IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Reportable

CASE NO: 10195/2017

In the matter between:

TREAD RESEARCH CC **Plaintiff**

And

BRIDOON TRADE AND INVEST 197 (PTY) LTD T/A NASHUA CAPE TOWN **Defendant**

JUDGMENT ELECTRONICALLY DELIVERED ON 8 DECEMBER 2021

DAVIS J

Introduction

[1] Plaintiff earns income from the conducting of clinical trials from its business premises which are located at Tygerberg Hospital in the Western Cape. Its members are Professor Lesley Jean Burgess (Burgess) and Professor Anton Frans Doubell (Doubell).

[2] Defendant operates its business under the name Nashua Cape Town. Plaintiff required certain telephone services and initially concluded a subscriber agreement with Electronic Communications Network (Pty) Ltd (ECN) in terms of which the latter agreed

to provide telephonic services to plaintiff using a Voice Over Internet Protocol Technology (VOIP). In 2016 defendant avers that a subscriber agreement was entered into on behalf of plaintiff by one Beulah Flandorp (Flandorp) who was employed by plaintiff as a financial administrator and defendant. The defendant was represented by one Michael Titus (Titus) as a result of which agreement defendant would replace ECN as the service provider in respect of plaintiff's telephonic services.

[3] Telephonic services were critical to plaintiff's business model and thus to its income. It appears that the clinical trials which it undertook involved regular contact and monitoring of patients participating in its research studies and regular communication responses to these clinical trials. Plaintiff earns income from each interaction with its patients. Its telephonic services are rooted to a call centre which plays a crucial role in its recruitment of and interaction with patients who form part of a clinical trial.

[4] The key issue in this case concerns the validity of an agreement to which I have made reference and which was allegedly concluded on 12 May 2016 and in terms of which defendant became plaintiff's service provider. The case that plaintiff has brought is predicated on the claim that its telephonic services were unlawfully disrupted by defendant during the period from 15 September 2016 to 1 December 2016. Pursuant thereto, plaintiff contends that it suffered damages in the form of a loss of income and that defendant is liable therefore.

[5] On 26 February 2001 an order was made in which it was recorded that defendant admits that the plaintiff may notionally have suffered damages in respect of a claim but the issue of the quantum of such damages and causation in respect of plaintiff's claim should be separated from the merits in terms of the Uniform Rule 33 (4) and adjudicated upon at a later stage, if need be. Accordingly, this case turns exclusively on the merits of plaintiff's claim.

Background

[6] On 17 April 2015 plaintiff duly represented by Professor Burgess concluded a subscriber agreement with ECN in terms of which it agreed to provide telephonic services to plaintiff. In order to retain the same geographical numbers that Telkom had allocated to it, plaintiff granted written consent so that these numbers could be ported to ECN.

[7] At some point both ECN and defendant operated under the "Nashua banner". It also appeared from the evidence that defendant had concluded a dealer agreement with ECN in 2011 in terms of which it provided certain support services to ECN including the procurement of subscribers for ECN and the sale of relevant hardware required in respect of the subscription services which ECN had offered.

[8] Plaintiff paid ECN directly in respect of the telephonic services provided by ECN by way of a debit order. It paid defendant separately for the various hardware related

rental agreements including photocopiers that it had concluded with defendant. The ECN subscriber agreement and the rental agreements with defendant were distinct agreements.

[9] It is important to note at this stage of the judgment that plaintiff, although it had switched from Telkom to ECN for its telephonic service, still require Telkom to continue to play a role in the services provided. The VOIP solution provided by ECN required the use of the same network infrastructure which had been provided by Telkom. These so called SAIX lines were a crucial part of the ECN subscription agreement and remained in place. The cost of hiring the SAIX lines were included in the ECN agreement. A portion of the subscription paid to ECN by plaintiff was then paid over to Telkom.

[10] The ECN agreement was to inure for a period of one year. Thereafter it continued indefinitely subject to termination on 90 day notice period for either party. The agreement continued for a year without any incident. The requisite services were rendered by ECN and plaintiff paid all the amounts due to ECN by debit order. It is important to emphasise that plaintiff's telephonic services included an overseas calling facility.

[11] Thus, the trigger for the litigation which followed began on 12 May 2016 when Mr Titus met with Ms Flandorp, who then signed two agreements, the subscriber agreement and the master rental agreement. In terms of these agreements, the

defendant would replace ECN as service provider in respect of the telephonic services. The master rental agreement concerned an important item of hardware which was required which it was referred to as a Gateway to facilitate connectivity through a new digital technology.

[12] On 6 June 2016 Titus forwarded a resolution and a suretyship document to Flandorp which he requested should be signed by plaintiff. Neither of these documents were ever signed by plaintiff's members.

[13] Plaintiff contends that on 23 May 2016, prior to the sending of the resolution and suretyship agreements, defendant unlawfully interfered with the existing ECN agreement without plaintiff's consent by causing it to be terminated. It followed that ECN ceased providing telephonic services to plaintiff and the debit order in terms of which plaintiff paid ECN was cancelled. Defendant installed its Gateway and caused the cancellation of the SAIX lines which were integral to the provision of the telephonic service plaintiff had been entitled to enjoy in terms of the ECN agreement. Defendant had done all this without the consent of plaintiff, relying instead on the 2016 agreement. Following thereupon defendant affected a debit order on plaintiff's bank account and commenced rendering telephonic services to plaintiff.

[14] In terms of the chronology, it appears that, after plaintiff declined to sign the resolution and the suretyship documents presented to it by defendant, the latter terminated the plaintiff's telephonic services on 15 September 2016 which services were only restored on 1 December 2016.

The claims

[15] Plaintiff advanced two claims against defendant being a delictual claim for damages in the sum of R 2 579 284.00 (claim A) and a claim for unjustified enrichment in the sum of R 81 567.00 (claim B).

[16] The main claim, claim A is based on the intentional, alternatively negligent omission on the part of the defendant which resulted in pure economic loss being suffered by plaintiff. The omission is pleaded as a breach of the defendant's legal duty to act positively. In essence therefor, the issues to be determined pursuant to claim A can be summarised thus: the defendant justified its conduct on basis that the agreement entered into on 12 May 2016 was validly concluded. That, in turn, raises questions of whether Flandorp was authorised to sign this 2016 agreement on behalf of plaintiff; if she was not so authorised, then did plaintiff misrepresent to defendant that Flandorp had the requisite authority and further, in the absence of a positive finding on these two questions, did plaintiff acquiesce to the 2016 agreement?

[17] If the 2016 agreement, for whatever reason, is found to be invalid, then the question arises as to the validity of defendant's reliance upon amounts it alleged were

due in respect of this agreement as the justification for refusing to permit the porting of plaintiff's numbers to a service provider of its choice.

