judgment and order of the high court with the leave of that court.

[5] In complying with the operative order, the CEO had called upon the parties to make representations to him,<sup>1</sup> which they did. In preparation for the submissions to the CEO, Mr Makate requested various documents from Vodacom which were not available to him. Vodacom provided some of these documents to Mr Makate. In its representations, Vodacom contended that the operative order contemplated an employee remuneration model based on international best practices. Mr Makate rejected that basis of the assessment. He asserted that, in his understanding of the order, the compensation had to be assessed by calculating a share of the actual revenue generated by PCM, because, according to him, it was common cause that the high court and the Constitutional Court had decided that the percentage will be 5% share of Vodacom's total revenue. He further asserted that to negotiate afresh would undermine the decisions of the Constitutional Court and the high court, as the issue of

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<sup>1</sup> The parties were represented by counsel. The CEO, too, was assisted by counsel.

sharing the revenue had been laid to rest by the Constitutional Court. And that any attempt to re-negotiate indicated *mala fides* on the part of Vodacom.

[6] Subsequent to the negotiations, the parties reached a deadlock. Mr Makate approached the Constitutional Court directly to clarify its order. He sought the following order which expressly stated that:

‘(a) Vodacom was obliged to pay [him] a share of the revenue generated by the PCM; and  
(b) that the precise share to be paid by Vodacom to [him] is to be determined through negotiations or, if necessary, by the determination of the CEO.’

Mr Makate’s application was dismissed on the basis that it had no reasonable prospects of success.

[7] The parties resumed the negotiations but there was no fruitful outcome. For a two-week period in July 2017, Vodacom granted Mr Makate and his team access to its data set<sup>2</sup> for the preparation of his revenue share model. Thereafter, Mr Makate made a settlement proposal of R20 billion (including interest capped at double the capital sum). The figure was determined based on a formula multiplying the effective rate per minute, PCM minutes of use, and the returned call conversion rate. The model uses financial and other information which is publicly available and makes various assumptions. In response to Mr Makate’s settlement proposal, Vodacom presented a counter-offer of R10 million based on the salary and variable compensation paid to a CEO of Vodacom in 2001, adjusting it with the time value of money to R7,7 million and rounding it up to R10 million. These final negotiations failed and Mr Makate declared a deadlock between the parties. Consequently, the parties, acting in terms of the operative order, referred the impasse to the CEO who accepted his role and function as that of a deadlock breaker.

[8] The parties accepted the CEO’s description of his role and function as a deadlock breaker. According to Mr Makate’s legal representatives, the proceedings before the CEO commenced on the understanding that the CEO’s role in the determination is ‘. . . to do no more than act in an objective manner, relying on [his] experience and applying [his] mind fairly and reasonably so as to ensure that [his]

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<sup>2</sup> Data set contained information on call, messaging and subscriber records including PCM messages.

determination neither results in a manifestly unjust, nor a patently inequitable outcome’.

[9] On 9 January 2019, after having considered the representations of the parties as well as their supplementary submissions, the CEO delivered his determination which was titled: ‘Determination of Reasonable Compensation due to Mr Kenneth Nkosana Makate Arising from the Please Call Me Idea’. The award outlined the areas of dispute and the specific issues which had been identified by the parties for determination. It was itself, the product of extensive deliberation, negotiations and a hearing of over two days. The witnesses included two experts on behalf of Mr Makate namely, Mr Zatkovich and Mr Hendriks, both of whom were experienced in the field of mobile technology and economy.

[10] Subsequent to receiving criticism from Mr Makate on how he arrived at the figure of R47 million payable as compensation, the CEO filed an explanatory affidavit in which he sought to further explain how and why he reached the decision he did.

[11] As alluded to, Mr Makate was aggrieved by the CEO’s determination and instituted review proceedings against him. The relief sought by Mr Makate in the review application was as follows:

‘1. The decision of the First Respondent delivered on 9 January 2019, determining the compensation to be paid to the Applicant by the Second Respondent, is reviewed and set aside;

2. The decision referred to in paragraph 1 is substituted with a decision that the applicant is entitled to be paid 5% – 7.5% of the total revenue of the PCM product from March 2001 to date of judgment by the Second Respondent, together with the mora interest thereon, alternatively interest in terms of Section 2A(5) of the Prescribed Rate of Interest Act, 55 of 1975 as amended, and that the total revenue of the PCM product shall be that set out in Model 9A, 9B & 9BB submitted to the First Respondent by the Applicant (Annexure “NM30” – “NM32” to the Supplementary Founding Affidavit);

3. In the alternative to paragraph 2 above:

3.1 The decision referred to in paragraph 1 is substituted with a decision that the Applicant is entitled to be paid 5% - 7.5% of the total revenue of the PCM product from March 2001 to date of judgment by the Second Respondent, together with mora interest



thereon, alternatively interest in terms of Section 2A(5) of the Prescribed Rate of Interest Act, 55 of 1975 as amended;

3.2 It is directed that the total revenue of the PCM product shall be determined by this Court, following such procedures as the Court deems in the interest of justice;

4. In the further alternative to paragraph 2 above:

4.1 The decision referred to in paragraph 1 is substituted with a decision that the Applicant is entitled to be paid 5% - 7.5% of the total revenue of the PCM product from March 2001 to date of judgment by the Second Respondent, together with mora interest thereon, alternatively interest in terms of Section 2A(5) of the Prescribed Rate of Interest Act, 55 of 1975 as amended;

4.2 It is directed that the total revenue of the PCM product shall be determined by a new referee, appointed by the Court;

5. It is directed that the Second Respondent shall bear the costs of the negotiations referred to in the Constitutional Court Judgment, which costs shall include:

5.1 Drafting of the submissions;

5.2 Preparation for and the hearing before the First Respondent;

5.3 Reservation, preparation and qualifying fees of experts, involved in the negotiations and hearing on an attorney and own client scale.

6. The costs of this application are to be paid, jointly and severally, by any Respondent opposing this relief.'

### **Issue(s) for determination**

[12] The issues for determination are the interpretation of the Constitutional Court order, in relation to the CEO's mandate and determination. Arising from that, this Court must determine whether the high court was correct in granting the order it did and, in particular, whether it was correct to impose directives on the CEO on, *inter alia*, the exercise of his mandate and the duration of the contract period.

### **The law**

[13] The standard of review applicable to the CEO's determination is one articulated some 40 years back in the judgment of *Bekker v RSA Factors*<sup>3</sup> which postulates that, where a third person is nominated to fix a price or make a valuation, such a person is

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<sup>3</sup> *Bekker v RSA Factors* 1983 (4) SA 568 (T).

expected to exercise the judgment of a reasonable person.<sup>4</sup> Courts have interpreted mandates of this nature to mean that, whenever two parties have agreed on this type of mandate, the decision is final and binding on them. However, should a valuer or third person exercise their judgment in such a manner that it is unreasonable, irregular and wrongly constituting an inequitable outcome, then the affected person would not be bound by the valuer's determination and such a determination would then be subject to rectification on equitable grounds. This test was applied in *Perdikis v Jamieson*<sup>5</sup> where this Court stated the following:

'It was held in *Bekker v RSA Factors* 1983 (4) SA 568 (T) that a valuation can be rectified on equitable grounds where the valuer does not exercise the judgment of a reasonable man, that is, his judgment is exercised unreasonably, irregularly or wrongly so as to lead to a patently inequitable result.'

This is also the position in respect of the referee's report – it can only be impugned on these narrow grounds.<sup>6</sup>

[14] The *Bekker* test, has its origin in the judgment of the English court in *Dean v Prince (Prince)*.<sup>7</sup> This judgment, which has been well received in South African law over the years, recognises the binding nature of an expert's decision, but also recognises that there might be some exceptions such as where the expert's decision is marred with unfairness and *mala fides*. In such cases, although the parties had agreed that it will be binding on them, the decision may be challenged and set aside on those bases. Importantly in *Dublin v Diner (Dublin)*,<sup>8</sup> the court stated with reference to *Prince* as follows:

' . . . "[E]ven if the Court cannot point to the actual error, nevertheless, if the figure itself is so extravagantly large or so inadequately small that the only conclusion is that he must have gone wrong somewhere, then the Court will interfere in much the same way as the Court of Appeal will interfere with an award of damages if it is a wholly erroneous estimate.'

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<sup>4</sup> Ibid at 568.

<sup>5</sup> *Perdikis v Jamieson* 2002 (6) SA 356 (W) (*Perdikis*) at 364H-I. The test was reaffirmed recently by this Court in *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* [2007] SCA 143; [2008] 1 All SA 321 (SCA); 2008 (2) SA 448 (SCA); 2008 (7) BCLR 725 (SCA); *Wright v Wright and Another* [2014] ZASCA 126; 2015 (1) SA 262 (SCA); *Rajkumar Tahilram v Trustees of the Lukamber Trust and Another* [2021] ZASCA 173 (*Tahilram*) para 15.

<sup>6</sup> *Perdikis* para 10.

<sup>7</sup> *Dean v Prince* [1954] 1 All ER 749, [1954] Ch 409 (*Prince*).

<sup>8</sup> *Dublin v Diner* 1964 (1) SA 799 (D) (*Dublin*) at 804G-H.

Provided the extravagance or inadequacy of the determination is sufficiently gross, it seems to me that the passage I have quoted substantially reflects our law too, save that I would add that I should not be understood to suggest that circumstances which would justify interference on appeal, in South Africa, with a trial Court's award of damages, would necessarily also justify the setting aside of the determination of price, in a matter of this nature.'

### **Before this Court**

[15] Vodacom contended that the CEO exercised a wide discretion when he embarked on his Constitutional Court mandate. This meant that the CEO drew on his own knowledge, expertise and research. In addition to this, he could consult anyone he wanted to – in line with the *Bekker* test – as he did, ie assisted by counsel during this exercise. Counsel for Vodacom submitted that, because the exercise does not fall under the Promotion of Administrative Justice Act 3 of 2000, the high court was not at large to second-guess the CEO, nor could it give him the directives it gave in its order of remittal for reconsideration because of the limited scope in which courts are permitted to interfere with this kind of mandate.<sup>9</sup> Neither did the parties, so it contended, request the high court to impose directives on the CEO. All that the high court was required to determine was whether the CEO made a determination and whether such determination was manifestly inequitable.

[16] On the question of whether the determination was manifestly inequitable, counsel for Vodacom contended that although the high court adopted the *Bekker* test, it did not proceed to consider whether the CEO's determination on the amount of R47 million was patently inequitable. Counsel for Mr Makate agreed that the applicable test was the *Bekker* test, the *caveat* being the test as espoused in *Dublin*<sup>10</sup> with reference to the English case of *Prince*,<sup>11</sup> that the CEO, should exercise his mandate in line with the standard of a reasonable man, preceded by negotiations conducted with *bona fides*. If those principles were not met, then Mr Makate was entitled to challenge the determination. To discharge that onus, Mr Makate had to show that the CEO used incorrect information leading to an incorrect evaluation. Counsel for Mr Makate argued that the *Bekker* principles do not fully cover the situation at hand, as Mr Makate's case

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<sup>9</sup> *Tahilram* para 27.

<sup>10</sup> *Dublin* at 804D.

<sup>11</sup> *Prince*.

is based on lack of *bona fides* on the part of the CEO and the patently unfair results which followed – which triggers the exception espoused in *Prince*.

[17] On this score, counsel for Mr Makate pointed out what they perceived to be anomalies in the determination of the CEO. Suffice to state at this stage that it was common cause between the parties that Mr Makate's claim was for financial compensation, in return for the commercial use of his invention by Vodacom. It was also common cause that the agreed rate for the determination of the compensation for Mr Makate was 5% of the share in the accrued revenue generated by PCM.

[18] Having listened to the submissions of parties and their experts on what the fair, reasonable and equitable compensation should be, the CEO embarked on his own exercise depicted as Table 1 in his determination, with no recourse to what the parties had agreed to. Based on that exercise, the CEO suggested that the basic estimates Mr Makate presented need to be carefully examined, without saying why. I point out only three examples (amongst many) in the determination to highlight the errors which, according to counsel for Mr Makate, the CEO could not refute. These are:

- (a) the omission of MTR;<sup>12</sup>
- (b) the arbitrary 70% reduction the CEO introduced; and
- (c) the change of heart on the agreed upon rate of 5% for the determination of Mr Makate's compensation.

### **Omission of MTR and revenue derived from PCM in relation to contract subscribers**

[19] With reference to Table A, counsel for Mr Makate submitted that the CEO simply ignored certain income constituting voice revenue earned by Vodacom. He explained that during argument in the high court, Vodacom avoided addressing the omission of MTR and contract revenue derived from PCM from the calculations in relation to contract subscribers from the calculations. It also did not raise any defence in this regard. He argued that the CEO could not give any tangible reason why a patent error of this magnitude was omitted or ignored. Before this Court, the least that counsel

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<sup>12</sup> 'MTR' is the abbreviation for Mobile Termination Rates.

for Vodacom could do in this regard, was to concede the error. He, however, submitted that the error was not relevant to the determination.

### **The arbitrary 70% reduction that the CEO introduced**

[20] In his determination, the CEO, as the parties agreed, accepted that the one-hour window translated to 27% of PCM success rate. However, he thereafter without any reference to the parties, deducted a further 70%. In doing so, he reduced the PCM response rate to 30% of 27% which translates to only 8.1%, a percentage none of the parties proposed or tabled during the interaction with him. The CEO provides no answer for this in his reasons for the determination.

### **Setting 5% of the share in the accrued revenue as the appropriate revenue share**

[21] It was common cause between the parties that the agreed rate for the determination of the compensation was 5% of the share in the accrued revenue. If this is accepted, as counsel for Vodacom conceded, that resolves the issue of whether the high court should have applied the test as formulated in *Plascon-Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd* (the *Plascon Evans test*).<sup>13</sup> Thus, it must then be accepted that whatever dispute there was, fell by the wayside as the issues were crystallised and as such, the high court was not barred from proceeding with the matter, on this basis. Therefore, on the approach I have adopted (on the basis of the commonly agreed rate which was premised on 5% of the share in the revenue generated by Vodacom and as it accrued over the years), the application of the *Plascon Evans* test does not come into play at all. The submission by counsel for Vodacom, to the contrary, is not consistent with what has already been decided by the courts prior to this appeal.

