**REPUBLIC OF SOUTH AFRICA**

**HIGH COURT OF SOUTH AFRICA**

**(GAUTENG PROVINCIAL DIVISION, PRETORIA)**

**CASE NO: 57882/2019**

**Reportable**

In the matter between:

**KENNETH NKOSANA MAKATE** Applicant

and

**SHAMEEL JOOSUB N.O** First Respondent

**VODACOM (PTY) LIMITED** Second Respondent

---

**J U D G M E N T**

---

**HUGHES J**

**Introduction**

[1] Two decades ago Kenneth Nkosana Makate (the applicant) came up with a *'brilliant idea'* which was rated as *'a world first'*. His idea was eventually developed by Vodacom (Pty) Ltd (the second respondent). At the time, Vodacom was Makate's employer and his idea was developed into one of Vodacom's most successful product dubbed '*Please Call Me'* (PCM). It is common cause that PCM generates billions of rands of revenue for Vodacom.[1]

[1] *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13; 2016 (4) SA 121 (CC) at para 9.

[2] Makate and Vodacom have been embroiled in litigation over the PCM product that spans over two decades. Relevant to these review proceedings is the pronouncement made by the Constitutional Court on 26 April 2016, which concluded in respect of the PCM product, that Vodacom was bound by the agreement concluded by Makate and Philip Geissler, the former Director of Product Development and Management of Vodacom. Geissler is not a party in these proceedings.

[3] The Constitutional Court then ordered Vodacom to negotiate in good faith reasonable compensation to be paid to Makate for PCM. Failing an agreement being concluded, that court further ordered, that the matter be submitted to the Chief Executive Officer (CEO) of Vodacom (the first respondent) to determine the amount. The CEO was appointed in terms of the agreement between Makate and Vodacom.

[4] Negotiations ensued between Vodacom and Makate, however no agreement was reached. According to the Constitutional Court order, the current CEO Shameel Joosub, was duly engaged to determine a reasonable amount of compensation to be paid to Makate. On 18 January 2019 the CEO made his determination. It is this determination which is the subject of this review application.

**The order of the Constitutional Court**

[5] The Constitutional Court set aside the order of the Gauteng Local Division of the High Court, Johannesburg. In my view, it is imperative that such order is set out, as its interpretation is a crucial feature in this review. The relevant portions of the order read as followings:

‘3 The order of the Gauteng Local Division of the High Court Johannesburg is set aside and replaced with the following order:

“(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.
(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.''
4. The negotiations mentioned in 3(b) must commence within 30 calendar days from the date of this order.'

**The relief sought by Makate**

[6] In Makate's amended notice of motion he seeks the following relief:

'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 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 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);

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 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.'

## Background after the Constitutional Court order

[7] As stated above, the parties Vodacom and Makate, were ordered to negotiate in good faith to establish a reasonable compensation for Makate's creation. Makate contends that during the course of the negotiations Vodacom conducted themselves 'in the most obstructive fashion imaginable'[2] even though

[2] Makate Heads of argument at para [77] at page 32.

Makate had indicated to Vodacom that he was amenable to receiving 15% of the revenue generated, if the product was successful. It was as though Makate had never indicated, at the get go, that he wanted 15% of the revenue. Thus, they deferred the determination of the amount for a later date.

[8] Notably, the Constitutional Court recorded in its judgment, that when the parties initially entered into their agreement, long before any court proceedings, Makate '…had indicated that he wanted 15% of the revenue....they agreed that in the event of them failing to agree on the amount, Vodacom's Chief Executive Officer (CEO) would determine the amount.'[3] The parties could not reach common ground on the share of revenue generated by Makate's brilliant idea and had to get the CEO on board.

[9] Taking a step back, after the Constitutional Court order, Makate did attempt to approach the court for a computation of the share of revenue to be paid. Makate approached the Constitutional Court for a declaratory order amending the court's order in the following terms:

'1. It is declared that in terms of the judgment and order handed down by this Court on 26 April 2016 ('the main order'):

1. Vodacom is obliged to pay the applicant a share in the revenue generated by the Please Call Me product; and

2. The precise share in the revenue to be paid by Vodacom to the applicant is to be determined by the negotiations referred to in paragraph 3(b) of the main order or, if necessary, by the determination of the Vodacom Chief Executive Officer, as referred to in paragraph 3(c) of the main order.'

[10] On 8 February 2017 the Constitutional Court considered Makate's application and dismissed it on the basis that there were no prospects of success.

[3] *Ibid Makate v Vodacom* (CC) at para [5].

[11] Negotiations between Makate and Vodacom failed and resulted in a deadlock. The Constitutional Court had ordered that in the case of a deadlock the CEO be tasked to make a determination of a reasonable amount due to Makate within a reasonable period.

[12] The CEO in executing his duties, engaged the parties at length and invited them to submit extensive written submissions. Makate did so on 31 January 2018 and Vodacom on 20 March 2018. Thereafter, oral submissions took place over two days, 4th and 5th October 2018, even post-hearing submissions were entertained from both parties. Both parties were in agreement that the process adopted by the CEO was fair.

[13] According to the CEO, the failed negotiations which resulted in a deadlock were as a result of the following:

- Vodacom sought that Makate's share be assessed on the basis of an employer and employee relationship, coupled with the International standards of awarding employees, translated in Makate's revenue share being assessed at R10 million, which exceeded both local and international practices;

- Whilst on the other hand, Makate proposed his revenue share be assessed on the basis that he was a third party supplier to Vodacom. Such suppliers are Value Added Service(VAS) providers and Wireless Application Service Providers (WASP) with whom Vodacom has revenue share arrangements;

- Makate based his third party supplier context by comparing other cases of third party suppliers in respect of VAS and WASP of Vodacom;

- Makate reasoned that the duration of his share over the PCM product, as well as the percentage of entitlement and, the total revenue attained by the PCM product, ought to be considered in assessing his revenue share. Accordingly, his revenue shares calculated to R20 billion in total.

[14] The CEO was adamant that his role in the process that unfolded was that of a ‘deadlock-breaker’. He reasoned that this was so as the proposals advanced by the parties had culminated in a deadlock and he was assigned to break that deadlock. In performing his duties as deadlock-breaker he concluded that an amount of R47 million was reasonable to be awarded to Makate.

[15] The CEO having perused the papers filed by Makate, in these proceedings, states that he was compelled to file an explanatory affidavit, to fully explain the reasons for his determination. Makate contends that the voluminous explanatory affidavit and the supplementary explanatory affidavit, filed by the CEO, is a facade for the CEO to advance further reasons to bolster his determination. Vodacom on the other hand, does not take issue with the CEO filing an explanatory affidavit and supplementary explanatory affidavit.

[16] It is common cause, that the role of the CEO is pertinent in the determination of this review. This is so, as it is instructive as regards the applicable standard to be applied in these proceedings.

**The application to Striking Out**

[17] Makate initiated the application to strike out. He seeks to strike a major portion of the explanatory affidavit of the CEO. This includes, but is not limited to, the factual evidence that MTN in January 2001 developed, patented and launched a product identical to the PCM product, before Vodacom launched its PCM in February 2001. The exclusion sought also encompasses the expert evidence of Mr. Hoppe and Dr. Houpis. The reason advanced for the exclusion, according to Makate, is that the CEO had already made a determination which encompassed his reasons thereto in January 2018.

[18] Makate contends that the explanatory affidavit of the CEO contains new and irrelevant factors which were not part of the submissions made by the parties. Further, that the reasons advanced in the explanatory affidavit amount to the CEO seeking to

'bolster his own determination' after the fact. Thus, the explanatory affidavit is inadmissible.

[19] Makate asserts that he would be prejudiced, hence he seeks paragraphs 41 to 141 of the explanatory affidavit be struck out. Conspicuously, this application was not vigorously pursued by Makate.