[18] Further questions then arise; in particular, did defendant gain and/or retain control of plaintiff's telephonic numbers in general and its geographical numbers in particular in an unlawful manner and without its consent and did defendant suspend plaintiff's telephonic numbers in order to exert undue pressure on plaintiff to consent to or to ratify the 2016 agreement. Furthermore, a question which will eventually have to be answered concerns whether any of this conduct was causally related to the disruption of plaintiff's telephonic services to show that an adequate legal link was established between the damages suffered by plaintiff and the alleged unlawful conduct by defendant.

[19] I turn to deal with the invalidity of the 2016 agreement, the answer to which is critical to the disposition of this case.

The 2016 agreement

[20] The court is confronted with diametrically different accounts regarding what took place when the 2016 agreement was signed, being the evidence on behalf of plaintiff given by Flandorp and evidence given on behalf of the defendant by Titus.

[21] Ms Flandorp was employed during 2011 and 2017 as a financial administrator. She testified that as an administrator she prepared a range of documents and, where

necessary, would hand them either to the relevant manager or to Burgess, who would be responsible for signing contracts, even to the extent that plaintiff required a contract for the provision of stationery. To a considerable extent, the status that Flandorp enjoyed in plaintiff's organisation was confirmed by Ms Riana Stander, who worked in a more senior position than Flandorp, between 2013 and 2017.

[22] Turning to the 2016 agreement Flandorp testified that she was in contact with Titus who, on her version, offered to negotiate cheaper call rates. In her evidence she insisted that she had informed Titus that Burgess was the person authorised to represent plaintiff in the conclusion of any contract with plaintiff Titus had assured her that documents that she was asked to sign were relevant to the cheaper call rates and that further documents would be provided to Professor Burgess. She conceded that, as she was in a hurry to return her work, she had signed a range of documents as requested by Titus without examining the content thereof. When confronted with the fact that she had signed 10 pages some 13 times, she insisted that, insofar as she was concerned, they all related to reduced call rates.

[23] Titus' testimony unexpectedly was reflective of a very different version of events. He testified that there had been two meetings with Flandorp as opposed to one, that he had explained the new LTE proposed solution that he was offering, that Flandorp expressed considerable interest in the offer and that Titus was of the view that she was the appropriate person with which to converse on these matters in that she had represented that she was plaintiff's accountant. The fact that the documents reflected that she was an accountant, in Mr Titus' view, made it probable that she had informed

him accordingly. It was put to Titus that Flandorp only earned R 11 050 per month, hardly a salary of a financial accountant, to which he said he was unable to dispute the point but insisted that that this had been her representation. He also denied Flandorp's version that there was no discussion of a technical nature and that they had only spoken about cheaper calls. In as an answer to the question on the possible knowledge that Flandorp might have possessed regarding, for example the Gateway system, he said he perceived that she has some technical knowledge and therefore was able to converse with him on this subject.

The different approaches to this testimony

[24] Mr Walther, who appeared on behalf of the plaintiff, pointed to evidence which had been given by Mr Mark Isaac, who had been employed by defendant as a consultant. It was Isaac who had procured the ECN agreement with plaintiff and had been responsible for other deals relating to equipment which were provided to plaintiff by defendant. According to Mr Isaac, when he discovered that Titus had arranged for the conclusion of the 2016 agreement with the customer, whom he regarded as his own, he sought to investigate the matter. In his view, Titus' had misrepresented to Flandorp that the deal included cheaper call rates and he had informed the defendant's sales manager, Rodney Wearing, who was not called to testify therefore to gainsay Isaac's evidence. Furthermore, Mr Walther placed emphasis on an opposing affidavit which had been deposed to by Mr Koekemoer, the managing director of defendant, in earlier summary judgment proceedings where Mr Koekemoer had confirmed that Titus

had offered cheaper call rates when he met with Flandorp. That was information which, in Mr Walther's view, Mr Koekemoer could have only received from Titus.

[25] According to Mr Walther, Titus were not able to satisfactorily explain why almost all the components of the master rental agreement which Flandorp signed were not completed when she affixed her signature. Isaac testified that this was not common business practice of defendant. Neither was Titus able to explain why Flandorp had been asked to sign a blank order form with only one amount on it which served to confirm her version regarding cheaper call rates.

[26] By contrast, Mr Jonker, who appeared on behalf of defendant, submitted that Flandorp's version of the 12 May 2016 meeting was improbable. On her version, Titus arrived at the premises and informed her of the purpose of the meeting which was to negotiate cheaper rates. No discussion followed upon the promise of an amount of cheaper rates nor was any evidence offered by her of any further discussions on the facts. Titus then proceeded to placed ten documents before her which reflected that they were in agreement and Flandorp then proceeded to sign these agreements some 13 times without demure. In his view, while Flandorp might not have been an accountant, she was an educated person holding an N6 certificate at Northlink College in accounting. She was no stranger to the nature of contractual documents, even if she was only a financial administrator. It was highly unlikely that she would have been ignorant of the implications of the meeting with Titus and thus of her signature on these documents. Furthermore, plaintiff had not pleaded that the agreement was invalid

because of a misrepresentation by Titus. Furthermore, Flandorp had testified that, after signing the documents on 12 May 2016, she had made copies so she could provide Burgess with the relevant documentation but, on her version, she only showed Burgess the documents when the telephone lines were suspended on 15 September 2016 on the ostensible basis that she did not think that the documents were of particular relevance. Furthermore, she testified that upon receipt of the suretyship agreement and the resolution from Titus on 5 June 2016, she had finally realised that the documents might be linked.

[27] It was clear that on 6 June 2016 not only did Titus forward a resolution but also a suretyship document to Flandorp. According to Stander, defendant's representatives had attempted on numerous occasions to contact Burgess. It was at this point that Stander began to investigated the situation. According to her, Flandorp had told her she had signed a document which related to cheaper calls. It transpired that the fact that defendant required further documentation meant that, on the basis of the document signed by Flandorp, meant that it had limited legal implications until the completion of the balance of the documents. Titus said that there were two meetings with Flandorp during which Titus allegedly discussed the solution he was offering. Flandorp only recalled one meeting. Titus was unable to provide any credible version as to what then occurred at the 'second meeting'. Confronted by the question of whether he had informed Flandorp about the need for a resolution and a suretyship agreement to complete the process, he answered in the negative, somewhat surprisingly on the basis that 'at the time, there was no need'. He also denied Flandorp's version that to obtain

these signatures, the ‘Professor will have the final say’; even though it was clear from the completed document that Burgess was the authorised signatories.

Evaluation

[28] In my view, neither the version of Flandorp or Titus are particularly satisfactory. There were clear discrepancies in some of Flandorp’s testimony. For example, Burgess, testified that during August 2016 she had discussed the problem of the 2016 documents which was in conflict with Flandorp’s version that she had only discussed the issue of the 2016 agreements after the lines were cut that is after 15 September 2016. This conclusion is not grounded solely on the basis of Burgess’ evidence but in addition there is an email generated by Ms Stander on 14 September 2016 where mention is made of the signing of documents by Flandorp. Similarly, there was testimony that only when the lines were cut did Flandorp realise that the signed forms may be of critical relevance. Flandorp’s version holds some clear difficulties.