### **Application of the law to the facts**

[22] I accept that the high court was correct, as conceded by counsel for Vodacom, that the CEO's determination was not reasonable. However, even if the high court was correct on the first leg of the *Bekker* test, it did not undertake the second leg of the enquiry to consider whether the CEO's determination of R47 million was manifestly

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<sup>13</sup> *Plascon-Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd.* 1984 (3) SA 620; [1984] 2 All SA 366 (A); 1984 (3) SA 623. This test was restated and applied in *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA); [2009] 2 All SA 243.

inequitable. For that reason, this judgment will focus only on the CEO's determination of reasonable compensation for Mr Makate, ie whether the R47 million is manifestly inequitable. Linked to that enquiry, is his choice to peg the amount to a fixed term of five years. I consider these two issues to be dispositive of the appeal before this Court.

### **Was R47 million manifestly inequitable?**

[23] As found by the high court, counsel for Vodacom accepted that the determinant percentage was 5% of the revenue generated by Vodacom. The CEO, in his determination, also accepted this fact. Counsel for Vodacom submitted that R47 million was a generous amount, and since the CEO dutifully accounted for his determination based on his knowledge of over 28 years with Vodacom, it cannot be said that such an award is unfair and manifestly inequitable. Counsel for Vodacom emphasised the various unpredictable variables which the CEO reflected upon in his determination, and that the determination is a forward looking one and in terms of the law of contract based on specific performance, which Mr Makate claimed from Vodacom. Having regard to this, he argued that, in the absence of any attack on the CEO's honesty in the exercise of his mandate, there was no basis to challenge the determination ie the 5% of the revenue determined from 2001 looking forward. He strongly asserted that the amount proposed by Mr Makate was 'outrageous' and that the CEO was generous to go over the maximum contractual period of three years (which is the term generally applied for contracts with third parties) to grant Mr Makate a five-year contractual period.

[24] To the contrary, counsel for Mr Makate argued that the approach which the CEO adopted in making the determination was a superficial reconciliation, as he failed to properly identify the references which he took into account to compute the R47 million. It was also argued that the CEO ignored information, which was both in his own domain and in the public domain, on the revenue Vodacom raked in since 2001 to 2021, which included that generated by PCM. Counsel for Mr Makate pointed to the anomalies in the table of comparison the CEO made to show various discrepancies. On this item alone, it was argued that the CEO's determination was pointedly to Mr Makate's disadvantage, considering that Vodacom has continued to benefit from the PCM invention. It was also submitted, on behalf of Mr Makate, that for Mr Makate to say that the compensation of R47 million was manifestly inequitable, it was not

necessary to prove the exact figures (even if they are available to Vodacom despite its denials) or financial prejudice. Logically, so it was argued, if Vodacom has generated revenue from the day of the invention to date, surely Mr Makate was entitled to benefit more than the R47 million the CEO considered appropriate compensation for his invention. On that basis alone, R47 million was manifestly inequitable.<sup>14</sup>

### **The duration of the contract**

[25] The issue of whether R47 million is manifestly inequitable must be considered in the context of the duration of the contract for which Mr Makate is entitled to be compensated as determined by the CEO. His decision must be assessed on the information presented by Mr Makate (extracted from the documents supplied by Vodacom) which showed the revenue generated by Vodacom from Mr Makate's invention between 2001 and 2021. Vodacom presented no evidence to refute or contradict this information.

[26] In my view, what Vodacom seems to propose is to 'unscramble the scrambled eggs'. They were not happy with how the Constitutional Court finally dealt with the matter on the 5% of the total 'revenue generated' basis. Thus, when the CEO considered the computation, he instinctively or by design (with his knowledge and expertise) fell back to Vodacom's original stance of sharing on a 5% profit basis, contrary to the operative order. Intractably linked to this 5% profit is the duration of the contract.

[27] The CEO's justification for capping the compensation at R47 million is premised on a five-year contract. He based this on the three-year standard contract which was generally the maximum period for so-called third-party service providers such as Wireless Application Service Provider (WASP) and iBurst.<sup>15</sup> In the CEO's own words, he was 'generous' with Mr Makate by stretching the three years to five years. Counsel for Mr Makate pointed out that there are similar service providers such as WASP and iBurst that are still contracted to Vodacom, for over 18-22 years, and those third-party service providers are being paid millions based on the revenue their products

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<sup>14</sup> *Tahilram* para 34.

<sup>15</sup> iBurst is an international mobile broadband internet manufactured by Kyocera used in Africa by various companies including Vodacom.

generated for Vodacom. In response, counsel for Vodacom contended that Mr Makate is not exactly in the same category as those two service providers, as they had added technical expertise to their products and their products were complete when they were presented to Vodacom. Yet this comparison was never in the equation when the negotiations commenced and the contract was concluded between the parties.

[28] In his reasons, the CEO went into fine details to show the extent to which Mr Makate's PCM product was not in the category of those third-party service providers. Counsel for Vodacom contended, in this regard, that whether the CEO compared the various products as Mr Makate wanted him to do, is not the issue. This is because the CEO gave full reasons why he did so, and Mr Makate did not raise any objection to this. However, this, so it was contended, does not answer the question at hand: If Vodacom is still using and generating revenue from Mr Makate's invention (as it does from WASP and iBurst) why would the CEO, looking back to 2001 or forward from 2001, have decided not to continue with Mr Makate's product beyond five years into 2018/2021? This is an important question, as Mr Makate's invention is still generating income for Vodacom some 18-20 years later. This appears to be common cause between the parties. Furthermore, the sole reason for any invention to be retained by Vodacom, for over 20 years, is that it continues to generate revenue. In the circumstances, it would have been eminently reasonable, sensible and 'business-like' for Vodacom to have extended Mr Makate's contract to a period beyond five years. There are no concrete reasons advanced in the CEO's determination in relation to why it was not possible to extend the contract with Mr Makate to beyond a period of five years.

[29] The CEO's motivation for adhering to the five-year contractual period is not borne out by the reasons he had provided in the original determination, nor by those in his supplementary reasons. The reasons which the CEO has provided, do not answer the real question which relates to what the CEO (of over 28 years with his knowledge and expertise) compared Mr Makate's PCM invention to? Nothing, in my considered view. In light of the evidence of more than 20 years as opposed to a hypothesis of five years, I am of the view that the CEO's determination is flawed and thus inequitable.



[30] As this Court affirmed in *Firestone South Africa (Pty) Ltd v Genticuro AG*<sup>16</sup> and a plethora of subsequent decisions,<sup>17</sup> the starting point in the interpretation of a court order is to determine its manifest purpose. In interpreting a judgment or order, the court's intention is to be ascertained from the language of the judgment or order in accordance with the usual well-known rules relating to the interpretation of the documents. As in the case of a document, the judgment or order, and the court's reasons for giving it, must be read as a whole in order to ascertain its intention. It follows from this, that the order of the Constitutional Court must be read with the reasons for judgment.

[31] At para 5 of the Constitutional Court judgment, Jafta J writing for the majority stated:

'The applicant and Mr Geissler negotiated and agreed that Vodacom would use the applicant's idea to develop a new product which would be put on trial for commercial viability. If the product was successful, then *the applicant would be paid a share in the revenue generated by it*. Although the applicant had indicated that he wanted 15% of the revenue, the parties deferred their negotiations on the amount to be paid to the applicant for a later date. However, they agreed that in the event of them failing to agree on the amount, Vodacom's Chief Executive Officer (CEO) would determine the amount.'<sup>18</sup> (Emphasis added.)

[32] Before proceeding to deal with the interpretation of the operative order, I wish to deal with the submission made, on behalf of Vodacom, concerning whether the agreement between Mr Makate and Vodacom was a revenue-share agreement. Vodacom submitted that in determining this appeal, this Court must take into account that Mr Makate made an application to the Constitutional Court to vary its own order (the operative order), which was dismissed on grounds that there were no prospects of success. What this means, argued counsel for Vodacom, is that the Constitutional Court did not consider Mr Makate to be entitled to an ongoing share of the revenue generated by Vodacom from the PCM invention. In response, counsel for Mr Makate

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<sup>16</sup> *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977(4) SA 298 (A) at 304D-F.

<sup>17</sup> See: *Administrator, Cape and Another v Ntshwaqela and Others* 1990 (1) SA 705 (A) at 715F-H; *Weber-Stephen Products Co v Alrite Engineering (Pty) Ltd and Others* 1992 (2) SA 489 (A) at 494E-G; *Zurich Insurance Co South Africa LTD v Gauteng Provincial Government* [2022] ZASCA 127; 2023 (1) SA 447 (SCA) para 5; *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* [2021] ZASCA 99; [2021] 3 All SA 647 (SCA) para 25.

<sup>18</sup> *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13; 2016 (6) BCLR 709 (CC); 2016 (4) SA 121 (CC).

submitted that this contention is not sustainable, as there is a myriad of reasons why a court would dismiss an application for leave to appeal. As long as the reasons have not been provided, as in this case, the order of the Constitutional Court dismissing Mr Makate's application to vary its order cannot be used against Mr Makate. I agree that nothing turns on the order of the Constitutional Court dismissing the application for leave to appeal, as it did not provide Mr Makate with reasons for why his application had no prospects of success.

[33] I now turn to the interpretation of the operative order. On the common cause facts, and on consideration of the language, context and the purpose of the operative court order, there can be no doubt that the Constitutional Court intended for the term 'compensation' to refer to Mr Makate's claim for payment from Vodacom for his invention, within 'a special contract' between the parties, outside the context of a traditional employer-employee relationship. Thus, it follows that the parties envisaged that Mr Makate will be compensated for his invention based on the duration of the contract, which has continued to generate revenue for Vodacom to date. This view is underscored by the fact that, at one stage, Vodacom wanted to buy Mr Makate out. This on its own, reinforces the significance of the product and the revenue it generated between 2001 and 2021 for Vodacom, as established on the very information which it provided Mr Makate with. This position motivated Mr Makate to compromise and make an offer of R28 billion, based on what was submitted to the CEO as Model 9A, 9B & 9BB to represent reasonable compensation for the past 18 years.

[34] The question remains, having found that even on the second leg of the *Bekker* test, the CEO was wrong, what should an appropriate remedy be? On a conspectus of the evidence presented including expert evidence, I could find no objection by Vodacom to the models presented by Mr Makate which point to a compensation similar to a third-party service provider, except that it was not countenanced in international practice within employer-employee relations; a reason which I reject. Over and above that, there is no basis laid out for why the CEO preferred his own model (profit basis) which he crafted with no reference or recourse to the parties.

[35] The litigation between Mr Makate and Vodacom has been going on for close to two decades without resolution and the costs alone have been enormous for both

parties. To remit the determination to the CEO who in his own words, made the determination in ‘a fair outcome overall and . . . on a balance [he has] done so to the best of [his] abilities’ would yield no results. If anything, it may yield worse results for any of the parties because, at this stage, as a deadlock breaker, he started on the wrong premise by rejecting the 5% which the parties had agreed to.

### **The remedy**

[36] The high court was correct in its legal conclusion that the CEO acted contrary to his Constitutional Court mandate. However, as alluded to, it did not undertake the second leg of the *Bekker* test. What compounds the matter is that the remedy as crafted, is not what Mr Makate sought because, as is evidenced from the amended notice of motion delivered on 9 January 2019; Mr Makate sought that the determination of the CEO be set aside and substituted; instead of remitting it for reconsideration to the CEO. To that extent, it erred. It follows therefore, that this Court is at large to interfere with the order of the high court.

[37] As I see it, the high court ought to have set aside the order of the CEO and substituted it with its own decision. That is what was sought by Mr Makate in his notice of motion. All the necessary evidence was before the high court for it to adopt a robust approach and substitute the CEO’s decision with its own decision.<sup>19</sup> There was therefore, no need for the high court to have referred the matter to CEO for redetermination with directives. Significantly, the parties presented expert evidence. Having considered the expert evidence presented, as guided by this Court,<sup>20</sup> absent any evidence that Mr Makate’s computation is wrong (save that it does not take some variables into account), I can find no reason why Mr Makate’s computation should not be accepted as correct. Particularly because the issue, on computation of the

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<sup>19</sup> This Court and other courts have adopted the robust approach in similar cases: *Hersman v Shapiro & Co* 1926 TPD 367 at 380; *Lazarus v Rand Steam Laundries* (1946) Pty Ltd 1952 (3) SA 49 (A); *Esso Standard SA (Pty) Ltd v Katz* 1981 SA 964 (A); *Marvanic Developments (Pty) Ltd v Minister of Safety and Security* [2009] ZAGPJHC 109; *Hack Stupel & Ross Attorneys v Kgang* [2007] ZASCA 132.

<sup>20</sup> In *NSS obo AS v MEC for Health, Eastern Cape Province* [2023] ZASCA 41 para 25; *MEC for Health and Social Development, Gauteng v MM on behalf of OM* [2021] ZASCA 128 para 17 this Court held: ‘it is trite that the opinion of an expert does not bind a court. It does no more than assist a court to itself arrive at an informed opinion in an area where it has little or no knowledge due to the specialised field of knowledge bearing on the issues. Expert opinion should not replace the function of the court to assess the evidence and thereafter, make its own decision on which evidence to accept, and provide reasons for the preference of one opinion of one expert above the other.’ See also *Bee v Road Accident Fund* [2018] ZASCA 52; 2018 (4) SA 366 (SCA) para 66.

compensation, was fully ventilated.<sup>21</sup> It is for the above reasons that I find that the order of the high court should have been to uphold Mr Makate's application, but on the basis expounded in the preceding paragraphs – in line with the *Bekker* test with the *Dublin* and *Prince caveat*, without remitting the determination to the CEO with a list of directives. For these reasons, the appeal against the order of the high court falls to be dismissed to the extent set out in the order below.