[20] In my view, the acceptance or rejection of the evidence contained in the explanatory affidavit has a bearing on determining whether this matter is reviewable in terms of the *Jockey Club v Feldman*[4] case under the common law or the *Bekker v RSA Factors*[5] test as applied in *Wright v Wright* and *Transnet National Ports Authority v Riet Investments* cases.[6]I deal in detail with these cases later in the judgment.

[21] I am mindful of the fact that a court faced with an application to strike out is not obliged to do so, and has a discretion whether to strike out or not.[7] In exercising my discretion, I note that the evidence sought to be struck out, is not prejudicial to Makate, on his own version. In my view, this is so, because the evidence Makate seeks to strike out in fact yields the conclusion he seeks and has advanced.[8] That being, the explanatory affidavit illustrates that the reasons the CEO advances in the determination are irrational and as such did not assist to advance a rational determination. Therefore, the determination is reviewable. Accordingly, Makate's application to strike out on his version alone, must fail.

**The role of the CEO and is his determination reviewable?**

[22] From the outset of the oral submissions by Makate and Vodacom, the CEO accepted that the parties were not ad idem concerning his role as a deadlock-breaker in the deadlock proceedings. Makate, on the one hand, was of the view

---

[4] *Jockey Club v Feldman* 1942 AD 340 at 350-351; *Turner v Jockey Club* 1974 (2) SA 633 at 645; *Jockey Club v Forbes* 1993 91) SA 649 (A).
[5] *Bekker v RSA Factors* 1983 94) SA 568 (T).
[6] *Wright v Wright* [2014] ZSCA 126; 2015(1) SA 262 (SCA); *Transnet National Ports Authority v Riet Investments* 1159/2019) [2020] ZASCA 129 (13 October 2020)
[7] *Titty's Bar & Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd* 1974 (4) SA 362 (T) at 368F-H.
[8] *Vaartz v Law Society of Namiba* 1991 (3) SA 563 at 566B-C.

that the CEO had assumed the role of an arbitrator, whilst Vodacom contended that his role was rather that of an expert valuer. The CEO was at pains to clarify that his role in the proceedings was neither that of an arbitrator nor an expert valuer. He persisted that his 'function would be to act as a dead-lock breaking mechanism'.[9]

[23] The CEO took the stance that, he was not an arbitrator, as there was no arbitration agreement between the parties and therefore the machinery of the Arbitration Act 42 of 1965 was not enforceable. Further, he did not see his duties as deciding 'between two opposing legal contentions' but rather saw his function to be nothing more than a 'deadlock-breaker mechanism' and as such his duties were as set out below:

'What I believe I must do is to invite each party to guide me to an appropriate outcome and then I must bring to bear my insights and knowledge as the Vodacom CEO to the question of fixing a fair remuneration. If either party has an objection to my proceeding on that basis, then please address me on this issue.'

The CEO asserts that there was no objection by the parties to the aforesaid inference drawn.

[24] Significantly, both Makate and Vodacom concurred that the CEO was 'required to do no more than act in an objective manner, relying on [his] your experience and applying [his] your mind fairly and reasonably so as to ensure that [his] your determination neither results in a manifestly unjust nor a patent inequitable outcome.'[10]

[25] It must be pointed out that the CEO acknowledged that '[w]hilst I [he] will deal with both perspectives, I [he] believe[d] I [he] must come to a result which is consistent

[9] CEO's Determination para 4.1; Lines 13 to 17, transcript of oral hearings 4 October 2018 at page 3.
[10] CEO's Determination para 4.2, page 65.

with what is set out in paragraph 5 of the majority judgment of the Constitutional Court. Paragraph 5 states:

'…If the product was successful then the applicant [Makate] would be paid a share in the revenue generated. 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.'[11]

[26] Hence, the CEO understood, that the model he proposed must result in determining a share in the revenue for Makate generated by the PCM idea.[12] He further understood that, but for, the aforesaid constraints imposed by the parties he had an unfettered discretion in arriving at his decision.[13]

[27] Considering the averments set out above, it is clear that the parties were in agreement that the CEO had to gather information, and having done so, objectively evaluate same taking into account the issue of fairness. Ultimately, the determination or decision reached ought to be just and equitable.

**The Interlocutory application**

[28] An interlocutory application was brought before Kollopan J where the learned judge ascribed the CEO's role as acting 'in a similar fashion that is largely underpinned by fairness, the principles of *audi alterem partem* and impartiality'. Further, that the process before the CEO 'resembled in many ways the features of

[11] *Makate v Vodacom* (CC) at para [5].
[12] CEO's Determination para 5.2, page 65.
[13] At para 11 of the CEO's Explanatory Affidavit.

a domestic tribunal' and as such, was susceptible to the prescripts of Rule 53(review) of the Uniform Rules of Court. [14]

[29] To this end, Makate contended that the issue of reviewability of the decision of the CEO had already been determined by Kollapen J in the interlocutory proceedings to compel Vodacom to produce records in terms of Rule 53. As such the issue of reviewability was *res judicata* as it was a decision involving the same parties, before the same court, concerning the same cause of action and regarding the same subject matter or thing.[15]

[30] In response to this argument Vodacom avers that the plea of *res judicata* is not permissible in interlocutory proceedings, as this defense is only competent in instances where a final judgment is sought.

[31] Both the Constitutional Court and the Supreme Court of Appeal have stated that in matters where the review record is sought, a ruling must first be made on the issue of jurisdiction of reviewability. Once this order is made the review record sought in terms of Rule 53 may be addressed. As providing the record without jurisdiction would be a nullity. There is thus a distinction between a jurisdiction ruling and the ruling of the merits of the review.[16]

[32] I must point out though, that Vodacom, asserts that they do not take issue with the fact that the decision of the CEO is subject to review, but it is the standard of review which is in dispute.

---

[14] *Makate v Shameel Joosub N.O and Another* 57882/19 [2020] ZAGPPHC 248 (30 June 2020) at para [40] and [41].

[15] *Ascendis Animal Health (Pty) Limited v Merck Sharpe Dohme Corporation and Others* [2019] ZACC 41at para [69] to [71].

[16] *Competition Commission of South Africa v Standard Bank* [2020] ZACC 2 (20 February 2020) at paras [118] - [120].

[33] I accept that Kollapen J found that the determination of the CEO is reviewable. However, I do not agree with the standard which he has ascribed to the review of the determination.

[34] In the interlocutory proceedings before Kollapen J, he expressed the view that the process adopted by the CEO resembled that of a domestic tribunal, thus Rule 53 would be applicable, as the CEO's decision was subject to the principles of fairness, reasonableness, impartiality and the principles of *audi alterem partem*.

[35] I however hasten to add, that in my view and as contended by Vodacom, the statement made by Kollapen J, that the process to be adopted in reaching the determination has 'the features of a domestic tribunal', are *obiter* and do not amount to a final judgment. What informs this conclusion is the dicta of the following set out below.

[36] In *African Wanderers Football Club (Pty) Limited v Wanderers Football Club,*[17] Muller JA states: 'Because Shearer J., found in favour of the club by applying the doctrine of *res judicate*, it is necessary to restate briefly the requirements for the application of that doctrine. Voet, 44.2.3 (*Gane*'s trans., vol. 6, p. 554) states as follows: 'There is nevertheless no room for this exception unless a suit which had been brought to an end is set in motion afresh between the same persons about the same matter and on the same cause for claiming, so that the exception falls away if one of these three things is lacking''. And at 45F Muller JA further said: 'And in *Custom Credit Corporation* (*Pty*.) *Ltd*. *v Shembe*, 1972 (3) S.A 462 (AD), Van Winsen AJA, stated: 'The law requires a party with a single cause of action to claim in one and the same action whatever remedies the law accords him upon such cause. This is the ratio underlying the rule that, if a cause of action has previously been finally litigated between the parties, then a subsequent attempt by the one to proceed against the other on the

[17] *African Wanderers Football Club (Pty) Limited v Wanderers Football Club* 1977 (2) SA 38 (AD) at 45E-F.

same cause for the same relief can be met by an exception *rei judicatae vel litis finitae"*.[My Emphasis]

[37] In *Aon South Africa* (*Pty*) *Limited v Van der Merwe* [*sic*: *Heever*] *NO and others* the Supreme Court of Appeal said: 'As mentioned earlier the plea of *res judicata* in this case takes the attenuated form commonly referred to as issue estoppel. *Res judicata* deals with the situation where the same parties are in dispute over the same cause of action and the same relief, and in the form of the issue estoppel arises…'[18] [My Emphasis]

[38] In order for Kollapen J to entertain the request for the review record, he had to make a determination on the issue of jurisdiction, as explained above, to grant the order for the review records, as he did. However, he was not tasked to determine the features which would dictate the CEO's process which was still pending, as he would have had to delve into the merits of the review process undertaken, which he could not have done at that stage.