[29] Titus was a most unsatisfactory witness. When he met Flandorp armed with his subscription list, the relevant subscriber agreement and the company billing details had been already completed in advance by defendant’s staff in which it was revealed that Burgess was the only authorised signatory and thus the contact person. Titus would have had to know by the time he entered into discussions with Flandorp that it was Burgess who had the requisite authority to contract on behalf of plaintiff. Yet he steadfastly insisted that Flandorp had represented to him that she had the requisite authority to contract and that he simply accepted this position without further

clarification. It is hard to believe on the basis of Flandorp's personality in the witness box that she could have been taken for a senior executive authorised to enter into contracts with third parties.

[30] Unlike the bombastic Titus (under cross examination), Flandorp was hesitant, somewhat overwhelmed by the occasion and exhibited so little confidence that it is a stretch to envisage her as a key member of plaintiff's staff as opposed to both Burgess and Stander. Similarly, there is little clear evidence to justify that she had overreached herself and represented that she was an accountant, when she was no more than the financial clerk/administrator. Titus had spoken about cheaper calls, as is clear from the affidavit deposed to by Koekemoer and to which the latter had a great deal of difficulty in explaining away. In short, Titus was a remarkably unimpressive witness who became increasingly aggressive and defensive under cross examination. This was in marked contrast to the way he represented himself when being examined by Mr Jonker. It is also highly unlikely, given Flandorp's testimony, that Titus could have ever assumed that he was speaking to somebody with the technical knowledge to understand the advantages of the Gateway system. Unless Flandorp is in line for an Oscar for a fine supporting role, her answers throughout gave no reason to believe that she had the technical knowledge as claimed by Titus.

[31] I was urged by both parties to adopt the approach dealing with contradictory versions as set out in *Stellenbosch Farmers Winery Group Limited and another v Martel and Cie and others* 2003 (1) SA 11 (SCA) at para 5:

'The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra curial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the later. But when all factors are equipoised probabilities prevail.'

[32] As indicated, the credibility of both witnesses can be questioned with some measure of justification. However, Titus' demeanour in the witness box coupled to the

fundamental contradictions between that which appeared in the answering affidavit in the summary judgment proceedings and his insistence of a different version in his *viva voce* evidence, the manner in which the 2016 document was filled in, all point to the inherent improbability that a financial administrator who enjoyed a low level of employment with plaintiff would have seen fit to represent that she had the authority to change fundamentally the telephonic system of plaintiff. To be clear demeanour alone is to be treated with great caution but when a witness eschews candour, behaves aggressively and refuses to answer key questions (e.g. 'if you say so'), this must form part of the overall evaluation. As Nugent JA said in *Medscheme Holdings (Pty) Ltd and another v Bhamjee* 2005 (5) SA 339 (SCA) at para 14, 'an assessment of evidence on the basis of demeanour without regard to the probabilities constitutes a misdirection. But demeanour can reinforce a conclusion reached on an objective assessment of the probabilities or even tilt the probabilities which otherwise would be in equipoise.' See *Body Corporate of Dumbarton Oaks v Faiga* 1999 (1) SA 975 (SCA) at 979.

[33] A few extracts from the cross-examination of Titus are illustrative. Confronted with his insistence that Flandorp had represented that she was an authorised signatory of plaintiff and as to the relevant documents which stated clearly that Burgess was the authorised signatory, Titus' testimony's was as follows:

> 'MR WALTHER: When, on your version, Ms Flandorp said that she's authorised to sign. Why didn't you change the document you're asking her to sign, to change "authorised signatory" on page 34, from Ms Burgess, to identify what you'd been told? Why didn't you ask Ms Flandorp to do that?

MR TITUS: To do what?

MR WALTHER: To change the authorised signatory from "Lesley Burgess" to comply with the information Beulah Flandorp had allegedly given you? Why didn't you make that change to that document?

MR TITUS: Because the documents are contract that people(?) … and we don't really make corrections on our agreements.

MR WALTHER: Well, that's not an acceptable explanation. People change things and initial them all the time.

MR TITUS: That's your opinion that. I don't know what, that's your opinion.

MR WALTHER: You see, because ultimately what we're left with, we're left with your version as to what Ms Flandorp said. We're left with Ms Flandorp's version, but the problem for you is that the document that you asked Ms Flandorp to sign, supports her version.

…

MR WALTHER: Well, I put it to you that Ms Flandorp's evidence was that she was a financial administrator. At no stage did she say to you that you were, that she was an accountant.

So I'm putting you that that is something, that your evidence on this point is not true. Any comment?

MR TITUS: That is incorrect.

MR WALTHER: You see … this is – if we go to your affidavit.

MR TITUS: Page, please? File?

MR WALTHER: File B, on page 352

MR TITUS: Paragraph?

MR WALTHER: Paragraph 28. Because there the, that's the affidavit of Mr Koekemoer and he, he says:

'Flandorp confirmed to Titus and he also held out to be that she was dully authorised to enter into the 2016 agreement. The fact that she was the financial manager of the plaintiff, and that the plaintiff placed her in a position and allowed her to negotiate contractual terms with third parties, like the defendant represented to the defendant, that she had the necessary authority to represent plaintiff in concluding the 2016 agreement.'

…

MR WALTHER: And Mr Koekemoer says:

'There were two things that happened at the time. The first one is Mr Titus came back and he gave me, you'll see my signature at the bottom of the page, so I have to verify every document. So when he came back I spoke to Mr Titus who represented them, and he of course gave me info. At that stage, we deal with the financial agreements. We had to do the verification ourselves which means we had to get one of the sales coordinators to phone customers to verify the signatures on that page. So the information that I received at that stage was that there was a document to the extent, but for some or other reason I don't know what happened, there was a document, it was referred to Ms Flandorp as the financial manager, and that, in hindsight, is not true. So the information I got back seems to be incorrect.'

And then he says:

'But is it Mr Titus that told you she was the financial manager?'

That's a question from the Court, and he says:

'Like I said, M'Lord, there's two verifications. One with Mr Titus confirming, he came back and gave me that impression.'

COURT: And what do you …(intervenes)

MR TITUS: Is there a question, M'Lord?

MR WALTHER: So what I'm putting to you is that you came back and told Mr Koekemoer that she was the financial manager.

MR TITUS: I don't recall.

MR WALTHER: Well, that is what Mr Koekemoer says in his affidavit, and that's what you confirmed.

MR TITUS: Like I said, 2017 was quite a long time ago, Mr Walther, I don't recall.'

[34] Titus was thus the sole conduit of information received by Koekemoer. And Koekemoer confirmed that Titus had told him that he had spoken to Flandorp about cheaper calls. In itself this calls into question the reliability of the testimony that I have reproduced.