### **Costs**

[38] It behoves this Court to show its displeasure in the manner in which this protracted litigation has been conducted over close to two decades, with Vodacom not playing open cards with Mr Makate on the necessary information until ordered to do so by the CEO significantly later in the hearing, to some extent, after pre-hearing negotiations had failed. This delay can safely be laid at the doorstep of Vodacom. I therefore find that Vodacom should bear the costs of the appeal.

[39] In the result, the following order issues.

- 1 Save to the extent set out below, the appeal is dismissed with costs including those of two counsel where so employed.
- 2 The order of the high court is set aside and substituted with the following:
  - (a) The decision of the First Respondent delivered on 9 January 2019, determining the compensation to be paid to the Applicant by the Second Respondent, is reviewed and set aside;
  - (b) The decision referred to in paragraph 1 is substituted with a decision that the applicant is entitled to be paid 5% – 7.5% of the total revenue of the PCM product from March 2001 to date of judgment by the Second Respondent, together with the mora interest thereon, alternatively interest in terms of Section 2A(5) of the Prescribed Rate of Interest Act, 55 of 1975 as amended, and that the total revenue of the PCM product shall be that set out in Model 9A, 9B & 9BB submitted to the First Respondent by the Applicant (Annexure “NM30” – “NM32” to the Supplementary Founding Affidavit)

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<sup>21</sup> This Court and other courts have adopted the robust approach in similar cases: *Hersman v Shapiro & Co* 1926 TPD 367 at 380; *Lazarus v Rand Steam Laundries* (1946) Pty Ltd 1952 (3) SA 49 (A); *Esso Standard SA (Pty) Ltd v Katz* 1981 SA 964 (A); *Marvanic Developments (Pty) Ltd v Minister of Safety and Security* [2009] ZAGPJHC 109; *Hack Stupel & Ross Attorneys v Kgang* [2007] ZASCA 132.

(c) It is directed that first respondent represented by the second respondent shall bear the costs of the negotiations referred to in the Constitutional Court Judgment, which costs shall include:

(i) Drafting of the submissions;

(ii) Preparation for and the hearing before the first respondent;

(iii) Reservation, preparation and qualifying fees of experts, involved in the negotiations and hearing on an attorney and own client scale.

(d) The costs of this application are to be paid, jointly and severally, by the first and second respondents, the one absolving the other.'

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B C MOCUMIE  
JUDGE OF APPEAL

### **Schippers JA (Kathree-Setiloane AJA concurring)**

[40] I have had the benefit of reading the first judgment by my colleague, Mocumie JA. I am unable to agree with the conclusion that the high court 'ought to have set aside the conclusion of the CEO and substituted it with its own decision'. This conclusion, respectfully, is at odds with the order of the Constitutional Court that in the event of the parties failing to agree on the compensation payable to Mr Makate for his PCM idea, the matter should be determined by Vodacom's CEO. It follows that I adopt the abbreviations used in the first judgment.

#### **The basic facts**

[41] Mr Makate worked for Vodacom as a trainee accountant. In 2000 he came up with a brilliant idea: a cellphone user with no airtime could send a request to another user with airtime, to call the former. Based on this idea Vodacom developed the PCM product. It turned out to be a resounding success. However, Vodacom refused to pay Mr Makate anything for his idea. In 2008 he sued Vodacom in the high court, inter alia,

for a declaratory order that the parties had entered into an oral agreement for Vodacom's use of PCM, and a share of the revenue derived from it. The case went to trial and the high court (Coppin J) dismissed his claim.<sup>22</sup>

[42] The trial court refused leave to appeal. Mr Makate's application for leave to appeal the trial court's order to this Court suffered the same fate. However, his application for leave to appeal to the Constitutional Court succeeded. On 26 April 2016 it granted Mr Makate leave to appeal and upheld the appeal with costs. The Constitutional Court issued an order declaring that Vodacom is bound by the agreement concluded by Mr Makate and Mr Philip Geissler, Vodacom's Director of Product Development; and directed the parties to negotiate in good faith to determine an amount of reasonable compensation payable to Mr Makate, failing which Vodacom's CEO was required to determine that amount within a reasonable time (Constitutional Court's 2016 order).

[43] In May 2016, following the Constitutional Court's 2016 order, the parties commenced negotiations to determine the compensation payable to Mr Makate. Vodacom proposed that Mr Makate's share of the revenue generated by the PCM idea be assessed on the basis of international standards for rewarding employees who make significant contributions to their company. Vodacom offered Mr Makate R10 million as compensation for the PCM idea. Mr Makate rejected this offer on the ground that it was inconsistent with the agreement between the parties. He claimed a share of the actual revenue generated by the PCM idea – between R28 and R110 billion. He proposed that in calculating that share, he should be regarded as a third party supplier to Vodacom; that the parties agree on the total revenue generated by the PCM product; and that they agree on the percentage of that revenue to which he was entitled, and for what period. The parties could not agree on an amount of reasonable compensation.

[44] In September 2016 Mr Makate unilaterally suspended negotiations with Vodacom and applied to the Constitutional Court for the variation of its order of 26 April 2016. He sought an order declaring that Vodacom pay him 'a share in the revenue

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<sup>22</sup> *Makate v Vodacom (Pty) Ltd* [2011] ZAGPJHC 241; 2014 (1) SA 191 (GJ).

generated by the Please Call Me product'; that the precise share in that revenue be determined by the CEO; and that Vodacom disclose what revenue was earned by PCM, failing which it should grant his experts access to its systems and records to determine the extent of PCM revenue (second Constitutional Court application).

[45] Vodacom opposed the second Constitutional Court application. On 8 February 2017 the Constitutional Court dismissed that application on the ground that 'it bears no prospects of success' (2017 order). The matter then proceeded before the CEO to determine the compensation payable to Mr Makate.

### **The CEO's determination**

[46] The CEO has held that office since 2012 and has been employed by Vodacom in various senior positions since 1994. In the process of determining the compensation payable to Mr Makate, he was assisted by senior and junior counsel who gave him legal advice where necessary.

[47] The CEO derived his mandate from the Constitutional Court's 2016 order. It reads:

- '(a) It is declared that Vodacom (Pty) Limited is bound by the agreement concluded by Mr Kenneth Nkosana Makate and Mr Philip Geissler.
- (b) Vodacom is ordered to commence negotiations in good faith with Mr Kenneth Nkosana Makate for determining a reasonable compensation payable to him in terms of the agreement.
- (c) In the event of the parties failing to agree on the reasonable compensation, the matter must be submitted to Vodacom's Chief Executive Officer for determination of the amount within a reasonable time.'<sup>23</sup>

[48] The Constitutional Court described the agreement referred to in its order of 26 April 2016, as follows:

'The applicant and Mr Geissler negotiated and agreed that Vodacom would use the applicant's idea to develop a new product which would be put on trial for commercial viability. If the product was successful then the applicant would be paid a share in the revenue generated by it. Although the applicant had indicated he wanted 15% of the revenue, the parties deferred their

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<sup>23</sup> *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13; 2016 (4) SA 121 (CC) para 107.

negotiations on the amount to be paid to the applicant for a later date. However, they agreed that in the event of them failing to agree on the amount, Vodacom's Chief Executive Officer (CEO) would determine the amount.<sup>24</sup>

[49] In his determination styled, 'Determination of Reasonable Compensation due to Mr Kenneth Nkosana Makate arising from the Please Call Me Idea' dated 9 January 2019 (CEO's determination), the CEO states that Mr Makate described his function as that of an arbitrator, and Vodacom's, as that of a valuer. The CEO however considered his function to be that of a deadlock-breaker, in accordance with the parties' agreement as confirmed by the Constitutional Court. Counsel for Mr Makate, in the course of his submissions before the CEO, agreed that the CEO functioned as a deadlock-breaker.

[50] The CEO described the process he followed in his explanatory affidavit. Mr Makate and Vodacom made comprehensive written submissions as to what constitutes reasonable compensation, supported by memoranda from their experts. Thereafter the CEO met with the parties for two days, heard oral submissions from both sides and put his queries and difficulties to them.

[51] Subsequently, the parties filed further written submissions and documents with the CEO. In that process Mr Makate submitted a report by ANZ Consulting, containing requests for information from Vodacom and Mr Makate's Model 8A, which sought to track estimates of the PCM revenue year by year. That report also contained a response to some of the questions posed by the CEO during oral argument. Vodacom granted Mr Makate access to the information sought. These exchanges concluded the parties' submissions to the CEO.

[52] There was consensus regarding the manner in which the CEO had to carry out his task. He was required to do no more than act in an objective manner relying on his experience and applying his mind fairly and reasonably, so as to ensure that his determination did not result in a manifestly unjust nor patently inequitable outcome. The parties agreed that the CEO should make his determination in 2001 looking forward.

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<sup>24</sup> Ibid para 5.



[53] In his determination the CEO awarded Mr Makate compensation for the PCM idea in an amount of R47 million. In making that determination the CEO considered four models:

- (a) A '2001 looking forward model'. The CEO put himself in the shoes of the CEO in 2001 to determine the computation that Vodacom would probably have agreed to pay Mr Makate for the use of his idea. The present-day value of this calculation came to R51.5 million.
- (b) An employee reward model for the PCM idea. In this model the CEO awarded Mr Makate the highest bonus paid to a Vodacom employee, namely salary and bonuses paid to the CEO over a period of three years (2016 to 2019). The present-day value of the upper limit of this model came to R21.8 million. Vodacom proposed and supported this model.
- (c) A 'Time Window Lock model'. In this model the CEO considered the time window lock customers envisaged to benefit from the PCM product in 2001. A customer purchased a prepaid voucher for a specific amount locked into a time period for usage, for example, 14 days. If the airtime was not used within that prescribed window, the customer was time window locked – they could not make or receive calls unless they bought another voucher. The present-day value of this model was calculated at R38.1 million.
- (d) A 'revenue share model looking backwards'. This model seeks to determine, with the benefit of hindsight, the compensation Vodacom would have paid to Mr Makate for the use of his idea under a contract concluded in 2001. The present-day value of this calculation came to R42.2 million.

[54] The CEO considered the outcomes of these four models and based his final determination on the average of the two outcomes most favourable to Mr Makate, (the first and fourth models), rounded up to R47 million.

[55] The only competing model put up by Mr Makate was a revenue share model looking backwards after 18 years, according to which he claimed compensation calculated at 5% of all revenue generated by the PCM product – between R28 and R110 billion. He contends that his quantification of the compensation due is the only one consistent with the Constitutional Court's judgment and that all other computations must therefore be disregarded.

## The review

[56] In August 2019 Mr Makate launched proceedings in the high court to review and set aside the CEO's determination. He sought essentially an order substituting that determination with a decision that Vodacom pays him 5 to 7.5% of the total revenue of the PCM product as set out in his Models 9A, 9B and 9BB, from March 2001 to date of judgment, together with interest and costs on an attorney and client scale.

[57] The review was founded on five alleged irregularities by the CEO which, Mr Makate contended, rendered the CEO's determination manifestly unreasonable, unjust and inequitable. In sum, these irregularities are:

- (a) The duration of the revenue share period. The CEO irregularly limited Mr Makate's revenue share to five years despite PCM having generated revenue for 18 years and continuing to do so. Mr Makate alleged that the agreement would have endured for as long as Vodacom used the PCM product, but he accepted a contract duration of 18 years.
- (b) The CEO declined to award Mr Makate any interest on his revenue share. He mistakenly assumed that Mr Makate's counsel had abandoned any claim for interest.
- (c) The proceedings before the CEO were inherently unfair because Vodacom refused to disclose the revenue earned from the PCM product.
- (d) The CEO relied on incorrect figures regarding the revenue earned by Vodacom. He used an incorrect revenue model in determining compensation and should have confined the determination to his fourth model – the revenue share model looking backwards.
- (e) The CEO failed to consider evidence concerning Mr Makate's claim based on Vodacom's own audited publications. In its 2017 financial statements the Vodacom Group provided for a minimum materiality threshold of R960 million concerning Mr Makate's claim. In 2016 the annual financial statements of Vodafone PLC, Vodacom's holding company, reflected the overall group materiality as £180 million (R3.7 billion at the relevant exchange rate).

[58] Vodacom's answer to these review grounds can be outlined as follows:

- (a) The five-year revenue share period determined by the CEO was consistent with the position in relation to untested products in 2001. It was generous in circumstances where Mr Makate was not rendering any ongoing service to Vodacom. The CEO's determination was one of a number of possibilities which could not be gainsaid. Mr Makate throughout sought 'reasonable remuneration' – not that the contract would run in perpetuity. His claim that a tenure of 18 years was 'rational' because PCM could have been patented, is unsustainable and was not contemplated by the parties. The dispute concerning the compensation payable to Mr Makate was referred to a deadlock-breaking party, the CEO, whose decision is final and binding on the parties. Mr Makate was therefore not entitled to review the CEO's determination.
- (b) As regards interest, the CEO recorded that his determination made provision for the time value of money even though the operative order required interest to accrue only once compensation had been determined. The claim for interest was not based on any legal ground but merely as 'a gesture of good faith'. Mr Makate did not pursue a claim for interest during the trial.
- (c) The proceedings before the CEO were not unfair, as there is no direct revenue that could be quantifiably attributed to the product. Mr Makate's legal team took an informed decision to proceed with their submissions before the CEO on the basis of the documentation disclosed to them at that stage. The CEO was acquainted with the relevant information and insofar as there were inadequacies, after the oral hearing he called upon Vodacom to provide additional information, which it did. Mr Makate was not hampered in any way in formulating his model to determine what he believed was reasonable compensation due to him, based on the information made available to him by Vodacom.
- (d) The CEO was given an unfettered discretion to determine reasonable compensation: he did not rely on incorrect figures and could not be criticised for the revenue model which he adopted.
- (e) The overall quantitative materiality thresholds stated in the independent auditors' reports in respect of the consolidated annual financial statements of the Vodacom Group for March 2017 (R960 million), and Vodafone for March 2016 (£180 million), constitute disclosures informed by an unquantified existing obligation, in accordance with the International Accounting Standard 37 (IAS

37). At the relevant time, Vodacom concluded that the outflow of economic benefits could not be reliably estimated. These materiality thresholds are irrelevant to the determination of reasonable compensation.