**Is the CEO an arbitrator or expert valuer and what is the standard of review applicable?**

[39] I commence by saying that I accept that a court is at liberty to scrutinise the decision of the CEO when he exercises his discretion to arrive at such decision. This is so, as the exercise of such discretion, ought to be subjected to fairness and reasonableness, in accordance with the principles of natural justice. In my view, the scrutiny of such process, is akin to dealing with the merits of the review application.[19]

[18] *Aon South Africa* (*Pty*) *Limited v Van den Heever NO and others* (615/2016) [2017] ZASCA 66 (30 May 2017); [2017] 3 All SA 365 (SCA); 2018 (6) SA 38 (SCA) at 22.

[19] *Meyer v Iscor Pension Fund* (392/01) [2002] ZASCA148; [2003]1All SA 40 (SCA) (28 November 2002) at para [22] and the cases mention therein.

[40] The parties concede that the decision of the CEO is reviewable. Where the parties' express different views, concerns the designation to be ascribed to the CEO as 'deadlock-breaker'. Makate sees the role of the CEO akin to that of an arbitrator, whilst Vodacom reasons, that the CEO's role was rather that of an expert valuer.

[41] I now turn to the aspect of the CEO's designation. Makate took the view that the CEO had entered the fray of the contractual relationship between him and Vodacom. Even though an instructive mandate, on the CEO's duties, was advanced by Vodacom and concurred by Makate, during the oral submissions to the CEO.

[42] Notably, the decision maker, in these circumstances would have a wide discretion and as such, it clearly tilted the balance of power in favour of the CEO. It is imperative for the CEO in exercising his discretion to have regard to the fundamental principle of justice, if he fails to do so, a competent court would be justified to scrutinize his decision, and grant the necessary relief. Yet another fundamental principle he must adhere to is that of *audi alterem partem,* when conducting the proceedings, which will inform his determination.

[43] Makate took the view that the CEO's position was similar to that expressed in the so called *Jockey Club* cases, which is a review in terms of the common law. According to the rationale in the *Jockey Club* cases it is imperative that there ought to be an agreement between the parties to refer the dispute to a private tribunal which decision will then be final. The only time such decision was subject to the jurisdiction

of the courts would be if the tribunal disregarded the fundamental principles of justice to the prejudice of one of the parties concerned in the grant of its relief. [20]

[44] The way I understand the stance taken by Makate is that the decision lies in the hands of the CEO of Vodacom, by way of the Constitutional Court order which enforced the contractual relationship between the parties. It is well to restate that Makate and Vodacom agreed to engage the services of Vodacom's CEO if they failed to reach an agreement. Hence, Makate places reliance on the *Jockey Club* cases together with Kollapen J's comment that the process is akin to that of a domestic tribunal, thus susceptible to review.

[45] That being said, it is against this backdrop that Makate contends that the CEO in exercising his contractual discretion failed to comply with certain standards. Further, in his explanatory affidavit filed he introduces evidence '*ex post facto*' which he ought to have inserted in his determination. In an attempt, so Makate argued, to provide some reasoning for his bad decision. Thus, according to Makate the *Jockey Club* line of cases is the standard of review applicable in this case.

[46] Vodacom took the view, that the *Jockey Club* cases are not the applicable standard of review. Primarily they argue, that the CEO's mandate is derived from a private contract to conclude an agreement between the parties in respect of the price determination for Makate's idea. Further, that the CEO assumed the role of an expert valuer and if his decision was in good faith, honest, not unreasonable, nor irregular or wrong so as to lead to a patently inequitable result, that determination would be binding and not subject to review. Vodacom argues, PAJA would not be applicable, as the CEO did not utilize any public power and neither was his decision reliant on public law.[21]

---

[20] *Jockey Club v Feldman* 1942 AD 340 at 350-351; *Turner v Jockey Club* 1974 (2) SA 633 at 645; *Jockey Club v Forbes* 1993 (1) SA 649 (A).
[21] Promotion of Administrative Justice Act 3 of 2000.

[47] Vodacom contended that the CEO did not perform the functions of a private tribunal and as such his functions were not quasi-judicial in nature. Therefore, the CEO's decision, in common law, could not be subjected to review as would be in the *Jockey Club* cases. In support of Vodacom argument it relied on *Lufuno Mphaphuli & Associates v Andrews*[22] where it was confirmed that no *audi alterem partem* was applicable where an expert valuer was assigned:

'Unlike an arbitrator, a valuer does not perform a quasi-judicial function but reaches his decision based on his own knowledge, independently or supplemented, if he thinks fit, by material (which need not conform to the rules of evidence) placed before him by either party. Whenever two parties agree to refer a matter to a third party for a decision, and further agree that his decision is to be final and binding on them, then, so long as he arrives at his decision honestly and in good faith, the two parties are bound by it.' [My Emphasis]

[48] The CEO from the outset asserted that his role was not that of an arbitrator as there was no arbitration agreement in place to which he was bound by. Thus, he could not be considered to be an arbitrator. Specifically, the CEO stressed that he was just a deal breaker, engaging the parties to assist him to ultimately make an informed determination.

[49] In my view, the CEO formulated his decision independently based on his knowledge of the subject matter, being the institution of Vodacom, which was then supplemented by the parties. Importantly, the Constitutional Court's order specifically sought of the CEO to determine the amount due to Makate. It certainly did not seek of the CEO to arbitrate, as it would have expressly made such order.

[50] The case of *Transnet National Ports Authority v Riet Investments*, duly informs my conclusion that the CEO is to be considered as an expert valuer:

[22] *Lufuno Mphaphuli & Associates v Andrews* 2008 (2) SA 448 (SCA) at para [22].

'The fundamental significance of this distinction lies in this. Our law has for over a century now always drawn a clear distinction between an arbitrator and a valuer. Thus, in *Estate Milne v Donohoe Investments (Pty) Ltd and Others* 1967 (2) SA 359(A) at 373H-374C, Ogilvie Thompson JA said the following:

'This argument assumes something in the nature of an appeal to the arbitrator against the decision of the auditor. That is, however, not the position. In making his valuation, the auditor hears neither party. His is not a *quasi*-judicial function. He reaches his decision independently on his knowledge of the company's affairs. His function is essentially that of a valuer (*arbitrator, aestimator*), as distinct from that of an arbitrator (*arbiter*), properly so called, who acts in a *quasi*-judicial capacity. The distinction between *arbitri* and *arbitratores* was well known to our writers (see e.g. *Voet*, Bk. 4, 8, 2; Wassenaer, *Praktijk Judicieel*, Ch. 26, sec. 17; *Huber*, Bk. 4, chap. 21, secs. 1 and 2, and other authorities listed by *Gane* at p. 93 of vol. 2 of his translation of that work). See also *Sachs v Gillibrand and Others*, 1959 (2) SA 233 (T) at A p. 236, and *Divisional Council of Caledon v Divisional Council of Bredasdorp*, 4 S.C. 445. *Voet*, in the above-mentioned passage, distinguishes between the respective functions of an arbitrator (*arbiter*) and a valuer or referee (*arbitrator*) and, in relation to the latter, uses the phrase *in quibus viri boni arbitrio opus erat*. This phrase is rendered by Sampson (p. 110) as "requiring the arbitrament of an impartial person", but by *Gane* (vol. 1, p. 738) as: "in which there is need of the discretion of a good man". Although the use of the word "discretion" may perhaps be open to criticism, *Gane's* translation appears to me to reflect *Voet's* meaning more correctly. The *arbitrator* or *aestimator* need not a necessarily be an entirely impartial person. In discharging his function he is of course required to exercise an honest judgment, the *arbitrium boni viri*; but measure of personal interest is not necessarily incompatible with a judgment exercise of such (see *Dharumpal Transport (Pty.) Ltd., v Dharumpal*, 1956 (1) SA 700 (AD) at p. 707).' [My emphasis]