[35] Titus was also asked about Flandorp's testimony that whatever she signed, further documents needed signature before an agreement was concluded between plaintiff and defendant:

'MR WALTHER: And Ms Flandorp also testified that you, when she told you that only the professor could sign, that your response was that she shouldn't be worried about that because further documentation would come along for the professor to sign. Your comment?

MR TITUS: That is 100 per cent incorrect.

MR WALTHER: Well, Mr Titus, that can't be because further documentation did come along. We know that. A resolution and a suretyship provided by you did come along. Your comment?

MR TITUS: Yes, the documents did come along. Yes, that's right.

MR WALTHER: Yes, So, now let's go back. When Ms Flandorp testified that she had reservations about signing these forms that had been put in form of you (?), she says you told her not to worry because further documents, or something to that effect, that further documents would be coming along.

MR TITUS: That's definitely incorrect. There was no reservations from Ms Flandorp. As on the date in question, the 12th, Ms Flandorp in her own free will signed the documents.

MR WALTHER: No look, okay … Well, as I put it to you before, Ms Flandorp says she signed the documents because she relied on representation from you that there were cheaper calls to be had.

MR TITUS: No.

MR WALTHER: And she signed the documents believing that further documentation for the professor to sign, in other words, which, because she was, she told you that the professor was the authorised signatory and you told her that further documents would be coming along. Did you or did you not say further documents would come along?

MR TITUS: I believe I did answer that question.

MR WALTHER: Did you or did you not say that…? So, in other words, you deny? Is it your, do you deny or admit that you…?

MR TITUS: That's correct.

MR WALTHER: You deny that … (intervention)

MR TITUS: That's correct, yes.

MR WALTHER: …having told her that?

MR TITUS: That's correct.

MR WALTHER: But then you did afterwards send, you admit to having sent her a suretyship resolution?

MR TITUS: That's correct, yes.'

[36] Again and again as the examples from his testimony reveal, Titus evidence ended in a cul de sac. To emphasise: the quality of Titus' answer are the crucial factors in the evaluation of his evidence. His demeanour is but a supplementary factor. The same analysis has been undertaken in respect of Flandorp. Her version of events are more plausible than that of Titus in that it holds greater congruence with the documentary evidence and the probabilities after a careful assessment of the evidence of Burgess, Stander, Isaac and Koekemoer. Her demeanour as described merely adds weight to the overall assessment.

[37] On balance, Flandorp's version was therefore more convincing than that of Titus. It is correct that she signed a document 13 times but on its own thus is not entirely inconsistent with the version that what was being contracted was for the existing telephone system to be based on significant cheaper calls. It is also the version of Flandorp that Titus informed her that there would be further documents for Burgess to sign. Significantly in the light of his confusing evidence about additional documents, as

set out above he sends an email with a resolution and a surety document in order that Burgess should sign them. This is evident in the following email of 6 June 2016:

> 'Good day Beulah
>
> As per our telecom earlier today, please have Lesley sign the documents attached.
>
> I've marked with a green highlighter where she needs to sign.
>
> I also require 1 signature from you, I've marked with a blue highlighter where you need to sign.' (my emphasis)

[38] They were sent after defendant had prompted the termination of the ECN agreement and proceeded to implement the 2016 agreement on 23 May 2016, an act which was done with expeditious haste. However, even if I assume in favour of Titus' version and that this was not a case of a naïve financial administrator succumbing to the persuasion of a sales person seeking additional commission, a further question arises as to Flandorp's legal lack of authority to contract on behalf of the plaintiff.

Did Flandorp have actual authority?

[39] Plaintiff claims that Flandorp did not have the requisite authority to contract on behalf of plaintiff. Defendant initially raised a question of estoppel but later abandoned this line of defence. Hence, defendant's case is based on the submission that Flandorp had authority to represent plaintiff.

[40] In a discussion of various forms of actual authority Cassim and Cassim write as follows:

'There are broadly three categories of implied actual authority. First, implied actual authority is that authority which is necessary or reasonably incidental to the effective execution of the agent's express authority. For instance where the agent has express authority to develop property for his principal, he will have implied authority to do all such things as are reasonably incidental to the development of that property such as appointing architects to prepare plans. Secondly, implied actual authority may be implied from the nature of the office or the particular position to which the agent is appointed. This may be referred to as implied usual authority. The appointment of a person as the managing director of a company, for instance, may carry with it implied usual authority to enter into contracts on behalf of the company and to do all such things as are within the usual scope of that office. Where the board of directors appoint one of their members to an executive position, they impliedly authorise him to do all such things as fall within the usual scope of that office. Implied usual authority must be distinguished from ostensible usual authority (see further paragraph III (b)(ii) below). Thirdly, implied actual authority may arise as a reasonable inference from the conduct of the principle, where the principal acquiesces in the activities of the agent. An example of this category arose in *Hely- Hutchinson v Brayhead Ltd* [[1967] 3 All ER 98 (CA)]'[1]

[41] This area of law was canvassed recently in *Makate v Vodacom (Pty) Ltd* 2016 (4) SA 121 (CC). There was a considerable debate between the majority judgment penned by Jafta J and a minority judgment authored by Wallis J about whether the concept of estoppel and ostensible authority are different conceptual animals. Jafta J held that 'ostensible authority is the power to act as an agent indicated by the

[1] FHI Cassim and MF Cassim "*The authority of company representatives and the Turquand rule revisited*" 2017 (134) SALJ 639 at 664

circumstances even if the agent may not truly have been given the power, whereas estoppel … is a rule that precludes the principal from denying that she gave authority to the agent.' Jafta J held that South African courts had sometimes conflated ostensible authority with estoppel. The learned judge referred to the judgment of Schutz JA in *NBS Bank Ltd v Cape Produce Company (Pty) Ltd and others* 2002 (1) SA 396 (SCA) this approach was expressly adopted.

[42] As Wallis AJ noted, estoppel is constituted by a representation by a principal either by words or conduct. Absent a representation which is sourced in words or conduct of a principal, there can be no estoppel. For this reason, in the view of Wallis AJ ostensible apparent authority is a form of estoppel.

[43] Unfortunately, that was not the approach adopted by the majority through what appears to be a different reading of a significant line of cases. I raise this unfortunate situation because Mr Jonker pressed the majority judgment to the effect that, at present, authority is established if it can be shown that the principal either by words of conduct created an appearance that an agent has the power act on its behalf. For this proposition he cited para 45 of the *Makate* judgment that;

> 'Actual authority and ostensible or apparent authority are the opposites sides of the same coin. If an agent wishes to perform a juristic act on behalf of a principal the agent requires authority to do so for the act to bind the principal. If the principal had conferred the necessary authority either expressly or impliedly the agent is taken to have actual authority. But if the principal were to deny that she had conferred the authority the third party who concluded the juristic agreement with the agent may plead estoppel in replication … estoppel is not a form of authority but a rule to the effect that if the principal

had conducted herself in a manner that misled the third party into believing that the agent has authority the principle is precluded from denying that the agent had authority.'