### **The high court's judgment**

[59] The review application came before Hughes J who held that the CEO 'did not exercise the judgment of a reasonable person, which resulted in an inequitable result for the affected parties'. The court apparently upheld the review and set aside the CEO's determination (it made no order to this effect). It concluded that the CEO's consideration of the Time Window Lock and revenue share models, of his own accord, 'renders the determination manifestly unjust'. This, seemingly because the CEO did not engage the parties on these two models and failed to act in accordance with their mandate.

[60] The high court endorsed Mr Makate's revenue share model looking back over 18 years. It found that the 'eighteen years proposed by Makate is reasonable, probable' and had been achieved; and that the CEO should 'apply the eighteen-year period'. Despite this, the court ordered that Mr Makate be paid 5% of the total revenue of the PCM product from March 2001 to March 2021 – a period of 20 years.

[61] The high court held that Mr Makate's challenge that the proceedings before the CEO were unfair because Vodacom refused to disclose documents relating to the revenue earned from PCM, was 'without merit, to say the least'. The CEO had directed Vodacom to provide the documents requested by Mr Makate, and his team were granted access to them. The documentation provided by Vodacom was adequate.

[62] But then the court upheld Mr Makate's contention that the CEO's determination and proposed models could not be relied upon because 'Vodacom did not disclose the relevant documentation and information'. These models, the court said, have 'inherent problems, which could only be resolved if Vodacom comes to the party and provides the relevant and necessary information'. Then it said that it could not exercise its discretion to make a substitute order, because there was no 'proper and adequate information on record'.

[63] Concerning the CEO's revenue share model to determine compensation, the high court held that the CEO's stance on incremental revenue was 'contrary to what both Makate and Vodacom understood' – that the success rate or call rate constituted incremental revenue. It dismissed the CEO's adjustment of 30% for incremental revenue as 'arbitrary' and said that the CEO had made this decision 'without granting the parties an opportunity to make representations'. The court stated that 'the CEO conceded that he was unable to provide an explanation why he applied a further 70% reduction against Makate's revenue'.

[64] Regarding interest, the high court found that the CEO 'confused the issue of interest with that of time value of money'. The CEO, it said, conceded as much in his explanatory affidavit by stating 'I may have been confused between the concept of interest on an unliquidated claim for damages and mora interest'.

[65] The high court held that the CEO should have allowed for an 18-year contract. Yet it granted Mr Makate a 20-year contract, essentially for three reasons. First, Vodacom's contract with a company, Cell-Find, was concluded in 2003 and was still extant in 2020. Second, the CEO had ignored a statement by Mr Andre Hendricks concerning advertising revenue generated on the back of PCM messages in 2012. And third, the CEO's determination was vitiated by the fact that he advanced further reasons for the duration of the contract after the event.

[66] The high court remitted the matter to the CEO for a fresh determination. Despite its acknowledgement that it has neither the experience nor competence to substitute the CEO's determination with its own, the court issued the following detailed directives to the CEO when determining compensation afresh:

- (a) The CEO's determination of reasonable compensation was restricted to a revenue share model of 5% for a period of 20 years.
- (b) The calculation of the total voice revenue in that model must include PCM revenue derived from prepaid, contract and interconnect (MTR) fees as set out in Vodacom's annual financial statements, the extracts from its financial statements for the period 2001-2017, and a table prepared by Mr Makate showing the CEO's fundamental errors in determining compensation.

- (c) The CEO must apply Mr Makate's PCM count in his Model 9A. Mr Makate is entitled to 27% of PCMs sent daily, being revenue generated by the return calls to the PCM. And the CEO must account for the time value of money at 5% for each successive year.
- (d) The CEO must assume that the average call duration of return calls is two minutes.
- (e) The effective rate applied by the CEO must be a blend of the contract effective rate and the prepaid effective rate, and in each case, the effective rate must not be less than those published by the Independent Communications Authority of South Africa (ICASA).

[67] The court granted this relief with costs, but did not state which party was liable for costs. It appears from the judgment that Vodacom was so liable.

### **Submissions in this Court**

#### ***Vodacom's main submissions***

[68] Vodacom submits that the reasonable compensation envisaged by the parties was a lump sum. They agreed that Mr Makate would be paid 'a share in the revenue generated by' the PCM product. They did not specify whether that share should be a percentage or a lump sum. They deferred their negotiations on 'the amount to be paid' and if they could not agree on that 'amount', it would be determined by Vodacom's CEO. All of this suggests that the parties had a lump sum award in mind.

[69] Vodacom further submits that determining the amount of compensation was within the discretion of the CEO. His mandate did not prescribe that Mr Makate was entitled to a share of all or any particular revenue generated by the PCM product; an ongoing or indefinite share of that revenue; or a share of that revenue for a particular period.

[70] Vodacom contends that the high court held that the CEO performed the function of an expert valuer, and referred to the test for the review of cases of this kind in *Bekker*,<sup>25</sup> but did not apply it. For the most part the court applied an appeal standard,

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<sup>25</sup> *Bekker v RSA Factors* [1983] 4 All SA 328 (T) (*Bekker*).

asking whether the CEO had been right or wrong, with frequent applications of the rules of administrative review. As an expert valuer, the CEO did not perform a quasi-judicial function and thus was not required to grant the parties a hearing at all.<sup>26</sup>

[71] Vodacom submits that the high court failed to adhere to the *Plascon-Evans* rule.<sup>27</sup> It repeatedly dismissed the CEO's findings and upheld Mr Makate's contentions without recognising that they were based on conflicting sets of fact, specifically as regards his determination of reasonable compensation.

[72] Vodacom contends that the attack on the CEO's determination on the basis of Vodacom's alleged failure to disclose documents, is unfounded. The high court concluded that Mr Makate's complaint that Vodacom refused to disclose documents of revenue earned from PCM had no merit. The court's subsequent criticism of Vodacom for allegedly failing to produce relevant documents, is unjustified.

[73] In Vodacom's submission, Mr Makate's revenue share model looking backwards over 18 years is conceptually flawed because it is inconsistent with the contract upheld by the Constitutional Court, and fails to determine the amount of compensation the CEO in 2001 would have considered to be fair to Mr Makate. The model is also fundamentally flawed because Mr Makate's calculations are grossly exaggerated. What is more, Mr Makate's model should be disqualified altogether because it does not conform to the CEO's forward-looking mandate.

[74] Vodacom contends that the CEO's calculation should prevail over that of Mr Makate because the parties agreed to entrust the determination of reasonable compensation to his discretion. His expert knowledge and experience concerning the determination the notional CEO would probably have made in 2001, is far superior to that of Mr Makate. His account of the facts must be preferred over that of Mr Makate under the *Plascon-Evans* rule.

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<sup>26</sup> *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* [2007] ZASCA 143; 2008 (2) SA 448 (SCA) (*Lufuno*) paras 21-22.

<sup>27</sup> *Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) (*Plascon-Evans*).

[75] Even on Mr Makate's backward-looking revenue share model, so Vodacom contends, the CEO's conclusion that the likely duration of a contract awarded to Mr Makate in 2001 would have been three years or five years at the most. Further, the CEO's determination of incremental revenue – that it would not have earned but for its use of PCM – was reasonable having regard to the PCM volumes, the call back success rate, the call duration and the effective rate. The high court erred in directing the CEO to base his calculations on the 'total voice revenue including PCM revenue' derived from Vodacom's annual financial statements, in paragraph 2(b) of its order.

[76] Vodacom contends that the high court erred in holding that the CEO's admission that he had mistakenly accepted that Mr Makate's counsel abandoned the claim for interest, vitiates his determination. The CEO's mistake did not affect that determination.

[77] Vodacom submits that the high court inexplicably granted Mr Makate a share of the revenue from the PCM product for a period of 20 years. This, after it held that the CEO should have allowed for an 18-year contract. The court erred in rejecting the CEO's conclusion that the likely duration of a contract awarded to Mr Makate in 2001 would have been three years or five years at most, because the commercial viability of PCM was uncertain.

[78] It is further submitted that the court's reasons for an 18-year contract are unfounded. The Cell-Find contract did not serve before the CEO – it was only raised during the review. In any event, it is not typical of Vodacom's contracts with service providers at the time. The court's reliance on Mr Hendricks' statement – which referred to advertising revenue generated on the back of PCM messages in 2012 – was misplaced. It had nothing to do with the likely duration of a contract with Mr Makate in 2001. The High Court mistakenly applied the administrative law rule that a public body may not justify its decision with new reasons after the event – this is a review under the *Bekker* test. The CEO, it was submitted, did not advance new reasons concerning the duration of the contract: he merely responded to the criticism of his determination based on new documents which Mr Makate produced in the review proceedings.



[79] Vodacom says that the high court's order is inappropriate. In his amended notice of motion Mr Makate never sought an order that the court usurp the CEO's discretion by issuing directives for the determination of PCM revenue. Moreover, the court effectively substituted the CEO's determination with its own; and issued directives for the calculation of reasonable compensation, ignorant of the impact of such compensation, more specifically whether or not it may be manifestly unfair or patently inequitable.

### ***Mr Makate's submissions***

[80] Mr Makate submits that he has a contractual claim based on an agreement to be paid a share of the revenue generated by the PCM idea – he accepts 5% as a fair share. The very concept of a 'share in the revenue' denotes some proportionality between the 'share' and the 'whole'. It is not simply an arbitrary 'amount'. Mr Makate contends that Vodacom's argument on the CEO's mandate is a wrong interpretation of the Constitutional Court's judgment; and that the CEO correctly found that his mandate required him to determine that Mr Makate was entitled to a percentage of the revenue.

[81] The parties agreed on the standards that the CEO had to apply in carrying out his function. These included objectivity, fairness and reasonableness. Mr Makate contends the CEO's failure to comply with these standards was correctly reviewed by the high court; and that Vodacom's reliance on the *Bekker* test for its submission that the CEO did not exercise a quasi-judicial function and thus did not have to hear the parties on the issue of reasonable compensation, is wrong – the review standard is not determined by the classification ascribed to the CEO's decision.

[82] Vodacom's contention that the CEO functioned as a valuer, Mr Makate says, is unsustainable for the following reasons. There is no suggestion of this in the judgment of the Constitutional Court. The CEO did not regard himself as an expert valuer. The function performed by the CEO does not comport with the role of a valuer: the appointment flowed from the office and could have been performed by any CEO holding that office. His deadlock-breaking task required the CEO to take quasi-judicial decisions on the interpretation of the Constitutional Court's order, and commercial decisions setting 5% as the appropriate revenue share. Once the CEO exercised his

discretion, he was bound to act within the established review grounds when he analysed the facts and figures before him.

[83] The high court was correct in rejecting Vodacom's 'narrative' that it has inadequate documents and records to calculate revenue. This was conclusively proved to be incorrect by a whistle blower, former employees of Vodacom and its own executives.

[84] Mr Makate says that his Model 9A is a reconstruction by his experts of the revenue earned from various sources based on a 15% revenue share, and shows that a 5% revenue share amounts to a capital sum of approximately R9 billion. The CEO's award of R47 million, Mr Makate contends, is patently inequitable and not close to an amount commensurate with the revenue derived from PCM.

[85] The CEO wrongly stated, so it is submitted, that Mr Makate's counsel had accepted that the CEO should adopt the 2001 model looking forward. Rather, Mr Makate's counsel had adopted an approach that the only precise science was hindsight, and it is inconceivable that a purely hypothetical looking forward model with no empirical data could be more accurate than using available data over 18 years. Mr Makate contends that the only model which is consistent with the agreement between the parties is the revenue share model looking backwards.

[86] When that model is utilised, Mr Makate submits that the CEO made numerous errors in relation to: the duration of the contract; the calculation of total voice revenue; and the dismissal of Mr Makate's Model 8A. Moreover, so Mr Makate contends, the CEO made critical errors in his calculation of incremental revenue and the inputs in that calculation. PCM volumes are understated by 41%. The call back success rate is wrong: the CEO's conclusion that for every 100 PCMs sent daily, 27 result in a call back, is incorrect. The data mining exercise proved that 38% were returned daily and the reduction of a further 70% was speculative. Neither the CEO nor Vodacom explained how they derived a call duration of two minutes. The effective rate cannot be lower than the ICASA rate.

[87] Mr Makate contends that paragraph 2(b) of the high court's order is based on evidence confirmed by Vodacom and Mr Makate. He says that the core aspects of the formula for calculating revenue were approved by all the directors of Vodacom's departments and Mr Makate's expert, Mr Ivan Zatkovich. In September 2012 Vodacom's managing executive of legal affairs 'confirmed under oath that Vodacom had data detailing whether a particular person had received a call from another'. Vodacom had also stated that it could calculate revenue generated by PCM, by using 'an appropriate time-frame between the PCM and a subsequent call' to determine whether the call was induced by the PCM.

[88] The CEO should have awarded Mr Makate interest on his revenue share. Vodacom's counsel conceded before the high court that mora interest, at a rate of 10.25% on the amount decided by the CEO, should have started to run on 18 January 2019.

[89] On the facts, there is no rational basis to limit Mr Makate to a five-year contract. PCM has been a success from day one and there is no reason why Mr Makate is not entitled to an ongoing revenue share in perpetuity, for as long as PCM continues to earn revenue. This happened in the case of other VAS products without proprietary rights, as is evidenced by the contracts which Mr Makate introduced in the review proceedings.