[33] This distinction serves an important purpose in review proceedings because, as Ponnan JA put it in *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* [2007] ZASCA 143; 2008 (2) SA 448 (SCA) para 22:

'. . . A finding that Andrews was a valuer would not assist Lufuno and does not require a decision. Unlike an arbitrator, a valuer does not perform a *quasi*-judicial function but reaches his decision based on his own knowledge, independently or supplemented if he thinks fit by material (which need not conform to the rules of evidence) placed before him by either party. Whenever two on them, then, so long parties agree to refer a matter to a third for decision, and further agree that his decision is to be

final and binding as he arrives at his decision honestly and in good faith, the two parties are bound by it. ...'[23] [My emphasis]

[51] That being said, in this case it is trite that 'the power of the courts to interfere with an expert's decision in review proceedings is severely circumscribed. The juridical ambit of this power was described in *Wright v Wright* [24] as follows:

'The position of a referee under s 19b is, as the high court correctly found, similar to that of an expert valuator who only makes factual findings but dissimilar to that of an arbitrator who fulfils a quasi-judicial function within the parameters of the Arbitration Act of 24 of 1965. In this regard, the dictum of Boruchowitz J in *Perdikis v Jamieson* is apposite:

"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.'[25]

[52] As alluded to above the parties have agreed that the CEO ought to act in an objective manner, relying on his experience and applying his mind fairly and reasonably. Such conduct, in my view, ascribes the duties of an expert valuer and not that of an arbitrator. It must be accepted that the parties are bound by the terms of the agreement they concluded in a quest to determine what a reasonable compensation ought to be.

[53] In addition, they agreed that the CEO of Vodacom was the person who would 'determine the amount' to be paid to Makate. During the course of this determination he was to use his knowledge of the company affairs of Vodacom and, supplementing the parties' submissions, to finally and independently make a determination. It is these

---

[23] *Transnet National Ports Authority v Riet Investments* 1159/2019) [2020] ZASCA 129 (13 October 2020) at para 32 and 33.

[24] *Wright v Wright* [2014] ZSCA 126; 2015(1) SA 262 (SCA) para 10.
[25] *Civair Helicopters CC v Executive Turbine CC and Another* 2003 (3) SA 475 (W) para [34].

factors that fortify my view that the CEO performed the function of an expert valuer and not that of an arbitrator.

[54] In light of my conclusion above, I deem it imperative, to restate the standard to be applied in reviewing the decision of an expert valuer. The decision is only reviewable if 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.' [26]

**Discussion**

*The process of the CEO's determination*

[55] It is appropriate at this stage to highlight that there were no reservations between the parties with regards to the manner in which the CEO conducted the hearings. What is in issue, according to Makate, is that the determination is 'manifestly unjust'; that there are 'irrational errors' as the CEO 'ignored relevant factors and took into account factors which were demonstrably incorrect'. That being the case, Makate must show that the determination of the CEO was not made honestly and not in good faith as per *Lufuno Mphaphuli*, in addition the CEO did 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' as per *Bekker v RSA Factor* test.[27]

[56] From the record it has been demonstrated that the parties and the CEO anticipated that there would be uncertainties to be taken into accounting in finalizing the determination. Ever so, the CEO pointed out that he relied on Makate's legal submission, set out below, in making his determination. That being:

'You have to make the best assessment you can on the evidence available to you…You got to do…the best you can with the material available notwithstanding the uncertainties that exist. …then you have to award compensation that is a reasonable and fair share of revenue being viewed as the best you could do with the materials available to you.'

[26] *Wright* para [10]; *Transnet* para [34] and [36].
[27] *Bekker v RSA Factors* as mention earlier in the judgment.

[57] That being said the CEO acknowledged in his determination that both parties models were of value and had been given consideration. He concluded that, even so, he had to give effect to the Constitutional Court judgment which required of him to ensure that the model that he selected had to 'result in the determination of a share in the revenue generated by the PCM idea' that amounted to reasonable compensation for Makate. The process adopted by the CEO was to take into account the outcome of the two highest models and averaged these on the current value basis, which ultimately culminated in the amount offered to Makate of R47million.

[58] Therefore, for Makate to succeed with a review of the determination he must show, firstly that the CEO did not excise the judgment of a reasonable man, secondly that the CEO's judgment was unreasonable, irregular or wrong and it led to a patently inequitable result. Makate must show that the aforesaid requirements have been demonstrated, then and only then, am I at liberty to review the CEO's determination.

*Has it been demonstrated that the CEO did not exercise the judgment of a reasonable man?*

[59] In addressing this issue I believe that foremost in the CEO's mind must have been the fact that the parties agreed to select the CEO of Vodacom as best suited to make the appropriate determination. He says so much in his determination, as such he has tried as best he can to function within the parameters agreed by the parties. In an endeavor to perform his duties, he went so far as to grant the parties a hearing, which he was not at liberty to do, but elected to do so.

[60] In applying the standard of review discussed above, it will come to the fore whether Makate was able to cross the threshold required. It is however, necessary to restate the law, which will guide the analysis to the conclusion reached.

*The law*

[61] It is trite that, '[i]t is a well-established principle that if an administrative body takes into account any reason[s] for its decision which are bad, or irrelevant, then the

whole decision, even if there are other good reasons for it, are vitiated. In *Patel v Witbank Town Council* 1931 TPD 284 Tindall J said (at 290);

'[W]hat is the effect upon the refusal of holding that, while it has not been shown that grounds 1, 2, 4 and 5 are assailable, it has been shown that ground 3 is a bad ground for a refusal? Now it seems to me, if I am correct in holding that ground 3 put forward by the council is bad, that the result is that the whole decision goes by the board; for this is not a ground of no importance, it is a ground which substantially influenced the council in its decision. ... This ground having substantially influenced the decision of the committee, it follows that the committee allowed its decision to be influenced by a consideration which ought not to have weighed with it.'

[62] This passage was approved by the Supreme Court of Appeal in *Rustenburg Platinum Mines (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration* 2007 (1) SA 576 (SCA) para 34 where Cameron JA said: 'This dimension of rationality in decision-making predates its constitutional formulation.' Once a bad reason plays a significant role in the outcome it is not possible to say that the reasons given for it provide a rational connection to it. (The decision of this court was reversed by the Constitutional Court but this principle was not questioned: *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24; [2007] ZACC 22 (CC))'.[28]

[62] This general evidentiary principle regarding decision making is not only applicable to administrative bodies but applicable to all forms of rational decision making. The focus is on 'whether the decision-maker properly exercised the powers entrusted to him or her. The focus is on the process, and on the way in which the decision-maker came to the challenged conclusion'.[29]

---

[28] *Westinghouse v Eskom Holdings (Soc) Ltd and Another* (476/2015) [2015] ZASCA 208; [2016] 1 All SA 483 (SCA); 2016 (3) SA 1 (SCA) (9 December 2015) at para 44 and 45.

[29] *Rustenburg Platinum Mines v CCMA* 2007 (1) SA 576 at para 31.