The difficulty arises with the following paragraph:

'The same misrepresentation may also lead to an appearance that the agent has the power to act on behalf of the principal. This is known as ostensible or apparent authority in our law. While this kind of authority may not have been confirmed by the principal, it is still taken to be the authority of the agent as it appears to others. It is distinguishable from estoppel which is not authority at all. Moreover, estoppel and apparent authority have different elements barring one that is common to both. The common element is the representation which may take the form of words or conduct.'

[44] Even though it appears to me that Wallis AJ's analysis of the doctrine is clearly correct, I am bound by the majority in *Makate*. That then raises the question as to the source of Flandopr's authority when defendant submits that Flandorp had the authority to conclude the 2016 agreement. This raise the question as to whether this Court must examine both whether she had actual authority as well as ostensible or apparent authority. This was never made clear to me in argument before this Court. In support of the argument that Flandorp had actual authority, Mr Jonker referred to the job profile attached to the employment contract in which one of the key performance duties of which she was required to perform was "to negotiate with suppliers and open new accounts" as the source of Flandorps authority. In other words, viewed in the context of Flandorp's employment contract, plaintiff had created the appearance that Flandorp had the power to act on its behalf, thereby conferring the necessary authority on her. Burgess was constrained to concede that if a third party examined this document, it

would have been under the impression, because of the wording thereof, that Flandorp had the authority to negotiate with suppliers and open new accounts. The source of this submission is the employment contract which, in Mr Jonker's view, expressly created the appearance that she had the power to negotiate and conclude contract with the suppliers such as the defendant.

[45] However, there is evidence which is clearly to the contrary. Isaac, the sales agent who initially dealt with plaintiff regarding the procurement of ECN contract and represented defendant regarding the conclusion of rental agreements with plaintiff pertaining to hardware such PABX and photocopier machines, testified that Burgess had always been the person with the authority to finalise and sign any agreement. That position was confirmed by Burgess, who testified that only the two members of plaintiff (being a CC) were authorised to represent plaintiff in concluding agreements such as the one concluded with defendant. Ms Stander also confirmed that it was well known in plaintiff's organisation that Burgess was the person with the authority to finalise and sign agreements. Stander confirmed that Flandorp's role was that of an administrative assistant to Burgess who did not have any authority to conclude agreements.

[46] Burgess also sought to explain the implications of the written contract of employment signed by herself and Flandorp on 8 June 2015. She testified that in 2014 plaintiff was engaged in the process of obtaining international accreditation. Pursuant thereto, written contracts of employment were required in respect of all plaintiff's employees. Burgess claimed that she used a standard template for all employees

including for Flandorp. Nonetheless, Flandorp continued to work with Burgess as an administrator on the same terms and conditions and retained the same job descriptions and responsibilities that she had done prior to the signing of the contract. She was unable to perform the role of a financial accountant. At the very least Flandorp would have had to possess a BComm degree or equivalent work experience, neither of which she had. Even if there can be a debate about whether the description of the job profile was a mistake as alleged by plaintiff's witnesses, defendant only came to know of the terms of this employment agreement upon discovery by plaintiff. Accordingly, there was no basis by which defendant was aware of or misled by its contents during 2016 or any time prior thereto; that is when the 2016 agreement was allegedly concluded.

[47] There was some debate about whether Burgess or Stander knew about Flandorp's signing of a document in August 2016 without reacting thereto. While there is merit in this point, it is also so that plaintiff's copy of the 2016 agreement was attached to its initial summons consisted of an incomplete version signed only by Flandorp. The completed version containing all of the relevant information to conclude a contract was attached to defendant's affidavit, deposed to in opposition to the earlier summary judgment application. This was the first time that plaintiff had actually seen the fully signed completed version of the agreement. Titus was unable to provide any explanation as to why the complete signed agreement was never previously sent to Burgess or indeed even to Flandorp. It is also significant that, notwithstanding considerable pressure from defendant's representatives, Burgess never signed the resolution or the suretyship agreement. Certainly the fact that no resolution or

suretyship agreement had been signed by Burgess makes it difficult to justify an argument that plaintiff acquiesced to the agreement into which Flandorp allegedly bound plaintiff.

[48] There is a further important issue which concerns the nature of the 2016 agreement which was signed by Flandorp and to which there were numerous blank spaces. Mr Jonker sought to argue away the fact that the blank spaces related solely to the commencement date and serial numbers and other identification of the goods. He further relied upon clause 20 of the contract in which the following was provided.

> 'The User authorises the Renter to complete any blank spaces in the Schedule relating to the Commencement Date and the serial numbers and under identification of the Goods. The User also authorises the Renter to rectify any manifest errors contained in the agreement and/or schedules. The Renter undertakes to give the user written notice of ay rectifications made to the agreement and/or schedules and for any blank spaces completed in the schedules in terms of this clause, and to send the User a copy of the completed and/or corrected agreement and/or schedules.'

[49] It is therefore necessary to examine the context of this clause, printed as a standard form clause which I should add, required a microscope to read this document.

[50] What was signed by Ms Flandorp other than the details of plaintiff were that there would be a monthly rental of R12 050, excluding VAT. Nothing else was filled in the document. In short, the document she signed contained no details of the agreement. Thereafter the master agreement was populated by Mr Titus. It is difficult to see how

the initial document signed by Ms Flandorp can be altered so radically in the manner that it was and still be saved by Clause 20 of the agreement.

[51] The initial document which Flandorp signed supports her version that the entire negotiations concerned cheaper rates, for that was the only figure inserted in the initial agreement. Significantly, no member of plaintiff was ever provided with the 2016 agreement which was however signed by defendant's representatives. The plaintiff's copy of the agreement which was attached to its summons consisted of the incomplete version to which I have made reference. The completed version containing the missing and pertinent information, to which I have also made reference, was only made apparent to plaintiff when it was attached to the defendant's affidavit opposing summary judgment application.

[52] The position gets even more difficult for the defendant in that Burgess never signed the resolution or the suretyship agreement as demanded. As Mr Walther submitted, there is great difficulty to understand how plaintiff could have been taken to have acquiesced or to have ratified an agreement that no member of plaintiff had ever seen, and in which, notwithstanding a consistent insistence by defendant's representatives, Burgess refused to sign the resolution or the suretyship agreement that were palpably regarded by defendant as part of the entire agreement, as its increased desperation to obtain Burgess' signature illustrates.