### **The issues**

[90] The issues raised by this appeal are these:

- (a) Is Mr Makate entitled to a percentage of the revenue earned from PCM?
- (b) The role of the CEO and the standard of review.
- (c) The failure to apply the *Plascon-Evans* rule.
- (d) Did Mr Makate establish the review grounds? More specifically, was the high court correct in holding that:
  - (i) the proceedings before the CEO were unfair because Vodacom failed to disclose relevant documents;
  - (ii) the CEO should determine compensation effectively in terms of a revenue share model looking backwards, in accordance with the court's directives;

- (iii) the total voice revenue in the CEO's determination should include revenue derived from prepaid, contract and interconnect (MTR) fees as set out in, amongst others, Vodacom's annual financial statements (paragraph 2(b) of the order);
  - (iv) the CEO should have allowed for an 18-year contract;
  - (v) the CEO's mistake in concluding that Mr Makate had abandoned his claim for interest and that he conflated mora interest with the time value of money, vitiated his determination.
- (e) Remedy and costs.

### **Is Mr Makate entitled to a percentage of the revenue earned from PCM?**

[91] The Constitutional Court's 2016 order, which states that the parties agreed that Mr Makate 'would be paid a share in the revenue' generated by the PCM product, must be interpreted in the context of the Court's judgment as a whole.<sup>28</sup> Mr Makate interprets this order to mean that the parties had agreed that he would get a fixed percentage of all the revenue generated by his idea.

[92] But that is not so. What was agreed was that Mr Makate would be paid 'a share' or 'a part' of the revenue. The parties did not specify what that share was, nor whether it should be a percentage of the revenue or a lump sum. Mr Makate wanted 15% of the revenue generated by his idea but Vodacom did not agree to that. Instead, the parties deferred their negotiations on 'the amount to be paid', and decided that if they could not reach agreement on that 'amount', the CEO would determine it.

[93] This interpretation, advanced by Vodacom, is buttressed by the plain wording of the Constitutional Court's 2016 order. It does not suggest that there was any breach of the agreement between the parties, or that Mr Makate is entitled to damages – to be placed in the position he would have been had the contract been performed.<sup>29</sup> Rather, the Constitutional Court ordered the parties to negotiate in good faith to determine 'a reasonable compensation' payable to Mr Makate. If they failed to agree

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<sup>28</sup> *SOS Support Public Broadcasting Coalition v SABC* [2018] ZACC 37; 2019 (1) SA 370 (CC) (*SOS Support*) paras 52 and 53.

<sup>29</sup> *Makate v Vodacom* fn 23 para 107.

on the reasonable compensation, the matter had to be submitted to the CEO to determine the 'amount' of that compensation.

[94] The interpretation is further buttressed by the following statements in the majority judgment (Jafta J). In the negotiations between Mr Geissler and Mr Makate for the use of his PCM idea – after he indicated that he wanted 15% of the revenue generated by the product – 'the parties agreed to defer . . . negotiations on remuneration'.<sup>30</sup> In other words, there was no agreement that Mr Makate would be entitled to a percentage of the revenue. Likewise, the Court found that the parties had agreed to negotiate the 'amount of compensation' once the product was developed and tried for its commercial viability.<sup>31</sup> In the event that they disagreed on the 'amount to be paid', Vodacom's CEO would determine that 'amount'.<sup>32</sup>

[95] The minority judgment of the Constitutional Court is also helpful because it accords with the majority's conclusion that the parties did not agree that Mr Makate was entitled to a fixed percentage of all the revenue generated by the PCM product. Wallis AJ said:

'[N]o agreement was reached on the precise form or amount of such remuneration. Mr Makate said that he wanted a profit share and had suggested 15%. Mr Muchenje confirmed that this figure was mentioned in his discussions with Mr Makate. *But the evidence is clear that Mr Geissler did not agree to this figure or any basis for determining the remuneration.* Everything was to depend on the successful launch of the product after which the matter would be discussed. If those discussions did not lead to agreement the question of remuneration would be referred to Mr Knott Craig for determination.'<sup>33</sup>

[96] Wallis AJ went on to say that the parties had agreed to negotiate in good faith concerning the remuneration payable. This, in fact, was Mr Makate's case:

' . . . Mr Makate sued Vodacom, basing his claim on a contract concluded between him and Vodacom represented by Mr Geissler. As often happens, his pleadings were more ambitious than the evidence led in support of his case. Over time they were amended. At the close of the trial *he claimed only that the contract between him and Vodacom was that in the return for his providing the idea to Vodacom it would enter into bona fide negotiations with him in order*

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<sup>30</sup> Ibid para 63.

<sup>31</sup> Ibid para 94.

<sup>32</sup> Ibid para 101.

<sup>33</sup> Ibid para 114, emphasis added.

*to agree on a reasonable remuneration for his idea.* Should they be unable to agree on a reasonable remuneration the matter would be referred to Mr Knott-Craig for his adjudication. The trial court held this to have been proved on a balance of probabilities.<sup>134</sup>

[97] The minority accepted that Vodacom would not have concluded an agreement with Mr Makate on a revenue share basis:

'I do not accept that the company would not have concluded a contract with an employee in order to procure the advantage of a profitable idea. While I accept that it would not have concluded an agreement on a revenue share basis, I do not accept that it would not have agreed to pay an employee, who generated, in his spare time and outside the scope of his ordinary duties, a highly profitable idea for a new product, reasonable remuneration commensurate with the financial benefit enjoyed by the company.'<sup>135</sup>

[98] Vodacom's interpretation of the judgment is also consistent with the 2017 order. The Constitutional Court dismissed Mr Makate's application for an order declaring that: (a) Vodacom is obliged to pay him a share in the revenue generated by the PCM product; and (b) that the precise share of the revenue be determined in the negotiations referred to in paragraph 3(b) of the order of 26 April 2016, or if necessary, by the CEO referred to in paragraph 3(c) of that order. That application was dismissed, because Mr Makate's claim to a precise share of the revenue had no prospect of succeeding at all.

[99] The CEO's mandate was accordingly the following:

- (a) He had to determine reasonable compensation payable to Mr Makate for his PCM idea.
- (b) Mr Makate was entitled to a share of the revenue generated by the PCM product in an 'amount'.
- (c) The CEO had to determine the amount. The parties' agreement did not prescribe how the CEO should determine that amount, what form it should take, or that it should be a percentage of the revenue earned from the PCM idea.
- (d) Paragraph 3(b) and (c) of the order of 26 April 2016 does not say that Mr Makate is entitled to: a share of all revenue or any particular revenue; an

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<sup>34</sup> Ibid para 115, emphasis added.

<sup>35</sup> Ibid para 179.

ongoing or indefinite share of revenue; or a share of revenue for any particular period. These matters were left to the discretion of the CEO.

[100] For the above reasons, the Constitutional Court's judgment is clear and unambiguous on the terms of the CEO's mandate. Mr Makate is not entitled to compensation on the basis of a percentage of the revenue earned. Consequently, 'no extrinsic fact or evidence is admissible to contradict, vary, qualify or support' that judgment.<sup>36</sup> That the parties agreed on a revenue share percentage before the CEO, does not change the fact that there was no agreement on a revenue share basis. The submission by Mr Makate's counsel that the calculation of compensation 'is based upon the bedrock of a royalty or annuity payment on an ongoing basis', is incorrect.

[101] It follows that the CEO was entitled to determine the compensation payable to Mr Makate on the basis that he did: the appropriate model does result in an amount constituting a share or a part of the revenue generated by the PCM idea.

#### **The role of the CEO and the standard of review**

[102] A critical feature of the CEO's mandate under the contract upheld by the Constitutional Court, was that it had to be a forward-looking determination from the perspective of the CEO in 2001. This is common ground, although counsel for Mr Makate informed the CEO that the only precise science is hindsight.

[103] The basic principles of the law of contract also required the CEO to make such a forward-looking determination. Mr Makate's claim is one for specific performance of the contract upheld by the Constitutional Court. That contract was concluded in 2001. It required the parties then and there to negotiate in good faith to agree on Mr Makate's compensation and, failing agreement, for the CEO to determine it. In other words, the contract required the CEO to make a forward-looking determination in 2001. In his determination, the CEO states that he also examined the situation in 2018 looking backwards, 'so as to get a more balanced view of the determinations'.

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<sup>36</sup> *SOS Support* fn 28 para 53.

[104] To the extent that it may be suggested that the CEO did not follow the parties' instructions in grounding his final determination on the average of his first and fourth models, this was not an irregularity alleged in the founding affidavit. Consequently, it was not a case that Vodacom was called upon to meet. Mr Makate's case was squarely that the CEO should have considered the revenue share model looking backwards.

[105] The parties and the CEO agreed that the CEO should perform the functions to the best of his ability, having regard to the material before him, and relying on his experience and expertise; that he should apply his mind objectively, fairly and reasonably; and that he should not make a determination that was manifestly unjust or patently inequitable. Subject to these requirements, the CEO's discretion was unfettered.

[106] The standard of review in a case of this kind was laid down in *Bekker*.<sup>37</sup> It is this:

'Where a third person is nominated to determine a purchase price or make a valuation, he must exercise the judgment of a reasonable man. If his judgment with regard to the determination of the purchase price or valuation is however so unreasonable, improper, irregular or wrong that it would lead to obvious unfairness, the person prejudiced is not bound by it, but the determination or valuation can be corrected on grounds of fairness.<sup>38</sup> (My translation.)

[107] The test in *Bekker* was applied and translated in *Perdekis*<sup>39</sup> as follows:

'It was held in *Bekker* . . . that a valuation can be rectified on equitable grounds where the valuer does not exercise the judgment of a reasonable man, that is, his judgment is exercised unreasonably, irregularly or wrongly so as to lead to patently inequitable result'

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<sup>37</sup> *Bekker* fn 25 at 573E.

<sup>38</sup> The Afrikaans text reads:

'Indien 'n derde persoon benoem word om 'n koopprijs vas te stel of 'n waardasie te maak, moet hy die oordeel van 'n redelike man aan die dag lê. Indien sy oordeel met betrekking tot die prysvasstelling of waardasie egter so onredelik, onbehoorlik, onreëlmstig of verkeerd is dat dit tot 'n ooglopende onbillikheid sal lei, is die persoon wat daardeur benadeel word, nie daaraan gebonde nie, maar kan die vasstelling of waardasie om billikheidsredes reggestel word.'

<sup>39</sup> *Perdekis v Jamieson* [2002] 4 All SA 560 (W) at 568.



[108] This Court has repeatedly endorsed the *Bekker* test.<sup>40</sup> Under that test, the crucial questions in this case are twofold. The first is whether the CEO exercised his judgment unreasonably, irregularly or wrongly. If he did not, the second question is whether his determination of the compensation due to Mr Makate in the amount of R47 million, is manifestly unjust or patently inequitable.

[109] It is accordingly unnecessary to decide whether the CEO functioned as a valuer or whether he exercised quasi-judicial functions. The parties agreed that the CEO had to act objectively, relying on his experience and applying his mind reasonably and fairly, to ensure that his determination did not result in a manifestly unjust or patently inequitable outcome.

### **The failure to apply the *Plascon-Evans* rule**

[110] The high court disregarded the *Plascon-Evans* rule. Motion proceedings are designed to determine issues based on common cause facts.<sup>41</sup> The judgment contains references to Mr Makate's version of the facts which the court accepts, for example, concerning the Cell Find contract, and an unsworn statement by Mr Andrew Hendricks (Vodacom's former Financial Manager Revenue Reporting), and statements by its former employees in relation to the revenue earned from the PCM product. The court then disregards the contrary version put up by Vodacom.

[111] This is impermissible.<sup>42</sup> As Schutz JA said in *Simelane*:<sup>43</sup>

'Such an approach is the converse of that laid down in *Plascon-Evans* at 634H-I, to the effect that in a case such as this, the decision must be based on those facts averred by the applicant which are admitted by the respondent, together with the facts averred by the respondent.'

[112] Instances in which the rule has been ignored will be dealt with under the relevant issues. As is shown below, the *Plascon-Evans* rule was repeatedly disregarded by the high court, and in relation to material disputes of fact.

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<sup>40</sup> *Lufuno* paras 21-22; *Wright v Wright and Another* [2014] ZASCA 126; 2015 (1) SA 262 (SCA) para 10; *Transnet National Ports Authority v Reit Investments (Pty) Ltd and Another* [2020] ZASCA 129 paras 32-34 and 36; *Tahilran v Trustees of the Lukamber Trust and Another* [2021] ZASCA 173; 2022 (2) SA 436 (SCA) para 27.

<sup>41</sup> *Zuma v DPP* [2009] ZASCA 1; 2009 (2) SA 277 (SCA).

<sup>42</sup> *Plascon-Evans* at 634H-I; *Simelane NO and Others v Seven-Eleven Corporation SA (Pty) Ltd and Another* [2002] ZASCA 141; [2003] 1 All SA 82 (SCA) (*Simelane*).

<sup>43</sup> *Ibid Simelane* para 10.

[113] Mr Makate's review grounds are dealt with next. These have no merit, save for the one relating to the duration of the contract.

**Alleged procedural unfairness: non-disclosure of documents and information?**

[114] The founding affidavit states that Vodacom failed or refused to disclose what revenue it had generated from PCM, which rendered the proceedings before the CEO inherently unfair. This allegation is based on the following contentions. In November 2011 already, the high court (Spilg J) ordered Vodacom to discover documents relating to revenue generated by PCM. Even if that revenue could not be calculated with precision, logic dictates that the closer the PCM message is to the returned call, the more likely that the call was generated by the PCM message. Vodacom's stance throughout that there is no direct revenue attributable to the PCM product because it is a zero rated or free service, is untenable and indicative of bad faith. The CEO 'ought to have directed that Vodacom make the information available as best it could'. In failing to do so he acted manifestly unreasonably, unfairly and inequitably. Moreover, affidavits by former employees of Vodacom showed that it was able to disclose the revenue it earned from PCM.