[63] The next aspect of the law which ought to be considered is whether the CEO acted within his mandate or whether he decided to stray therefrom, and acted in bad faith, dishonestly, and improper. To demonstrate the aforesaid Makate has to make out a detailed case for this court to interfere with the determination of the CEO.[30]

It is pertinent to reiterate that, in the exercise of the CEO's duties to formulate the determination, a crucial issue for consideration, is whether he exercised his duties within the mandate prescribed by the parties and whether in doing so the determination is not manifestly unjust.[31] If no case is made out that the CEO acted in bad faith, dishonest and improper and strayed from his mandate, a court should be slow to interfere with the determination.[32] It is trite that where there is an express and defined mandate, one has to act within such mandate and cannot stray therefrom.

*The Explanatory Affidavit and Supplementary thereto*

[64] The crux of the complaint with regards to these documents is that the CEO after making the determination filed an explanatory affidavit and supplementary thereto. According to Makate these documents produced additional new reasons for the determination. Notably, the CEO advanced reasons for filing the explanatory affidavit, which I set out hereafter:

'I found the deadlock breaking exercise to be a difficult and complex one and I have understood that it would evoke criticism from one or the other party, as indeed it did.

…

I do …feel that I am entitled not only to clarify matters, but also to respond to criticisms directed at me and which I feel are not fairly made'[33]

[65] Vodacom argues that the only thing one can take out from these documents, is that the CEO was merely responding to the criticism Makate had leveled against him, in Makate's founding affidavit. Further, that no new reasons were advanced as contended by Makate.

---

[30] *S A Breweries Ltd v Shoprite Holdings Ltd* 2008 (1) SA 203 (SCA) at para 42.
[31] *Transnet* at para 36.
[32] *S A Breweries Ltd v Shoprite Holding Ltd* [2007] ZASCA 103; 2008 (1) SA 203 at para 41.
[33] CEO'S answering affidavit to the Application to strike out para 6 and 8.

[66] Equipped with the explanation expressed by the CEO above, I am guided by the dicta below:

'The duty to give reasons for an administrative decision is a central element of the constitutional duty to act fairly. And the failure to give reasons, which includes proper or adequate reasons, should ordinarily render the disputed decision reviewable. In England the courts have said that such a decision would ordinarily be void and cannot be validated by different reasons given afterwards – even if they show that the original decision may have been justified. For in truth the later reasons are not the true reasons for the decision, but rather an ex post facto rationalization of a bad decision…'[34] [My emphasis]

[67] If I concluded that these documents encompassed new reasons to validate the determination or if I conclude that they bolster the initial reasons advanced, this would amount to an *ex post facto* rationalization. Such conduct, has been characterized as, amounting to the justification of a bad decision.

[68] I now proceed to examine the factual matrix together with the law as it would demonstrate whether the CEO exercised the judgment of a reasonable man, that such judgment was reasonable, regular and correct and that it does not lead to a patent inequitable result.

*Was the determination fair?*

*Duration*

[69] The determination sets out the duration and share revenue period as being five years. Makate argues that from the outset he was entitled to an ongoing revenue share and he has never waived that entitlement. He submits, at paragraph 18 of his supplementary founding affidavit that he has basically compromised by accepting 18 years instead. Makate states that his acceptance of 18 years is informed by the fact that no agreement had been reached between the parties with regards to the duration

[34] *National Lotteries Board v South African Education and Environment Project* (788/2010) [2011] ZASCA 154 (28 September 2011) at para 27.

of revenue share. On the other hand, Vodacom had been using PCM since 2001. Makate contends that if PCM could have been patented, as such, he would have then been entitled to 20 years revenue share. Thus, Makate submits, the CEO by ascribing five years as Makate's revenue share, has 'created his own terms of the contract' between the parties.

[70] The CEO in his defense, for attributing a five-year period, acknowledged that the parties had not suggested to him that Makate's share should run 'for so long as the PCM generated revenue'. He states that his decision was informed by the fact that Makate sought to position himself as a third party service provider, who would provide services to Vodacom.

[71] According to the determination, the CEO used his experience of the business of Vodacom in arriving at the conclusion that the VAS and WASPS, the third party service providers, would ordinarily be entitled to a contract period of three to five-years. Notably, in the determination of the CEO at paragraph 6.28, he gives detailed reasons for the use of the five-year period, instead of 18 years suggested by Makate.

[72] In response to the CEO's determination, Makate filed a supplementary affidavit, in which he produces VAS contracts of other third party service providers to illustrate that the CEO's reasoning is not correct. It was common cause that these contracts are subject to confidentiality.

[73] In the CEO's explanatory affidavit he addressed the fact that these contracts were not before him when he made his determination, but he was aware of their conditions. He states that generally these contracts were applicable to third party service providers, typically in the case of a new product. He points out that Vodacom would not have bound itself to a situation of perpetuity, as was borne out by the contracts put up by Makate.

[74] The directive of the Constitutional Court was that the negotiations were to facilitate a serious intent at reaching consensus.[35] With the aforesaid directive in mind, the CEO relying on his knowledge of PCM's performance at Vodacom, thus 'approached the assessment of duration in accordance with that same framework, namely to take, by way of comparison, Vodacom's standard dealings at the time with VAS providers and WASP's particularly [in]regard[s] to new products.'[36]

[75] A comparison of the contract durations of different VAS and WASP, third party valued service providers (as Makate sought to be categorized), was made available to the CEO. One of these third party value service providers was a company, Cell-find (Pty) Ltd, which Vodacom contracted with in 2003. That company, though a WASP according to the CEO, was still contracted to Vodacom as at 2020. This is 17 years later.

[76] On the CEO's own version, he placed reliance on the past practice of Vodacom with both the VAS and WASP. I find it strange that having this information at hand the CEO came to the conclusion that Makate's PCM launched in 2001, would never reach an 18-year anniversary. The CEO's conclusion also contradicts the stance that he took to look both forward from 2001 and backwards from 2018 in a pursuit of having a balanced view.

[77] Accordingly, it would not be an impossibility that PCM could have reached its 18th anniversary with Vodacom, just as Cell-find, having contracted with Vodacom for some 17 years.[37] Another aspect that the CEO ignored is the statement of Andre Hendricks, a previous Financial Manager Revenue of Vodacom. In my view, the extract is self-explanatory, if indeed the CEO was in pursuit of a balanced view. Hendricks stated:

'Please Call Me advertising is the highest Advertising revenue generating service and the fasted growing Mobile Advertising revenue stream. PCM advertising (Black Rose) is valued more than other modes of mobile adverts placing within Vodacom because the company is able to prove its worth to advertisement companies largely because a person receiving a PCM

[35] *Ibid* para 102.
[36] Para 41 of CEO's Explanatory Affidavit.
[37] Para 4.1.5 of Makate's Supplementary Founding Affidavit.

message is compelled to engage with the advert when they return a call and Vodacom can prove both delivery and reading of such message.'[38]

[78] It is with that in mind, in respect of the issue of duration of revenue and in light of the Cell-find and Vodacom relationship illustrated above, as well as Hendricks statement above, I am persuaded by Makate's proposal of 18 years. In the result the CEO committed a misdirection and in the circumstances, the point of duration raised by Makate must succeed to vitiate the determination.

*Additional Explanations*

[79] The CEO's additional reasons filed in the CEO's explanatory affidavit is another concern. It would appear that some aspects were not dealt with in the determination at all. The in-depth and detailed explanation, which appears from paragraph 41-59 of the explanatory affidavit, with regards to the choice of five years as opposed to 18 years, in my view, is not foreshadowed in the determination.

[80] The aforesaid, is a clear indication that the CEO has indeed *ex post facto* added further reasons which informed his decision. This in itself is sufficient to vitiate the determination even if the initial reasons in the determination are correct.[39]

*Revenue Share*

[81] Turning to the issue of the revenue share due to Makate. Conspicuously, the determination of the CEO contains two revenue share models which were not proposed by the parties, that being, the Time Window Lock model at 10.2.3 and the revenue model at 10.2.4.