Unlawfulness

[53] In its amended plea, plaintiff avers that, notwithstanding that there was no binding agreement in place between plaintiff and defendant:

> 'Defendant installed certain equipment at plaintiff including a Patton Gateway with serial number 00A0BA0BC6A0 (hereinafter referred to as "the Gateway"), and defendant effected the cancellation of, and/or depravation of plaintiff's access to the SAIX lines (which were integral to the provision of electronic communications services in terms of the 2015 Agreement) without plaintiff's consent;
>
> Defendant commenced providing electronic communications services to plaintiff via, amongst other equipment, the Gateway; and
>
> ECN terminated its services to plaintiff which services and obligation it had provided to plaintiff in terms of the 2015 subscription agreement.'

[54] In its amended plea, defendant responds thus:

> 'The defendant admits that in terms of the 2016 agreement:
>
> 1. It installed certain equipment at plaintiff, including a Patton Gateway with serial no: 00A0BA0BC6A0 ("the Gateway");
> 2. Defendant commenced providing electronic communications to plaintiff via, amongst other equipment, the Gateway; and
> 3. ECN terminated its services to plaintiff, which services and obligations it provided to plaintiff in terms of the ECN agreement.
>
> The defendant pleads that ECN terminated its services in terms of the ECN agreement on the basis that the plaintiff and defendant concluded a valid binding agreement.'

[55] Plaintiff's contention is that, if the 2016 agreement is found to have been invalid, it must follow that the defendant had no right to cause the termination of the ECN agreement because this termination would have occurred without plaintiff's consent and defendant's actions would then amount to an unlawful interference in a contract between plaintiff and the ECN. Plaintiff also pleads that, pursuant to the defendant's approach that the agreement was valid, it cancelled SAIX lines which were an integral part of the ECN agreement and defendant did so without plaintiff's consent.

[56] Mark Isaac, under cross examination, informed the court that the SAIX lines had been cancelled as from 2016, pursuant to the conduct of defendant, namely that the 2016 agreement had replaced the ECN agreement in which the SAIX lines had been utilised.

[57] Mr Koekemoer testified that, once instructions had been given by plaintiff pursuant to the meeting between Titus and Flandorp in which the two related agreements had been signed, being the subscriber agreement and the master rental agreement, Koekemoer regarded this action as representing instructions from the customer for the implementation of that which had been agreed upon, including the employment of the Gateway. As a result, on 13 May 2016 Koekemoer testified that an order was placed for the necessary equipment in order to implement the 2016 agreement.

[58] Mr Walther referred to the fact that once defendant sought to implement the 2016 agreement on 23 May 2016 and installed the Gateway, it caused the cancellation of the SAIX lines which had been integral to the provision of telephonic services to which plaintiff had been entitled in terms of the ECN agreement. Considerable pressure was then exerted upon plaintiff to sign the necessary resolution and suretyship documents which were required by defendant. It was during the period from July 2016 to early September 2016 when plaintiff's members finally became aware of the existence of that which would had been signed by Flandorp. It was a steadfast refusal by plaintiff's members to sign the resolution and surety agreement that triggered the exertion of pressure upon plaintiff. This culminated in an email sent by Mr Rodney Wearing of defendant to Ms Stander on 14 September 2016 in which the following was stated:

> 'Hi Riana
>
> The surety documents were presented at the same time as it is on the main contract, but unfortunately the members were not available as Lesley was out of the country. Beulah assured us that she has the right to sign hence the reason why it was resented to her.
>
> As far as the cost, all efforts were made to keep the costs the same. The costs breakdown is just now different than what it used to be. The previous ECN agreement was R1599.00 Excl. VAT per month. The new agreement structured on R1250.00 excl. VAT for rental and R450 excl. VAT for line rental which is the new infrastructure.
>
> I don't have a <u>complete new agreement</u> in place due to the resolution and Surety's that is outstanding. I need to move back to the previous agreement and terminate my services immediately.' (my emphasis)

[59] Defendant admitted that on 14 September 2016, through Wearing, it accepted the plaintiff's repudiation and termination of the 2016 agreement and reinstated the ECN agreement between the parties. Significantly, however, in his affidavit opposing the summary judgment application, Mr Koekemoer had stated that Wearing had merely conveyed to plaintiff that there were formal documents, being the resolution and suretyship agreement, which required a signature pursuant to the 2016 agreement. He then stated 'he (Wearing) mentioned reverted to the old agreement purely in an attempt to get the outstanding documents from the Plaintiff.' This was confirmed by Wearing in a confirmatory affidavit pursuant to the summary judgment proceedings. Tellingly, the court never was given the benefit of Wearing's testimony.

[60] The question therefore which arose was what was behind Wearing's email of 14 September 2016. In my view, Mr Walther correctly submitted that, in the light of Wearing not testifying on behalf of defendant in these proceedings, the inference to be drawn was that he would have confirmed that defendant had mentioned reverting to the ECN agreement in order to obtain the outstanding documents from plaintiff; that is, this conduct was part of a campaign to pressurise the plaintiff to sign the necessary documents and therefore conclude the 2016 agreement.

[61] Whatever the motivation, it is clear that defendant suspended plaintiff's telephonic services on 15 September 2016. On 16 September 2016 Flandorp, clearly concerned about the suspension, generated an email to Wearing requesting an invoice for any outstanding amounts owing by plaintiff to defendant. To that Wearing replied:

'Your account is up to date. There is no amount outstanding. The reason for the suspension of the line is because of the long outstanding documents since May 2016. The updated agreement was signed by you with the understanding that you had all authority to do so. But we required a resolution and surety as previously requested in order to complete the paper work as per Companies Act.'

[62] Pursuant thereto, Flandorp wrote a series of emails, the most important of which was on 22 September 2016 which was directed to Wearing in which Flandorp told Wearing that Burgess required plaintiff's geographic numbers to be ported back to Telkom. There was no response from Wearing.

[63] On 26 September 2016 a further email was generated by Flandorp to Wearing indicating that plaintiff had agreed to settle all amounts in respect of hardware contracts with defendants, such as the PABX and photocopier machines. She requested settlement figures in this regard. When Flandorp received the settlement figures she sought the assistance of Mr Van Rensburg of Nashua Tygerberg in regard to what she considered to be erroneous figures. Van Rensburg advised Flandorp to address a letter to Wearing requesting that plaintiff's existing numbers be ported back to Telkom. This was confirmed in an email which Van Rensburg wrote to plaintiff and in which he included Wearing on 7 October 2016. The response from Koekemoer was as follows:

'Can you maybe confirm what we need to now. If they continue with us we are back to square one and I will suspend their service in order to reactivate the line on the dealer agreement. This can take up to six weeks exactly what we told the customer.'

It is clear that at this point there had been no reinstatement of the ECN agreement which was the meaning of the phrase “dealer agreement”. Plaintiff sought a way out of the impasse by paying a settlement amount but defendant continued to insist that plaintiff pay the amounts in respect of the 2016 agreement prior to porting.