[115] These contentions are however unsustainable on the evidence. Mr Makate abandoned the discovery order issued by Spilg J when Vodacom sought leave to appeal against it. Consequently, Vodacom did not proceed with the appeal.

[116] On 28 October 2016 Vodacom formally tendered to Mr Makate's attorneys access to its information systems and records. The tender was subject to the following conditions: both parties could appoint their own experts; the integrity of Vodacom's systems had to be maintained; the identity of its subscribers had to be protected; and Mr Makate could appoint an expert to confirm that Vodacom was not concealing any records of PCM calls and revenue.

[117] Mr Makate ignored this tender and proceeded with the second application to the Constitutional Court, in which he also sought access to financial records relating to the PCM product. As already stated, on 8 February 2017 the Constitutional Court dismissed that application with costs.

[118] Subsequently, Vodacom again tendered access to its information systems and records under a strict confidentiality regime. In the result, the parties commenced a process jointly styled the 'data mining exercise'. Mr Makate's experts conducted this exercise from 3 July 2017 to 14 July 2017 at Vodacom's premises, where they were provided with technical support and assistance. They were given access to three stores of raw data, namely detailed information for six months of every PCM message sent; call data records for a period of six months containing all voice calls and messaging records; and a record store of prepaid information where there was a zero-airtime balance, indicating whether or not there was airtime when a PCM message was sent. The answering affidavit states that at the conclusion of the data mining exercise, Vodacom's negotiating team were advised that the data extracted was sufficient for Mr Makate's experts to develop and modify their model.

[119] After the initial data mining exercise, Mr Makate's team were given additional opportunities for further data mining to correct their model, after patent errors in it were pointed out to them. Mr Makate declined these offers. Following the data mining exercise, Mr Makate formulated his model of reasonable compensation amounting to billions of Rands.

[120] The CEO considered Vodacom's claim that it would be impossible to determine with any reasonable accuracy whether a call made after receipt of a PCM was in fact prompted by the PCM; whether that call was an incremental call; whether the sender of the PCM had airtime when the PCM was sent; the duration of the call as it relates to the PCM; and the tariff paid by the recipient of the PCM. These uncertainties could not be answered despite the fact that Vodacom furnished a significant amount of data covering a period of six months, which Mr Makate's team had studied. The evidence showed that Vodacom retains only six months of operational data at a time, and this data makes no direct link between PCM and return calls. Consequently, the CEO concluded that assumptions and estimates had to be made. Indeed, both parties did so in their various models.

[121] The CEO found that the inadequacy of the documents was not indicative of a lack of bona fides on the part of Vodacom. Instead, it is 'a situation in which

documentation is inadequate to address the various uncertainties inherent in the exercise being undertaken’.

[122] The following submission by Mr Makate’s counsel to the CEO is thus not surprising:

‘You’ve got to do, Mr Chair, the best you can with a material available notwithstanding the uncertainties that exist. That is what you have to do. And then you have to award compensation that is a reasonable and fair share of revenue, that revenue being viewed as the best you could do with the materials available to you.’

[123] What all of this shows, is that Mr Makate was not hindered in any way from formulating his claim. After the parties made their oral submissions, Mr Makate submitted the ANZ report (his Model 8A), which contained various requests for information from Vodacom. Vodacom provided this information. Mr Makate raised no objection as to its adequacy.

[124] The CEO states that following the further submissions made after the oral hearing, Mr Makate’s team did not ask him to order the production of additional documentation. Neither did they indicate that they wished to apply to court for such an order prior to his determination. On the contrary, they asked the CEO to proceed on the available evidence, to the best of his ability.

[125] Mr Makate’s allegations that Vodacom was able to determine revenue from PCM based on affidavits by its former employees, information contained in the Vodacom mobile advertising deck, and a rule 35(12) notice under the Uniform Rules of Court (given in interlocutory proceedings to clarify an order granted in an application to compel the provision of documents), have been refuted in the answering affidavit. Disputes of fact in this regard, if any, must be resolved in Vodacom’s favour under the *Plascon-Evans* rule.

[126] Finally, on this aspect, the high court found that Vodacom had given Mr Makate’s team access to the documents requested, and his complaint that Vodacom refused to disclose documents of revenue earned from PCM, was without merit. The court said that if Mr Makate considered that those documents were

insufficient, he could have brought an application to court to compel Vodacom to furnish additional documents, which would have addressed his complaint. He did not do so. The only conclusion to be drawn was that Mr Makate was satisfied with the documents that Vodacom had produced.

[127] But then, inexplicably, the court sharply criticised Vodacom for allegedly failing to provide relevant documents. In any event, Mr Makate requested the CEO to do the best he could on the information before him. Any shortcoming in Vodacom's disclosure cannot found a basis to attack the CEO's determination. Mr Makate was treated fairly.

### **The backward-looking revenue share model**

#### ***The percentage of revenue share***

[128] The CEO determined Mr Makate's share at 5%. Mr Makate accepted this determination.

#### ***PCM incremental revenue***

[129] The CEO states that there was consensus that the exercise was limited to incremental calls – made by the person responding to the PCM which would not have been made but for the PCM. This by itself, the CEO said, presented a significant challenge in determining reasonable compensation. Moreover, to qualify as an incremental call, that call must be an additional call, ie it must generate additional revenue for Vodacom over and above the customer's normal spend, but for PCM. There were however substantial difficulties in determining incremental revenue.

[130] The records show that millions of calls were made by responders but it was hard to establish whether the responding call would have been made in any event. The next difficulty was to determine the duration of the incremental responding call, which was virtually impossible since it required a call by call analysis of millions of calls per day. Even if one could determine the duration of the incremental responding call, there was the further problem of identifying the rate payable by the responding caller for that call. This, in turn, depended on whether the responding call was initiated through the Vodacom network or another network provider, and if through the Vodacom network, what rate in a range of possible rates was applicable.

[131] In addressing these difficulties, the CEO assumed that responding calls made within one hour of a PCM were as a result of the PCM, in accordance with a proposal by Mr Makate. The CEO concedes that this assumption 'can be attacked on many levels' but states that without it, it is impossible to quantify revenue generated by the PCM product. The CEO's best estimate of that revenue was based on the following factors: PCM volumes; call back success rate; incremental revenue; call duration; and the effective rate.

(i) *PCM volumes*

[132] The Makate model attempted to estimate PCM volumes from information put together from Vodacom's marketing materials and annual reports, supplemented by calculations which Mr Makate's team made from 2017 data to which they were granted access by Vodacom.

[133] The CEO states that the assumptions made in Mr Makate's model to determine this is flawed and unrealistic. These assumptions were deficient in material respects. First, there was a miscounting of the PCM volumes. The PCM count which Mr Makate relied on included not only the PCMs sent, but also the confirmation messages that the original senders received. In the result, the volume of PCMs was doubled. The PCMs generated daily were approximately 19 million and not 38 million. Second, although the information was only for three years between 2002 and 2017 (namely 2008, 2015 and 2017), in Mr Makate's model the figures used for the other years were simply assumed by reference to the three years.

[134] To correct Mr Makate's errors, the CEO calculated the percentage of customers who used PCM and then calculated that off the average customer base for the year, in order to arrive at a base penetration rate. He used Vodacom's 2018 data and extrapolated backwards from the 2018 data points. This showed the percentage of customers who used PCM and the average number of PCM's sent per customer. He came to a base penetration rate of 37.4%. The CEO's approach was, as he put it, 'very generous' to Mr Makate because the average figure applied to the 2002-2006 period was much higher than Mr Makate's estimates.

[135] The High Court ignored the CEO's determination and directed him to base the PCM volumes on Mr Makate's Model 9A (a modified version of his model 8A). However, Model 9A was never before the CEO and was produced for the first time in the review.

[136] The high court gave no reasons for this directive. This is perplexing as Mr Makate did not criticise the CEO's reasoning on the PCM volumes. Model 9A merely repeats the same flawed assumptions and exaggerated figures that the CEO had criticised.

*(ii) Call back success rate*

[137] Mr Makate proposed, and the CEO accepted, a call back success rate of 27%. In other words, it was assumed that for every 100 PCM's sent in a day, 27 resulted in a call back.

[138] The figure of 27% was drawn from the data mining exercise conducted by Mr Makate's team. As stated, the CEO also accepted that a responding call made within an hour of a PCM was triggered by the PCM.

*(iii) Incremental revenue*

[139] Incremental calls are those made by the person responding to the PCM which that person would not have made but for the PCM. But even incremental calls often do not earn any revenue for Vodacom.

[140] Assume that A sends a PCM to B who responds by making a call to A. The call is, in other words, one of the 27% triggered by the PCM. However, the call is neither incremental nor would it earn Vodacom any incremental revenue in the following cases:

- (a) But for PCM, A would have sent B an SMS to call her. B would have responded by calling A.
- (b) But for PCM, A would have 'buzzed' B by giving her a missed call. B would have responded by calling A.

- (c) B (a mother) calls A (her daughter) every day. A sends B a PCM to indicate that she is free to take the call. But without the PCM, B would in any event have called A.
- (d) B has a contract in terms of which she pays R100 for 100 minutes of talk time per month. She only uses 70 minutes per month. The PCM causes her to use 90 minutes per month. But Vodacom still only earns R100 per month.
- (e) B buys prepaid talk time of R100 minutes per month. She carefully rations her calls to remain within her budget of R100 per month. Following a PCM from A, she makes a call to A that she would not otherwise have made. She compensates for this additional call by reducing her talk time to remain within her budget of R100 per month. Here too, Vodacom would not earn incremental revenue from the call.

[141] Mr Makate's expert, Mr Ivan Zatkovich, recognised that the calculation of PCM revenue needed to take into account not only the call back success rate, but also the portion of those returned calls that were incremental. Despite this, Mr Makate's revenue share model did not make any adjustment for incremental revenue.

[142] The CEO was concerned about this oversight and raised it repeatedly with Mr Makate's senior counsel during the hearing before him. He specifically asked counsel:

'[I]f Vodacom [was] doing a million calls a day, what has Please Call Me done to increase that? Did it increase by 5%? Did it increase by 20%?

MR PUCKRIN SC: I see.

CHAIRPERSON: Exactly what is it and I would have imagined that they weren't going to pay you on a million calls. They would pay you on the increment of the 20% or 5% or whatever it is.

MR PUCKRIN SC: Yes, of course.'

[143] The CEO then asked Mr Makate's counsel to explain how Mr Makate's model catered for the issue of incremental revenue. Counsel replied that Mr Makate was entitled to incremental revenue 'as a matter of logic'; that the 'difficulty is to calculate it'; and that he would 'fall back on [his] argument' that had Vodacom in 2001 concluded an agreement with Mr Makate, the question of incremental revenue 'would have been



a matter of great facility for Vodacom'. Counsel's reply, needless to say, was unhelpful, as was his submission regarding what Vodacom could have done to determine incremental revenue. The fact is that Vodacom never retained the relevant data to do so, due to its sheer volume.

[144] Mr Makate's counsel acknowledged that in determining incremental revenue one must necessarily rely on estimation without data, but offered no solution. Instead, he said, 'We would ask you never to underestimate, in this potpourri of assessing revenue, . . . the value of unlocking the time window lock'.

[145] The CEO pressed Mr Makate's counsel for more. He said that the proposed 27% success rate 'is not necessarily incremental revenue, right?', to which counsel replied, 'No'. The CEO asked how one derives incremental revenue from Mr Makate's model. He clarified this question as follows:

'[A]re you saying that we should take into account 27% that called back [are all incremental] or are you saying that you should take the amount that would have been incremental? So whether it's over an hour or 24 hours or whatever, . . . the person may have called back at a later stage.'

Mr Makate's counsel responded:

'I would suggest the following as a matter of logic and I'm not an expert in these matters. The more urgent the call back, in other words the time envelope – the narrower the time envelope the more one may assume that it is incremental revenue. In other words it is an additional call that is made rather than a call that would have been made anyway.'

[146] The CEO put it to counsel that one should then see an increase in billions of Rand in Vodacom's revenue. Counsel had no answer. Instead, he reverted to what Vodacom could have done in 2001:

'If Vodacom had made a calculation of the additional calls made in – once the system got going. Let's say May/June 2001 they would have had an accurate figure. An accurate figure of incremental revenue. To ask us with our limited time in which to do this mining exercise we were only able to take two days and, Mr Chair, with respect I come back to the law. We have done more than what we were called upon to do. You know, if the negotiations had proceeded in good faith and if this has been one of the methods which the Vodacom negotiation team had been prepared to entertain, those questions may have been resolved.'

[147] Vodacom's counsel also addressed the issue of incremental revenue in his oral submissions to the CEO. He pointed out that Vodacom's market share did not change in the two years after PCM was launched; that the growth in revenue between 2000 and 2005 did not meaningfully change as a result of PCM, which indicated that there was no incremental revenue; and that Mr Makate's calculation of the revenue as a result of PCM – R2 billion – represented 80% of the revenue generated by Vodacom in 2002.

[148] Both parties made further submissions to the CEO after the hearing. Despite the focus on the issue of incremental revenue at the hearing, Mr Makate did not take the opportunity of addressing it any further.

[149] The CEO in his determination said:

'There can never be any data which can tell whether a responding call would have been made anyway and I can only rely on my best estimate made on the strength of my insights and impressions over the years.'

[150] The CEO assumed, in Mr Makate's favour, that 30% of the returned calls triggered by a PCM yielded incremental revenue. This assumption was favourable to Mr Makate because the CEO in fact 'could not find any significant increase [in call revenue] which was demonstrably attributable to PCM'.

[151] In the replying affidavit Mr Makate states that the CEO's determination of incremental revenue 'was not explained', and is 'without any factual basis' and therefore arbitrary and irrational. But, as the CEO's counsel submitted in the review, the CEO did as courts do when faced with 'pondering the imponderable' – he did the best he could 'on the material available even if the result may not inappropriately be described as an informed guess'.<sup>44</sup> This, after all, is precisely what Mr Makate asked the CEO to do: 'You've got to do . . . the best you can with the material available notwithstanding the uncertainties that exist.'