[82] The CEO of his own accord included these models in his determination. In my view, the inclusion of items or aspects not proposed or agreed upon by the parties

---

[38] Annexure at page 2157 at page 2161 of Vodacom's answering Affidavit.

[39] *National Lotteries Board v South African Education and Environment Project* at para 27:
'[27] The duty to give reasons for an administrative decision is a central element of the constitutional duty to act fairly. And the failure to give reasons, which includes proper or adequate reasons, should ordinarily render the disputed decision reviewable. In England the courts have said that such a decision would ordinarily be void and cannot be validated by different reasons given afterwards – even if they show that the original decision may have been justified.[20] For in truth the later reasons are not the true reasons for the decision, but rather an ex post facto rationalization of a bad decision. Whether or not our law also demands the same approach as the English courts do is not a matter I need strictly decide.'[Footnote omitted].

renders the determination manifestly unjust. Firstly, this is so, because the CEO did not even engage the parties with regards to these two model. Secondly, the CEO did not act in accordance or within the scope of the parties' mandate. [40]

*Interest*

[83] The next issue to be addressed is the claim of interest raised by Makate. He contends that the CEO dealt with this issue incorrectly in that he concluded that Makate had abandoned this issue. This is illustrated in paragraph 60 where the CEO explains the error as follows:

'In paragraph 6.33 of my Determination, I commenced to deal with the question of interest. I said that Mr Makate's counsel had seemed to abandon the claim for interest at the oral hearings and Mr Makate has criticized that statement as being incorrect. Having re-read the transcript I think that Mr Makate is correct and I regret the misstatement on my part. Fortunately, as I noted, the ANZ report had not repeated this supposed concession and so I deal with the claim for interest as appears from para 6.34 of the Determination.'[41]

[84] Surprisingly, even in the face of the above, Vodacom still persisted with a contention that this was purely a 'half-truth' and that the CEO did not make any errors in his determination. In my view, Vodacom is clearly mischievous. Hence, I am persuaded, that the conduct of the CEO, by making such an admission is a classic case of him taking into account a bad reasoning, in reaching a determination. This ultimately vitiates the determination, even though there may be other good reasons for the determination.[42]

[85] To exacerbate the situation, the CEO confused the issue of interest with that of time value of money, which are clearly two different concepts. The CEO in his explanatory affidavit concedes this much at paragraph 62, where he states '…I may have been confused between the concept of interest on an unliquidated claim for damages and *morae(sic*) interest…My applying time value of money is actually generous.'

---

[40] *Transnet National Ports Authority* at para 38.
[41] Paragraph 60 of the explanatory affidavit.
[42] *Westinghouse* at para 44.

*Time Value*

[86] The CEO factored in the determination a time value money equivalent. This was done so as to place a value to the revenue Makate would have attained from the PCM as far back as 2001. Until an amount of value was accepted by Makate for which Vodacom would be indebted to pay, interest would start to run. Informatively, the Constitutional Court pronounced on this, and the CEO contends that he was merely abiding on such pronouncement.[43]

[87] Makate's initial proposal of his share of the revenue was 15%. He capitulated, and accepted that his share in the revenue was between 5% and 7, 5%. The parties ultimately agreed that Makate was entitled to 5% of the share of revenue. Notably, the CEO applied a revenue share of 5% as agreed.

*Production of Documents*

[88] The issue raised by Makate, that Vodacom's refusal to disclose documents of revenue earned from the PCM is without merit, to say the least. As is evident from the record Makate requested the documents and the CEO directed that the documents be provided. This culminated in Makate's team having a 10-day access pass to the documents requested. Importantly, if the documents so provided by Vodacom were insufficient after the aforesaid exercise, Makate's team had an opportunity to bring an application before this court. They did not do so. That application would have cured the defect complained of, that the documents produced were not of assistance and as such failed to assist Makate to make a proper assessment in respect of his position.

[89] Makate had the option of pursuing a Rule 21(4) application, as Vodacom had failed to deliver the documents he had sought. If Makate brought such an application, he could have ultimately sought to have Vodacom's defense struck off, had Vodecom persisted not to comply.[44] As he failed to do so, it could only be concluded that Makate

[43] *Makate v Vodacom* CC at para186.
[44] Rule 21(4):
(4) If the party requested to furnish any particulars as aforesaid fails to deliver them timeously or sufficiently, the party requesting the same may apply to court for an order for their delivery or for the

was satisfied with that which had been produced, which was examined over a ten day period. Vodacom provided Makate with an avenue to seek further and better particulars and he failed to do.

[90] The CEO made a determination that the particulars provided were sufficient. This was acknowledged by the CEO in the documents below, being paragraph 69 of his explanatory affidavit:

'Following the further submissions which were made after the oral hearing, Mr Makate's team did not ask me to order the production of additional documentation (assuming that I had that power) nor did Mr Makate's team indicate that it wished to apply to the High Court for an order to obtain further documentation before I proceeded to make my Determination. On the contrary, as I have noted, the concluding submission made on behalf of Mr Makate was that I had to proceed on the evidence that was available to me, even though that evidence may have failed to remove uncertainty. I was to do the best that I could with the material available.'

[91] Therefore, Makate's challenge that the CEO failed to order the production of further documentation is unreasonable, unfair, unjust, and inequitable, must fail.

*Revenue Share Models*

[92] The major complaint in this review is the assumptions and revenue models adopted by the CEO. According to Makate the CEO has placed reliance on revenue models which were not proposed by the parties. As regards the revenue models proposed, Makate contends that the CEO did not stick to the brief, in that, he looked at both proposed revenue models, his and Vodacom's, and disregarded both. Instead the CEO came up with his own revenue share models. Makate contends that this is yet again an example of the CEO not complying with the prescripts within which the parties sought his determination.

[93] The CEO's revenue models appears at paragraph 10.2 of the determination. There are four revenue models projected as set out below:

---

dismissal of the action or the striking out of the defence, whereupon the court may make such order as to it seems meet.

'first, a model looking forward from 2001, as if the CEO had been asked to break the deadlock at that time, in which case the CEO would have acted on the strength of the information and evaluation which had been undertaken prior to the product launch and I have then supplemented this information with the subsequent data acquire since that time;
second, an employee reward model;
third, a Time Window Lock model, which references Prepaid and Top Up customers who were out of airtime. The Time Window Lock facility provided a limited time (window) for customers to use their airtime before they were locked (a similar state to having no airtime); and
fourth, a revenue share model, but not as populated in the way suggested by Makate.'

[94] With regards to all the models above the CEO applied the following:
'10.6.1 I have adjusted for the time of money even though the operative order would require for the interest to only be accrued once a determination regarding compensation has been made.
10.6.2 In the absence of PSM data, I have used the 6 months of history supplied by Vodacom to calculate the customer base penetration of the service and extrapolated that to the average customer bases per year for the 5-year period.
10.6.3 The base penetration was 37,4 % calculated from the data provided by Vodacom and I used that from year one of my model even though it would only have increased to that level over time.
10.6.4 I used the PSMs sent per customer on the data provided and extrapolated that to the relevant periods as well as determining the number of PSMs sent per customer.
10.6.5 I calculated the average revenue per minute by taking voice prepaid ARPU as supplied by Vodacom divided by the published minutes per customer.[45]

[95] The CEO reasoned that the revenue model 8A advanced by Makate, was based on a calculation of Voice Revenue. In addition, his assessment of Makate's model 8A (also termed as 'ANZ Report'), which tracks the PCM revenue year-by-year, has the effect of looking backwards and places reliance on Voice Revenue.

[96] As regards Vodacom's model, the CEO reasoned that the model was an employee/employer remuneration model. It was pointed out by Makate that this model does not even leave the starting blocks. This is so, Makate argues, as the employee/employer relationship, in terms of development of innovations, was not part

[45] Para 10.6 of the CEO's Determination.

of Makate's contract. He was employed as an accountant, and not an engineer in project development, where this scenario would have arisen and would have been applicable.