[64] Significantly, in his affidavit deposed to pursuant to the summary judgment proceedings, Koekemoer referred to a letter generated by plaintiff’s attorney on 17 November 2016 in which the latter demanded the porting of plaintiff’s lines to Telkom. He stated:

> ‘I advised Plaintiff’s attorneys that this was not possible due to the 2016 agreements still being in place. I further advised that before the Defendant would relinquish its ownership of the lines to Telkom, Defendant was entitled to payment of its settlement amounts in terms of the 2016 agreement.’

[65] This position was confirmed in a letter generated by defendant’s attorneys to plaintiff’s attorney which the following was stated:

> ‘Your client is bound to the agreement (the 2016 agreement) to exit from same and it is liable for the settlement figures as provided to your client…’

[66] It was then that plaintiff paid the outstanding amount of R 81 567,00 on 25 November 2016 and shortly thereafter succeeded in securing the restoration of its lines on 1 December 2016.

[67] There was considerable debate about the amended plea; in particular, that in December 2020 defendant amended its plea to aver that it had accepted plaintiff's repudiation and terminated the 2016 agreement and reinstated the ECN agreement. Its amended plea reads thus:

> 'Upon the plaintiff's instruction / request, the ECN agreement was reinstated on or about 14 September 2016, after which date the ECN agreement remained operative and was not terminated in accordance with clause 2.1 thereof.
>
> In any event, there was no obligation to release the telephone lines and port same to Telkom given the plaintiff's indebtedness to the defendant for the accelerated rental as a result of the termination of the 2016 agreement … Accordingly, pending the resolution the resolution of the dispute between the parties and the payment of all amounts outstanding to the defendant, the defendant exercised a lien over the telephone lines;
>
> In the alternative, and in the event that the court finds that the 2016 agreement was null and void, the defendant pleads that at all relevant times the ECN agreement remained operative between the plaintiff and ECN and was not terminated.'

[68] The problem is that, until December 2020, this had not been defendant's approach. In any event, reinstatement of the ECN agreement would have required the consent of ECN and plaintiff. There is no proof that any of this had been communicated to ECN or to plaintiff.

[69] The upshot is that, notwithstanding some temporary restoration of plaintiff's telephonic services from 3 to 18 October 2016, the SAIX lines were only reconnected on 21 November 2016. This meant that there was no connection in respect of these

lines from 15 September 2016 to 21 November 2016. Absent the validity of the 2016 agreement, there could have been no legal basis for defendant to refuse to restore the status *quo ante* because there would not have been a legal basis to interfere with the infrastructure which was central to the ECN agreement.

[70] To the extent that defendant avers that it was under no duty to port telephone numbers back to Telkom, its case has to be based on the validity of the 2016 agreement. Absent the validity thereof, there was no legal basis by which defendant could aver that it was not obligated to release the telephone lines and port them to Telkom.

[71] However, Mr Jonker submitted that, before a requirement of wrongfulness can be shown to be successfully pleaded, the court has to be persuaded that the legal convictions of the community demand that such conduct ought to be regarded as unlawful. That, in my view, is a trite and correct proposition of law. But as was stated in *Loureiro and others v Imvula Quality Protection (Pty) Ltd* 2014 (3) SA 394 (CC) at para 53:

> 'The wrongfulness enquiry focusses on the conduct and goes to whether the policy and legal convictions of the community, constitutionally understood, regard it as acceptable. It is based on the duty not to cause harm – indeed to respect rights – and questions the reasonableness of the imposing liability… [a] defendant's subjective state of mind is not the focus of the wrongfulness enquiry. Negligence on the other hand focus on the state

of mind of the defendant and test his/her conduct against that of a reasonable person in the same situation in order to determine fault.'

[72] Absent one argument that requires further attention, in my view, it is clear that, once it is established that the 2016 agreement was not validly concluded, the interference with ECN agreement and further conduct which resulted in the plaintiff not having access to telephonic lines which were crucial to its research enterprise dictates a clear conclusion: The legal convictions of the community would not sanction such conduct. Harm was caused to plaintiff (the amount of the harm stands to be quantified in subsequent proceedings) as a result of defendant relying on a contract which was not legally concluded.

[73] The issue that remains to be canvassed is Mr Jonker's submission that a delictual remedy is not available to the plaintiff as the legal duty contended for arises in the matrix of obligatory relationships based on contract.

[74] In essence, Mr Jonker submitted that the defence he was raising did not require this Court to make any finding on the validity of the 2016 agreement. His argument relied solely on the existence of the 2015 agreement in terms of which ECN at would ender VOIP telephone communication services.

[75] ECN had entered into the dealer contract concluded on 22 March 2012. Of relevance were the following clauses:

'ECN granted the defendant the right to conduct the Business (as defined in clause 1.1) which included the rendering of Support Services (defined in clause 1.19), the sale of Products (defined in the clause 1.13) and the submission of Offers by prospective clients;

Clause 3.4 - Support Service shall mean the assistance, advice and/or support which the defendant must provide to any Subscriber or potential Subscriber;

Clause 1.19 - In relation to the Support Services, the defendant would assist any person requesting assistance or advice with regard to any aspect of the Services or the Products.

Clause 10.11 – The Services which the defendant would assist in is defined in clause 1.16 and means –

"The facilities provided by ECN to Subscriber as set out in the Subscriber Contract, consisting of, amongst other things, telephonic service provided by means of the connection of the equipment…"

Clause 1.16 – the defendant will at all times be an independent contractor of ECN in rendering its services in accordance with the dealer contract.'

[76] The defendant acted as sub-contractor of ECN in, inter alia, delivering services on its behalf to a subscriber, in the case being the plaintiff. Thus Mr Jonker submitted that on both the plaintiff and defendant's versions, the 2016 agreement could be disregarded as from at least 14 September 2016. This was either because the defendant accepted the plaintiff's repudiation and cancelled the 2016 agreement on 14 September 2016 or the 2016 agreement was void from inception.

[77] Thus, once the 2016 agreement is regarded as no longer legally operative, the duty to port the numbers back to Telkom was to be located in a contractual arrangement

between the plaintiff and ECN on the one hand and the contractual arrangement between ECN and defendant on the other.

[78] Mr Jonker submitted that Flandorp testified that, upon receipt of the suretyship agreement and resolution from Titus on 5 June 2016, she made the connection that they may be linked to the documents she had previously signed. However, she did nothing to correct the position. Moreover, Flandorp testified that she thought the reason for the international call dilemma was due to her signing the documents. That is why she emailed Titus on 26 July 2016 requesting a change to the rates to normal rates and reactivating the international calls. In short, her testimony was that only when the lines were cut, did she realise for the first time that the signed blank forms may be relevant.