[152] For the above reasons, the high court's finding that the CEO's stance on incremental revenue was 'contrary to what both Makate and Vodacom understood' –

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<sup>44</sup> *Southern Insurance Association Ltd v Bailey* NO 1984 (1) SA 98 (A) at 114B.

that the call back rate constituted incremental revenue, is baffling. The court's dismissal of the CEO's 30% adjustment for incremental revenue as 'arbitrary', and made 'without granting the parties an opportunity to make representations' is unsustainable on the evidence. So too, its order directing the CEO to determine Mr Makate's revenue share based on an entitlement to '27% of the number of PCMs sent daily as being revenue generated by the return call to the PCM'.

[153] The high court said that 'the CEO conceded that he was unable to provide an explanation why he applied a further 70% reduction against Makate's revenue'. But that is not correct. As shown above, Mr Makate's counsel appreciated that calculating incremental revenue is a difficult exercise; that Vodacom has no record, let alone an accurate record of calls 'induced' as a result of a PCM message; and that the CEO was forced to rely on assumptions. These facts are repeatedly stated in the answering affidavit. The CEO gave a detailed explanation for his assumption that 30% of the return calls triggered by PCMs yielded incremental revenue. He merely conceded that he could not prove that his informed guess of 30% was correct, precisely because nobody knows nor can determine what proportion of return calls yield incremental revenue. The CEO drew on his experience and expertise to make an assumption in Mr Makate's favour that 30% of the return calls yielded incremental revenue. Ultimately, his determination was an estimate which, in his words, 'defies exact computation'.

*(iv) Call duration*

[154] Call duration is one of the key input variables in estimating PCM related revenue. The CEO states that the average duration in Mr Makate's model changes dramatically from year to year, ranging from 3.6 minutes to 7.61 minutes, without justification. In his original model submitted to the CEO prior to the oral hearing, Mr Makate used 1.6 minutes in line with published data which showed a duration consistently below two minutes. He subsequently changed the call duration to 3.6 minutes without stating its source or rationale.

[155] However, Mr Makate's model 9A applied a 6.8-minute call duration for the 2002 financial year, based on United States data. This increased the estimated revenue in his model by as much as four times. Such a dramatic increase in call duration would

have been borne out by a similar increase in Vodacom's voice revenue. But that did not happen.

[156] The CEO concluded that international data was irrelevant. Published local numbers are very different and are known. That data had been made available by Vodacom from which the average duration of calls could be calculated – less than two minutes per customer. The CEO's assessment of the call duration cannot be faulted. In any event, Mr Makate accepted that the average call duration was two minutes.

(v) *Effective rate*

[157] The CEO applied a rate determined by dividing the prepaid voice average revenue per user (ARPU) by the average number of minutes per user per year. He said that the rates applied in Mr Makate's model were incorrect:

'As I indicated in my Determination, the [blended] effective rates used in Mr Makate's model are incorrect. Mr Makate's model used a blended contract and prepaid rate. The contract calculated rate includes the monthly committed subscription fees where a customer pays a fixed amount for a recurring fixed amount of allocated minutes/SMSs. A portion of the subscription charge to the customer relates to charges for the recovery of the cost of the handset over the contract period. It is best to use the average prepaid rate as the rate does not include any device recovery. This is the rate that best reflects a charge for a pure voice call.'

[158] Mr Makate's incorrect rate produced an outcome more than double the true effective rate. This has the effect of substantially increasing the revenue ascribed to an assumed call back from a PCM.

[159] The high court merely described the debate between the parties on the 'blended effective rate' but did not engage with it. It held that because Mr Makate contended that his model applied rates that were guided by ICASA rates, the court was 'bound to apply' these rates, since 'ICASA is the regulating authority which ensures transparency'. It concluded that 'the contention that the rate does not exceed that of ICASA is sound'.

[160] Despite giving no reason for preferring a blended rate, and contrary to its conclusion on the ICASA rate, the high court ordered the CEO to determine the

effective rate on the blended basis advanced by Mr Makate 'including prepaid, contract (both in and out bundle) and interconnect (MTR) fees'. Further, it directed that the 'contract effective rate and prepaid effective rate . . . are not to be less than the published ICASA effective rate'.

[161] There is thus no justification for the orders in paragraphs (3) and 3.2 of the high court's order.<sup>45</sup> The CEO's determination on the effective rate is reasonable.

(vi) *Paragraph 2(b) of the high court's order*

[162] In the founding affidavit, Mr Makate asserted that the total voice revenue provided by Vodacom was the starting point of the CEO's determination; that it was materially understated; and that this understatement was achieved by 'simply excluding all in-bundle revenue from contract customers, so that the total revenue used by the CEO was only that from prepaid airtime and out-of-bundle airtime.' Mr Makate then asserted that the CEO applied various percentage factors to that revenue to calculate the part of the revenue he considered to be attributable to PCM. Mr Makate claimed that these assertions are supported by Prof Wainer, a forensic auditor and professor of accounting.

[163] In the answering papers it is denied that Vodacom understated the revenue in any manner. In amplification of that denial, Vodacom states the following. Vodacom furnished the source information used to prepare the voice revenue tables forming part of its post-hearing submissions. These tables contain both prepaid and contract customers' outgoing voice revenue in South Africa and voice ARPU for the years ended 31 March 2001-2018. The voice revenue was furnished from detailed internal management accounts and excluded voice revenue generated by customers when calling international numbers or roaming abroad, and subscription revenue from contract customers based on a fixed amount of allocated minutes and/or data and/or is SMSs. The CEO explained to Mr Makate's counsel at the hearing that it is wrong to conclude that such revenue was as a result of contract customers receiving PCMs.

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<sup>45</sup> Quoted in para 66 above.

[164] The CEO's answer to Prof Wainer's comments on how and when in-bundle and out-of-bundle and prepaid mobile voice revenue is earned; whether these revenue sources are distinguishable; and whether there is any basis to exclude in-bundle revenue in the calculation of incremental revenue attributable to PCM, is that these considerations are irrelevant. This is because in determining compensation, the CEO did not take them into account as they would have had negative effect on his determination in relation to Mr Makate. The CEO says that he did not use the total voice revenue provided by Vodacom as the starting point of his determination.

[165] What is stated above are further instances in which the *Plascon-Evans* rule was ignored. Vodacom's version or that of the CEO on these aspects is neither far-fetched nor untenable.

[166] In paragraph 2(b) of its order, the high court directed the CEO to base his calculation on the 'total voice revenue including PCM revenue' derived from Vodacom's annual financial statements. But total voice revenue and Vodacom's annual financial statements say nothing about incremental revenue. They are entirely irrelevant to the exercise.

[167] Apart from this, Mr Makate's allegation that Vodacom's contingent liability disclosure in its audited financial statements is evidence of a large provision for payment to Mr Makate, because an insignificant amount would not have warranted such a disclosure, is refuted in the affidavit by the Executive Head for International Financial Reporting Standards and Compliance for the Vodacom Group Limited. She states the following. Based on the evaluations performed under IAS 37, Vodacom disclosed the PCM matter as a contingent liability in its annual financial statements, following the Constitutional Court's 2016 order. This disclosure was driven by qualitative factors. No amount was provided for because IAS 37 states that an entity shall not recognise a contingent liability, and the disclosure does not imply a specific amount regarding Vodacom's materiality thresholds. The contingent liability – disclosed but never recognised – continued to be disclosed in the Vodacom Group's and Vodafone's annual financial statements until March 2018. Since the disclosure never originated from a quantitative perspective, the materiality thresholds disclosed

in the Vodacom Group and Vodafone's financial statements are irrelevant. Yet again, the *Plascon-Evans* rule was ignored.

[168] The issue giving rise to paragraph 2(b) of the court's order, came about as follows. In his determination, the CEO compiled a table (Table 1) in which he compared the 'PCM revenue' claimed in Mr Makate's model to Vodacom's outgoing voice revenue. By contrasting these figures, the CEO demonstrated that according to Model 8A, up to 97% of Vodacom's outgoing voice revenue was attributable to PCM. He conducted this exercise merely to show that Mr Makate's Model 8A cannot be reasonable when compared to the outgoing voice revenue of the company, and that one cannot rely on his assumptions.

[169] Mr Makate missed the CEO's point. He accused the CEO of 'deliberately excluding vast amounts', by not applying the mobile voice revenue figures reflected in Vodacom's annual financial statements. He complained, for example, that the CEO's figures in Table 1 excluded outgoing call revenue.

[170] What Mr Makate overlooks, is that the CEO did not use these outgoing mobile voice revenue figures in his determination of Mr Makate's compensation at all. Neither outgoing voice revenue nor 'interconnect minutes' were inputs in any of his models. It had no impact on his determination. In that determination the CEO describes the four models he considered, the assumptions made and the methodology applied. Mr Makate's criticism is thus baseless.

[171] Mr Makate's reliance on Vodacom's financial statements is also flawed. Vodacom's Managing Executive for Data and Analytics (its former Finance Director) explained that the published revenue data included voice revenue generated by Vodacom's international operations, international roaming, calls terminated internationally, and fixed subscription charges. Logically, these categories of voice revenue are not generated by PCM.

#### *Conclusion on PCM incremental revenue and the backward looking share model*

[172] Whether a return call earned incremental revenue was an 'imponderable' that particularly troubled the CEO. There were not only conceptual difficulties in the

exercise, such as determining out of millions of calls, whether a return call in response to a PCM would have been made in any event, its duration, the revenue it generated and the rate payable, but also other factors influencing the revenue generated by Vodacom, such as network investment, other products and services, customer device investment and customer growth. The CEO's statement that determining PCM incremental revenue was 'an extremely complex exercise which defies any exact computation and must rely on assumptions', is thus not surprising.

[173] In his determination, the CEO demonstrates that the numbers resulting from Mr Makate's Model 8A are unrealistic, and for this reason alone, no reliance can be placed on it. On Mr Makate's figures, 97% of Vodacom's total voice revenue in 2002 and 2003 was as a direct result of PCM. This cannot be correct. The assumptions used in Mr Makate's model are unreasonable and unjustifiable. The number of customers, PCMs sent and customer base are unrealistic. The call rates, call duration and effective rates, are wrong. The assertion in the first judgment that Vodacom presented no evidence to refute or contradict Mr Makate's information showing the revenue generated by Vodacom from the PCM idea, is incorrect.

[174] For the reasons advanced above, it cannot be said that the CEO's determination of PCM incremental revenue is unreasonable or patently inequitable. The backward looking share model is fundamentally flawed because it is inconsistent with the contract upheld by the Constitutional Court. It is also at odds with the agreement between the parties that the CEO should make a forward-looking determination.

#### **The duration of the contract**

[175] In his explanatory affidavit the CEO states that for the most part, he approached the duration of the contract as a separate issue. This issue, and the revenue share of 5%, were common to the first, third and fourth models which the CEO considered in determining reasonable compensation due to Mr Makate.

[176] The CEO's determination states that a reasonable basis for deciding duration is to look at typical time periods governing the provision of services and products to



Vodacom by third parties. He gives the following terse reason for his view that a CEO in 2001 would have awarded a contract for a maximum period of five years:

'The typical duration for an untested new product in the Vodacom stable would be 3 years and the longest, plausible initial period would be 5 years. Here there is much to say in favour of the 3 year period, but I am inclined to allow a 5 year period which I think is the outer limit of what could realistically be contemplated. I do so because whilst a CEO looking forward would not have committed beyond 3 years, I have allowed for 5 years which I believe is generous.'

[177] The CEO however went further in his explanatory affidavit. He said that according to his knowledge and experience, Vodacom did not bind itself to new products for more than three years, due to their uncertain commercial viability. Where the product or service was well established, the tenure of the contract could be three or possibly five years. Longer term contracts usually contained clauses which allowed Vodacom to review the commercial terms on short notice.

[178] Had he been called upon to break the deadlock between the parties in 2001, the CEO said that he 'would have considered both the opportunities and risks identified in the key documents of 2001'. One of these risks would have been the commercial viability of PCM. The initial proposal was to levy a charge of 15 cents for each PCM message. However, Vodacom's competitor, Mobile Telephony Networks (Pty) Ltd (MTN), had a comparable product for free, which introduced an element of uncertainty into the commercial viability of PCM. He would therefore have included some flexibility in the commercial terms of the contract.

[179] A further risk, the CEO said, was the possibility that PCM would have had a negative impact on Vodacom's SMS revenue and outgoing call revenue, particularly if it was being offered as a free service. Another uncertainty was whether PCM was to be targeted to time window lock customers or whether it would apply more generally. On the other hand, PCM was a good idea and the CEO in 2001 would have supported its launch in the expectation that it would be beneficial to customers.

[180] The CEO goes on to say that a CEO in 2001 would not have entered into a contract of indefinite duration with Mr Makate, and 'would never have committed Vodacom to a contractual period of 18 years or anything like it'. Consequently, he contends that a five-year contract duration is generous. At the time of the commercial

review (at the earliest after a year to assess commercial arrangements going forward), the relevant CEO would have known that there was no prospect that Vodacom would extend duration of the contract, because Mr Makate was not making any contribution and would have had the benefit of 5% of PCM revenue for five years, which would have been regarded as fair compensation for the initial PCM idea.

[181] He was 'satisfied', the CEO said, 'that the answer lay in assessing whether, given the predicted revenue set out in Vodacom's 'Call-Me Service Product Description Document dated 22 January 2001 (PDD), a share of 5% over 5 years would amount to a sum of money which would cover reasonably and would be regarded as fair compensation for the initial PCM idea'. In his affidavit the CEO states that Vodacom's 'Product and Service Approval: USSD or Call Me Service dated 1 March 2001 (USSD) shows that the PCM service at no charge would dilute SMS and outgoing call revenues, and result in the product making a loss. This would have been a significant factor when reviewing the product and the agreement with Mr Makate at the time. In his determination the CEO states that the PDD and USSD are very similar.