[97] In the end, the conclusion reached by the CEO as regards the recommendation of his revenue share model, as reasoned is as follows: '[t]his requires the identification of the PCM component of the Vodacom Voice Revenue, i.e, the responding call by the receipt of the PCM to its originator bearing in mind that calls which qualify as responding calls for this purpose are those which are incremental in nature, i.e. would not have been made in any event, and would not otherwise have been made. It is this *additional* revenue which can be said to be attributable to the PCM. 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.'

[98] According to the CEO, this model does not accord with the instruction of the parties. As such he was resolute that when considering Makate's model 8A, he did so with great caution, for he feared that the estimates applied by Makate might be inconsistent with 'the publicly available financial data', resulting in this model being discredited.[46]

[99] To this, Makate contends that the employee/employer model was 'glaringly unjust, unfair, irrational and unsubstantiated. It goes without saying that this model should not have been included as one of the CEO's assessment models that informed his decision.

*Success Rate*

[100] Makate proposed that the success rate of the PCM idea be pegged at only 27%. Both Vodacom and Makate agreed that incremental revenue would be limited to 27% success rate. The CEO, in his determination, acknowledged the agreement between

[46] Para 6.3 of the CEO's Determination.

the parties on the incremental revenue generated by the PCM, and that it ought to be taken into account in the determination.

[101] The CEO proposed a further adjustment on his revenue model which, he adopted that resulted in the Vodacom Total Mobile Voice Revenue being understated by 60%, so argues Makate. Makate further argues that this under statement came about as a result of the CEO excluding 'from total voice revenue [,] the revenue earned from calls by a user on another fixed or mobile network (MTR) and …all contract revenue'. What is odd, is that the CEO in his determination concedes that the documentation supplied by Vodacom would not be adequate to address the uncertainties as set out in 8.3 of the determination below:

'8.31 whether a call made subsequent to the receipt of the PCM was in fact prompted by the PCM,

8.3.2 whether the call was an incremental call, or whether the PCM just brought the call forward;

8.3.2 whether the sender of the PCM had airtime credit at the time of sending the PCM;

8.3.4 the duration of the call as it relates to PCM; and

8.3.5 the tariff paid by the recipient of the PCM.'

[102] The aforesaid uncertainties have a bearing on MTR revenue, which was not included in Vodacom's documentation, submitted after it was requested to supplement.[47] The CEO at 8.4 of his determination states '[a]ny calculation of revenue would, in the absence of the above information, be based on unacceptable assumptions'. This evidently is another instance where the CEO makes assumptions and estimates in the face of various uncertainties, which he deems is necessary for the calculation of revenue determination.

[103] Surprisingly, the CEO having accepted that Vodacom and Makate agreed to a 27% limitation as the success rate of incremental revenue, decided to 'assume[d] that 30% of the calls would have been incremental'. This, he stated was 'very generous' on his part, as a true reflection of incremental calls attributable to the PCM product. The CEO attributes the aforesaid assumption to the fact that he was unable to find an

[47] Para 3.7.1, 3.7.3 and 3.7.4 of Moses Pandaram's Affidavit.

increase in calls from the data mining exercise he conducted. This went contrary to what both Makate and Vodacom understood, as they regarded incremental calls to be 27% of success rate from the PCM.

[104] In light of the CEO's contention, that he was unable to find an increase in the calls, hence the assumed 30%, in my view, this is contrary to the CEO's undertaking in respect of incremental calls. As he states that he was prepared to take into account Makate's teams suggestion 'to assume that responding calls made within one hour of the PCM, as it was as a result of a PCM'.

*One hour Call duration*

[105] Turning to the issue of the call duration within the one hour period mentioned above. The CEO contended that the incremental call duration within that hour was less than two minutes. Makate took issue with this, as he found it strange that the CEO could fix the call duration down to less than two minutes. Whilst Vodacom contends that it was unable to provide documentation to support call duration.

[106] Further, in the determination, the CEO contradicts Vodacom's contention, at 6.13 of the determination, where he states that this assumption of less than two minutes is 'derived from disclosed minutes use'. Therefore, I would deduce that the CEO was privy to this information or documentation so disclosed. Be that as it may, Makate commenced from the premise that his model used 6,8 minutes, but he retracted from the stance earlier taken. He eventually agreed that he is not opposed to the application of a call duration of 2 minutes.

*Effective Rate*

[107] According to the CEO he bemoans Makate's model for the use of a 'blended effective' rate. The CEO states that the calculation of an effective rate is simply 'calculated by taking the prepaid voice ARPU divided by the minutes', which then computes to R0.71. Whilst, on the other hand, Makate's model used R1, 72 instead.[48]

[48] Para 6.14 of the CEO's Determination.

[108] The CEO concluded that this effective rate calculated by Makate, was his 'blended' approach, where Makate took into account both contract charges and 'interconnect' (MTR) into account. The CEO's complaint with the blended approach was that interconnect charges or contract charges are also inclusive in the recovery of handset costs. Therefore, this results in Makate's model being more than double the effective rate. In his defense Makate was adamant that the interconnect revenue, only included access and outgoing revenue, which was in line with the HFM accounts supplied by Vodacom, after disclosure was sought.

*ICASA rate*

[109] In my view, a further issue in respect of interconnect revenue (MTR), which Makate demonstrated that the CEO used a 35% lower MTR rate in his determination. Makate contended that it was a well-known fat that the MTR was guided by the Independent Communications Authority of South Africa (ICASA) rates. He contends that, this is what he used in his model. The ICASA rate as at 1October 2020 to 30 September 2021 is recoded as Regulated - 0.09 and Asymmetry - 0.13. In 01 October 2018 to 30 September 2019 the recording was, Regulated at 0, 12 and Asymmetry at 0, 18.[49]

[110] I am persuaded that I bound to apply the ICASA rates applicable as I am mindful of the fact that ICASA is the regulating authority, which ensures transparency. Thus, the contention that the rate does not exceed that of ICASA is sound.

*Further Reduction applied*

[111] From the document of the CEO and the determination it transpired that a further reduction was applied to Makate's compensation. In dealing with this aspect during the course of argument before this court, the CEO conceded, that he was unable to provide an explanation why he applied a further 70% reduction against Makate's revenue. What boggles the mind, is that he did so without granting the parties an opportunity to make representations as regards such a huge reduction and clearly he did not comply with the prescripts of the parties yet again.

[49] Independent Communications Authority of South Africa (ICASA).

[112] According to Makate the course taken by the CEO is merely a thumb suck on his part. Especially, as during the entire process the CEO had given the parties an opportunity to be heard, *audi ateram partem*. Belatedly, I might add, the CEO accepted that if the court found that the 70% applied was not canvassed with the parties, then the matter ought to be referred back. As the writing is on the wall, I am persuaded that is confirmation, in its self, which validates my view that the determination by the CEO is reviewable and ought to be set aside.

[113] It is for the reasons set out above that the review against the determination of the CEO must succeed.

**Remedy**

[114] Makate seeks that I set aside the order of the CEO and proceed by way of substitution instead of remitting the matter for reconsideration to the CEO. He argues that I am duly equipped to correct the errors in the CEO's determination and calculation. Regrettably, I disagree with Makate as his submission is fatally flawed.

[115] Firstly, it is the parties who agreed that the CEO would be the deadlock breaker. In addition, the Constitutional Court sanctioned the agreement of the parties and ordered that the determination of a reasonable compensation lies with the CEO. This of course does not take away from the fact that a party has the right to seek the assistance of the courts if unsuccessful during negotiations. But one should bear in mind that, with substitution, the courts will only exercise its discretion to make such an order in exceptional circumstances. Reference is had to:

'It is only in exceptional cases that a court will exercise a power of substitution and will only do so when it is in as good a position as an administrator to make such a decision and the decision by the administrator is a foregone conclusion.'[50]

[116] Secondly, in these review proceedings, it is Makate who has pointed out that the CEO did not have all the relevant information before him. Further, that Vodacom

[50] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) at para 47.

did not disclose all the relevant documentation and information, hence the CEO's determination and proposed models could not be relied upon. This is so, as the determination and model proposed by the CEO lacked the necessary substance and credibility. Evidently, the CEO took into account factors which were not relevant and ignored relevant factors.