[182] However, none of these considerations stated in the explanatory affidavit are to be found in the CEO's determination. The inference is inescapable that he did not direct his mind to these factors. And Vodacom's submission that the CEO 'did not advance new reasons for his determination' and merely explained his reasons in response to Mr Makate's criticism, is incorrect. The CEO states unequivocally that he 'was satisfied' that had he been asked to break the deadlock in 2001, he would have approached the matter on the basis of the new facts set out in his affidavit.<sup>46</sup>

[183] To begin with, concerning the duration of the contract, there is no reference in the CEO's determination to a single 2001 document – the PDD and USSD are referred to on the question whether the CEO's determination had to be forward-looking. There is no inkling in the CEO's determination, of the commercial viability of PCM in relation to the duration of the contract. Neither is there any reference to the fact that MTN, Vodacom's competitor, had a comparable product – which would have been a critical factor in the decision to launch or continue with PCM. Moreover, the CEO's determination says nothing about the review of the contract by the relevant CEO, nor

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<sup>46</sup> Emphasis added.

any risk of PCM having a negative impact on Vodacom's SMS and outgoing call revenues.

[184] The PDD provides a complete answer to the following allegations by the CEO. The commercial liability of PCM was at risk, because of the proposed charge of 15 cents for each PCM message, and MTN's comparable product offered as a free service. Vodacom would not have extended the duration of Mr Makate's share because he was not making any ongoing contribution to the service. Vodacom would have reviewed the PCM product typically after a year to assess its success, commercial arrangements, support and investment going forward. All of these allegations are afterthoughts.

[185] The PDD states that MTN was not offering a similar service, and that PCM had to be launched urgently with a minimum configuration server, and without a full production infrastructure. The PDD concludes:

'On the basis of the [revenue] model described in Section 2.3 and the implications in terms of both development and hardware costs that would be necessary to modify either HLR, the provisioning systems and processes and/or the USSD Server (which could as a rough estimate exceed the R5 million figure), we recommend that we launch the service in the next two weeks, using the existing infrastructure and solution.'

[186] Then there is the CEO's reliance on the USSD – a contemporaneous document approving the launch of the PCM product on 1 March 2001 – not referred to at all in his determination on the duration of the contract. It is true that the USSD shows that the PCM service at no charge would dilute Vodacom's SMS and outgoing call revenues. But it contains no hint of PCM making a loss.

[187] What is more, the CEO's reliance on the USSD is selective. It shows that PCM was launched to remain competitive with MTN and despite commercial risks such as the devaluation of SMS and voicemail deposits. It states the following:

- (a) To 'stimulate uptake in the market' it is proposed that the 'nominal fee of R0.15 (Vat inclusive) per SMS' be waived, and that subscribers would be charged at this rate after the initial period of six months.

- (b) MTN did *not* have a similar service available (also stated in the PDD). Of course, if it did, the PCM idea would not have been ground-breaking.
- (c) Vodacom estimated that '60% of the Vodago subscriber base (65%)' would utilise the PCM service 'to indirectly stimulate traffic onto the network by means of revenue generated from all returning calls'; and it is assumed that 40% of the active prepaid subscriber base would make use of the service on a continuous basis.
- (d) The revenue figures show that despite a decline in outgoing call and SMS revenues, the additional incoming call revenue (R78.4 million) and the nett additional revenue (R25.4 million) in Scenario A (Free Service) are significantly higher than their equivalents, R65.3 million and R16.1 million respectively, in Scenario B (15c per SMS); and R25.1 million and R6.7 million respectively, in Scenario C (40c per SMS).
- (e) The PCM service should be approved for implementation with effect from 1 March 2001.

[188] The USSD also demonstrates that Vodacom implemented the service regardless of the risks and concerns outlined in that document. For example, the financial impact of PCM had only been estimated and no thorough research was conducted. A detailed analysis of all capital expenditure requirements had not been fully understood. No feasibility studies had been performed in order to obtain a better understanding of customer behaviour patterns to offset the concerns in relation to the decline in outgoing call and SMS revenues.

[189] In these circumstances, Vodacom would never have launched the PCM service – which was untested – unless it was financially viable. PCM was, by Vodacom's own admission, a triumph,<sup>47</sup> and contradicts the CEO's muted description of it as a 'good idea' that would 'benefit customers'. The CEO ignored Vodacom's newsletter – quoted by the Constitutional Court – which states:

"Call Me" has been a big success. On the first day of operation about 140 000 customers made use of the service. It will be free until December 31 this year and thereafter will cost users 15 cents per transaction.<sup>48</sup>

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<sup>47</sup> *Makate v Vodacom* fn 23 para 113.

<sup>48</sup> *Ibid* para 7.

[190] PCM however continued as a free service. Given the facts stated in the USSD, and the success of the PCM service – all of which would have been known to a CEO in 2001 and whenever the contract came up for review, if in fact it did – it is extremely unlikely that the contract would have endured for five years at most. So viewed, the CEO's claim that a tenure of five years is 'generous', does not even arise.

[191] In addition, logic and business sense dictate that after the launch of PCM, and as it continued being offered as a free service, Vodacom would have addressed the risks and concerns stated in the USSD, and continued to monitor the success of the PCM service. If it was not commercially viable, it would have been discontinued. This, however, is not to say that Mr Makate was 'entitled to an ongoing revenue share in perpetuity', unless PCM was discontinued, as his counsel submitted. There was no such term in the parties' agreement. Still, in light of the obvious success of the PCM service, it would have been irrational for Vodacom to terminate it after three (or five) years.

[192] What all of this shows, is that the CEO's determination as to the duration of the contract is unreasonable and patently inequitable. The high court's finding that he had advanced further reasons for that determination after the event, was correct. Vodacom's submission that the high court had mistakenly applied the administrative law rule that a public body may not justify its decision with new reasons after the event, is not the point. The facts stated in his affidavit – entirely new – do not form the basis of the CEO's determination that the contract between the parties would have come to an end after five years. They do not constitute the reasons for that determination. The decision on the duration of the contract is insupportable on the facts, and the CEO's version on this score is plainly untenable.

[193] There is a further reason why the CEO's determination concerning the duration of the contract is unreasonable and inequitable. It is the principle articulated in *Bwillfa*,<sup>49</sup> which concerned the estimation of lost profits by an arbitrator. Lord MacNaghten said: '[T]he arbitrator's duty is to determine the amount of compensation payable. In order to enable him to come to a just conclusion it is his duty, I think, to avail himself of all information at hand

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<sup>49</sup> *The Bwillfa and Merthyr Dare Steam Collieries (1891) Limited v The Pontypridd Waterworks Company* 1903 AC 426 (HL) at 431.

at the time of making his award which may be laid before him. Why should he listen to conjecture on a matter which has become an accomplished fact? Why should he guess when he can calculate? With the light before him, why should he shut his eyes and grope in the dark?’

[194] This passage was cited with approval by the Constitutional Court in *New Clicks*.<sup>50</sup> The Court noted that similar reasoning had been applied in South African courts.<sup>51</sup> In *Fundsatwork*,<sup>52</sup> Wallis JA tersely stated the *Bwillfa* principle thus: ‘In judicial proceedings facts are preferred to prophecies’.

[195] Applied to the present case, it is true that the CEO’s determination of reasonable compensation had to be forward-looking, ie from the perspective of the CEO in 2001. Principle, consistency and fairness dictate that factors existing at that date should not be ignored, and factors which occurred afterwards should not be taken into account. However, in my view, and given the particular circumstances of this case, the *Bwillfa* principle does not require the CEO, when determining compensation, to ‘guess at something which events have made certain’.<sup>53</sup>

[196] It is accordingly insensible and unnecessary to resort to guesswork as to the duration of the contract. The CEO’s determination on this issue has been shown to be unreasonable. There is no reason why Mr Makate should be content with a contract for only five years. The commercial viability of PCM is a proven fact. It is common ground that Vodacom has used the PCM service for more than 20 years and continues to do so. Mr Makate has stated that he is willing to accept a contract duration of 18 years. That, I think, is both reasonable and fair.

[197] It follows that the high court’s order that Mr Makate be paid 5% of the total voice revenue generated by the PCM product for 20 years, must be set aside. The issue of the duration of the contract must be remitted to the CEO to redo his determination in

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<sup>50</sup> *Minister of Health v New Clicks* [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) para 19.

<sup>51</sup> *Devland Investment v Administrator, Transvaal* 1979 (1) SA 321 (T) at 327-8.

<sup>52</sup> *Fundsatwork Umbrella Pension Fund v Guarnieri and Others* [2019] ZASCA 78; 2019 (5) SA 68 (SCA) para 23.

<sup>53</sup> *Amec Developments Ltd v Jury’s Hotel Management (UK) Ltd* (2001) 82 P & CR para 13.

accordance with the models that he considered when making the determination dated 9 January 2019, save that he must allow for an 18-year contract period.

### **Mora interest and the time value of money**

[198] As appears from the CEO's determination and his affidavit, he dealt with Mr Makate's claim for interest. He allowed for the delay in the implementation of the parties' agreement by escalating the amount of his award, on an annual basis, by the average rate of inflation from 2002 to 2019. He did this to allow for the time value of money.

[199] The CEO noted in his determination that Mr Makate's counsel seemed to have abandoned the claim for interest, which had been retained in his expert report. The CEO realised afterwards that he had been mistaken that counsel had abandoned Mr Makate's interest claim, for which he apologised. But the mistake did not affect his determination.

[200] Mora interest and an allowance for the time value of money are in any event two methods of compensating a creditor for the delay in paying its claim.<sup>54</sup> The CEO's adjustment for the time value of money was generous to Mr Makate because he was probably not entitled to mora interest at all. Awarding both would have amounted to double compensation and would have been clearly wrong.

[201] The high court's finding that the CEO conflated mora interest with the time value of money is unfounded. The CEO denied Mr Makate's allegation that he 'may have been confused between interest on an unliquidated claim for damages and mora interest'. The CEO explained that the Constitutional Court had stated when interest is due – until negotiations on reasonable compensation had been concluded, there was nothing due by Vodacom to Mr Makate and nothing that he could claim.<sup>55</sup> The CEO was correct. It follows that the concession by Vodacom's counsel in the high court that

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<sup>54</sup> *Drake, Flemmer & Osmond Inc v Gajjar NO* [2017] ZASCA 169; [2018] 1 All SA 344 (SCA); 2018 (3) SA 354 (SCA) paras 56-68.

<sup>55</sup> *Makate v Vodacom* fn 23 paras 92 and 186.

Mr Makate was entitled to mora interest is neither here nor there. In any event, a court is not bound by a wrong concession of law.<sup>56</sup>

[202] For these reasons, the high court's conclusion that the CEO's mistake concerning interest was a 'classic case' of bad reasoning which vitiated his determination and justified its review, is incorrect. The mistake was not a reason for CEO's determination at all. Moreover, the rule that one bad reason vitiates a decision is a principle of administrative review and inapposite in the application of the *Bekker* test.

### **Conclusion**

[203] Mr Makate failed to establish that in his determination of reasonable compensation for the PCM idea, the CEO committed the irregularities complained of, except in relation to the tenure of the contract. This irregularity renders the CEO's determination unreasonable and patently inequitable. It has a significant impact on the award, because the duration of the contract was an assumption the CEO made in his first, third and fourth models, in arriving at his final determination of compensation of R47 million.

[204] It follows that this issue must be remitted to the CEO for him to determine reasonable compensation afresh. The parties do not object to remittal. In its submissions Vodacom asked for such an order in the event of its appeal failing. Although Mr Makate sought in the high court, alternative relief to the effect that the total revenue of the PCM product be determined by a new referee, he could have no objection to remittal to the CEO: the issue is one of pure calculation.

[205] Vodacom has been partially successful in its appeal. It demonstrated, save for the irregularity relating to the duration of the contract, that the high court erred in upholding all Mr Makate's review grounds. However, Vodacom failed on the central issue: whether the CEO's determination is unreasonable or patently inequitable. There

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<sup>56</sup> *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) at 23D-24G, affirmed in *Alexkor Ltd and Another v Richtersveld Community and Others* [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) para 43.



is accordingly no reason why the costs of appeal should not follow the result. The parties agreed that the costs of three counsel on appeal, are warranted.

[206] I would make the following order:

- 1 The appeal succeeds in part.
- 2 The appellant is ordered to pay the costs of appeal, including the costs of three counsel, namely the costs of two senior and one junior counsel.
- 3 Paragraphs (2), (3), (4), (5) and (7) of the high court's order are set aside and replaced with the following:
  - '(a) The second respondent's Determination of Reasonable Compensation due to Mr Kenneth Nkosana Makate arising from the Please Call Me Idea, dated 9 January 2019, is reviewed and set aside.
  - (b) The matter is remitted to the second respondent for him to determine the amount of reasonable compensation due to the applicant, in accordance with the four models in his determination of 9 January 2019, solely on the basis that the second respondent would have awarded the applicant a contract for 18 years, commencing on 1 March 2001 and terminating on 28 February 2019.
  - (c) The award made by the second respondent shall take into account the time value of money, calculated at an average inflation rate of 5%, from 1 March 2001 to 28 February 2019.
  - (d) The first respondent shall finalise his determination within 30 calendar days of the date of this order.
  - (e) The second respondent shall pay the costs of the application; which costs shall include the costs of two counsel.'

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A SCHIPPERS  
JUDGE OF APPEAL

## Appearances

For the appellant:

W Trengrove SC (with R Solomon)

Instructed by:

Leslie Cohen & Associates, Johannesburg

Lovius Block, Bloemfontein

For the respondent:

C Puckrin SC (with G Marcus and R Micham)

Instructed by:

Stemela & Lubbe Inc., Pretoria

Webbers Attorneys, Bloemfontein.