[117] The question to be asked; is this court better equipped than the CEO, who has decades of specialist experience, is exposed and privy to all the relevant and necessary resources and documents of Vodacom, to compute a reasonable and just compensation for Makate?

[118] In responding to my rhetorical question, I am mindful that all the models considered had inherent problems, which could only be resolved if Vodacom comes to the party and provides the relevant and necessary information. Makate argues that this court is in a good enough position as the CEO to make a determination on his proposed model, as the CEO's determination was erroneous. Regrettably, the CEO's model places reliance on assumptions which are not backed up by facts or documents.

[119] To me, it is clear that, Vodacom is defying the Constitutional Court order to act and negotiate in good faith. As such this court is placed in an invidious position. This is so, as I do not have proper and adequate information on record, and the requisite experience nor the competence, to exercise my discretion to make a substitute order.

[120] Another relevant considerations is the result of the delay, which is prejudicial to the affected parties, and whether the CEO had exhibited incompetence, or bias. Makate does not complain, that the CEO was incompetent or biased. In fact he contends that the decision is merely a foregone conclusion, but for 'the CEO ...descending into the arena… [and] the CEO ['s] extraordinary commitment to the merits of his determination, notwithstanding the manifest errors it contains'.[51]

[51] Para 176.1 of *Makate's* heads of argument.

[121] The latter does not, qualify as exceptional circumstances, in these proceedings. Bearing in mind that, every party is passionate and steadfast about their proposed models and as discussed above in the judgment each prosed model has its own challenges. This amounts to yet a further delay for Makate to receive his compensation.

[122] I am not persuaded by this reasoning, as in my view, it does not outweigh this courts obligation in ensuring that a just and equitable determination is achieved for all implicated parties concerned. Thus, in my view, Makate's argument must fail.

[123] In my view and for the reasons advanced aforesaid this is not a case that justifies an order for substitution. It is trite that it is only in exceptional cases that a court will exercise its power to substitute and will only do so when it is in a good position as the decision maker, in this case the CEO, to make such decision and the decision to be made is a foregone conclusion.[52]

[124] I must make mention of the fact that Vodacom on the other hand sought that the matter commences to trial *de novo*, if their or the proposed model by the CEO, which they supported, was not accepted by the court. This submission, does not even get out of the starting blocks for the reasons set out above. In addition, Vodacom accepted the model proposed by the CEO as being correct. This clearly prejudices Makate after two decades to begin *de novo* with a long drawn out trial that would most certainly take another two decades, knowing the parties concerned. This submission by Vodacom must surely fail as it is not just and equitable.

**Conclusion**

[125] From my findings above, I cannot use my discretion and order substitution, as the only way forward in these circumstances and as such ought to be remitted to the CEO. There are parameters that have been set out by all affected parties that ought to be taken into consideration based on the facts. The CEO will in essence have a

[52] *Ibid* at para 47.

canvas to work from and it surely will not be difficult to produce a determination with the input of the parties at hand.

[126] In light of the aforesaid it is pertinent to point out that which is commonality. Makate accepted a share revenue percentage of 5%, which was also accepted by the CEO and not disputed by Vodacom. As this amounts to an agreement between the parties the CEO is bound to accept and retain such agreed percentage.

[127] So, the percentage revenue share of the PCM is at hand, now to look at what the period would be, having regard to the fact that the product has existed over two decades. The CEO has been with Vodacom since 1994. Since 1998 he professes to have knowledge of the long term contracts with Vodacom, especially those dealing with products or services rendered to Vodacom. Thus, he concludes that with new products, Vodacom, from the onset, would have committed to engage in a three to five year contract. This would be so, with a review of the commercial terms on a short notice. Hence, he recommended that a five-year contract duration was generous in his determination for Makate.

[128] The CEO failed to take into account at least one example advanced by Makate, that being the contract concluded with the company Cell-find in 2003, which marketed the Look4Me and Look4Help. In respect of this contract, Cell-find retained 85% and Vodacom 15%, and the benefits awarded excluding support were R23m.[53]

[129] The CEO placed much emphasis on the fact that Makate wanted to be treated as a third party service provider and as such, he catered for the three to five-year period for the PCM product. That being so, it stands to reason that Makate would have been in the same position and would have signed the same standard agreements as Cell-find for his brilliant concept. This is confirmed by the fact that the service provider contract with Cell-find was still running strong and in operation in 2020. The success story of PCM surely surpasses that of Cell-find. Thus, Makate's PCM contract, as a third party service provider could have endured the test of time, as it has done.

[53] Vodacom's answering Affidavit at page 2160.

[130] In light of the aforesaid, the CEO was disingenuous to project that PCM, as a third party service provider, should only be allocate a duration of five years. Which he adds was generously allocated. However, the facts demonstrate otherwise. In my view, it is therefore projectable that PCM as a brilliant concept would have had the longevity which it has today. Thus, the eighteen years proposed by Makate is reasonable, probable and has been achievable. In the circumstances, with respect to the issue of duration, the CEO is to apply the eighteen-year period.

[131] The next enquiry would then be the composition of the revenue from PCM. The main issue here, is that the CEO in his determination did not include revenue from MTR interconnect fees and the contract customers. As alluded to above the CEO over and above this decided to apply a 30% as the true reflection of incremental calls. He states he was unable to find an increase in calls attributable to the PCM product. This means that out of the 27% calls resultant from the PCM a further 30% thereof was reduced as incremental calls, i.e. related to the PCM's. This was contrary to what both Makate and Vodacom understood, as they regarded the 27%, as being attributable to the incremental calls arising for the PCM. What is surprising is that the CEO, agreed and even acknowledged this agreement between the parties.

[132] I do not see the logic in departing from what the parties understood to be that which makes up incremental call success rate (27%), and accepted by the CEO. The arbitrary application of a further 30% just demonstrates the intention of the CEO to further reduce the compensation of Makate, without any substantiated facts. The 30% is to be disregarded by the CEO.

[133] Lastly, on this topic the PCM voice revenue and interconnect revenue (MTR) ought to have been taken into account. Reason being, on the CEO's own version, 'it is very difficult to calculate or determine such incremental revenue.' The CEO focused on own two models and the methodology applied thereto. These were not in terms of the directives of the parties. In the result, the CEO did not exercise the judgment of a reasonable man, as it was unreasonable, irregular and wrongly formulated, such that it resulted in an inequitable result for the affected parties.

**Costs**

[134] The Constitutional Court granted a costs order when it ordered negotiations to take place. In my view, the Constitutional Court did not envisage mulcting costs on the parties. In addition, there was no agreement between the parties as regards costs from the outset.

[135] One should bear in mind that the review process is a complex process and as such a litigant is entitled to seek the assistance of the court if dissatisfied with a private lawful outcome. In the circumstances, the victor is entitled to the costs of the review application. I am of the view that this matter warranted the employment of only two counsel, as did the Constitutional Court. The scale of the costs are to be on a party and party basis.

**Order**

[136] In the result the following order is made:

(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 Annexures 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 published 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 for 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.

W. Hughes
Judge of the High Court

Date heard: 04-07 May 2021

Judgment electronically delivered: 7 February 2022

APPEARANCES:

For the Applicant: Adv. Puckrin SC, Adv. Marcus, Adv. Michau SC, Adv. Lubbe,

Adv. Scott and Adv. Ngakane

Instructed by: Stemela & Lubbe Inc.

For the First Respondent: Adv. Kuper SC and Adv. Badela

Instructed by: Fusken Inc.

For the Second Respondent: Adv. Trengove SC, Adv. Solomon SC

Adv. Gumbi and Adv. Raw

Instructed by: Leslie Cohen & Associates