[79] On this basis, the foundation for defendant's submission was that a delictual remedy should not be extended where the legal duty contended for arises within the matrix of obligatory relationships based on contract. In turn this submission draws its authority from *Lillicrap Wassenaar and Partners v Pilkington Brothers (SAA) (Pty) Ltd* 1985 (1) SA 475 A at 500 H – I:

> '(I)n general, contracting parties contemplated their contract should lay down the ambit of their reciprocal rights and obligations. To that end they would define, expressly or tacitly, the nature and quality of the performance required from each party. If the Aquillian action were generally available for defective performance of contractual obligations, a party's performance would presumably have to be tested not only against the definition of his duties in the contract, but also by applying the standard of the bonus

parerfamilias. How is the latter standard to be determined? Could it conceivably be higher or lower than the contractual one?'

[80] In *Bayer South Africa (Pty) Ltd v Frost* 1991 (4) SA 559 (A) at 570 Corbett CJ clarified the position as set out in *Lillicrap* as follows:

'I hold that in principle a negligent misstatement may, depending on the circumstances, give rise to a delictual claim for damages at the suit of the person to whom it was made, even though the misstatement induced such person to enter into a contract with the party who made it. The circumstances will determine the initial issues of unlawfulness and whether there is a casual connection between the making of the misstatement and the loss suffered by the plaintiff. There is no ready formula for determining unlawfulness. Each case must be decided on its own facts.'

[81] The following paragraph from the *AB Ventures Ltd v Siemens Limited* 2011 (4) SA 614 (SCA) per Nugent JA at para 21 - 22 is also instructive:

'The principle that emerged from Pilkington Brothers was that there was no call for the law to be extended when the existing law provided adequate means for the plaintiff to protect itself against loss.

By its own contractual act it took upon itself the risk of liability arising from delay and expenses that might be caused by the default or other contractors. The act of Siemens in causing delay and expense was no more than the trigger for that liability to arise. Had AB Ventures not contracted to accept that risk in the first place then it would not have suffered the loss at all. That it had no contractual nexus with Siemens means only that it was not capable of shifting the loss that it had brought upon itself to Siemens contractually but that is beside the point. We are concerned with whether it was capable

of avoiding the loss, and not whether it was capable of shifting it elsewhere, and clearly it was capable of doing so.'

[82] In summary, the basis of defendant's submission is that in terms of the 2015 agreement ECN took upon itself the risk of liability arising from delay and expenses that might be caused by the default of its contractor, the defendant, failing to render its services in terms of the dealer contract. Any act (or omission) by the defendant was no more than a trigger for that liability to arise in terms of the 2015 agreement ECN and the plaintiff. Accordingly, a contractual relationship existed between ECN and plaintiff and thus, legal policy on the basis of the authority of *Lillicrap*, did not favour an extension of the delictual claim to plaintiff. In effect, defendant contends that the 2015 was extant, notwithstanding its vigorously pursued argument that the 2016 agreement had been validly concluded.

[83] The problem with this approach is the insistence from defendant's representatives that plaintiff had been bound to the 2016 agreement which manifestly, on its version, therefore replaced the 2015 agreement. In any event, defendant was not a party to the ECN agreement and merely provided support services to ECN. It was therefore an independent contractor which clearly did not have the authority to reinstate an agreement entered into between plaintiff and ECN. Initially, defendant, by way of the evidence of Koekemoer, had testified that ECN had ceded the 2015 agreement to defendant on or about May 2015. There was however no cession and this fact finally transmogrified into a common cause fact. This concession took place after Koekemoer testified before this Court that ECN had ceded the ECN agreement to defendant in

2015. It does appear that reinstatement of the ECN agreement would have required the consent of ECN and plaintiff. Further defendant had contended that the 2015 agreement remained extant throughout the period, but only in December 2020 did defendant amend its plea to finally accept that plaintiff had repudiated the 2016 agreement.

[84] Whatever the merits of this argument, plaintiff's case was that, on 15 September 2016, defendant unilaterally suspended services to plaintiff without arranging for the reinstatement of the services to plaintiff and without arranging for the reinstatement of the services to plaintiff by ECN in terms of the ECN agreement. The defendant suspended its services on 15 September 2016. Furthermore, the ECN service could not be restored because in order to do so steps would have had to be taken to deal with the consequences of defendant's interference with the infrastructural requirements in terms of the ECN agreement; in particular, the cancellation of the SAIX line service which was only reconnected on 21 November 2016.

[85] What this reveals is that, even if the ECN agreement had been reinstated, itself a submission open to significant doubt, the infrastructure to allow that agreement to continue to be implemented was not available as from 15 September 2016 until 21 November 2016. The numbers were ported back to Telkom on 1 December 2016. That is due to defendant's conduct.

[86] In summary, this is an entirely different case from that of *Lillicrap*. It would not have been open to the plaintiff to seek contractual relief under the 2015 agreement. Its

only option was to contend that there had been unlawful conduct which had been perpetrated by the defendant. The core of the *Lillicrap* holding was that the existing law enabled the plaintiff to protect itself by way of a contractual remedy. Hence there was no need to extend the law of delict to create a remedy where a contractual one existed. For this reason, the argument that the *Lillicrap* defence applies on the basis that there is a contractual remedy available to plaintiff on the basis of the factual matrix this case stands to be dismissed.

Fault

[87] Plaintiff's case in respect of this requirement is that defendant's employees, including Koekemoer should, at least, reasonably have known that they had not procured plaintiff's consent on any reasonable basis in respect of the conclusion of the 2016 agreement and that it was void.

[88] Mr Jonker conceded that it was reasonably foreseeable that the failure to consent to the porting of the numbers would result in the plaintiff having no telephone connectivity which, in turn, would lead to harm to the plaintiff for all the reasons set out in this judgment. In his view, the only issue was whether the defendant failed to take reasonable steps to guard against such harm. According to Mr Jonker, once it became apparent to the defendant that the plaintiff had repudiated the 2016 agreement, Mr Wearing responded by way of an email on 14 September 2016 in which he wrote to Ms Stander as follows:

> 'When we resigned the contract from the dealer model onto the Service Provider model as explained by Mark, we changed the technology and last mile connections to the latest

in the interest of Tread Research. This had additional costs to it which we had to carry, hence the reason for the resign of the agreement to protect our interest.

As per your communication below, in order to revert back to the old agreement, I need to immediately suspend the service and request for the old lines to be reinstalled which will cause no voice communications for Tread Research. Please note that his can take up to 14 working days, should the old infrastructure still be on site.'

[89] That email however has to be read within the context of an email sent by Ms Stander, replying thereto, in which she said:

'Dear Rodney

Forgive me if I miss something and if that is the case then please fill me in, but should you not have obtained our approval for this increase in the cost before you implemented it, rather than requesting us in hindsight to sign for an agreement that, quite honestly, we did not agree to? When Beulah Flandorp, our Financial Administrator, was recently presented with a document to sign she clarified that this will have no negative costs implications to TREAD and received re-assurance from representative. If that document is linked to this event I am wondering why the Surety Document was not presented at the same time? Please clarify.'

[90] Reading the two emails together, Ms Stander made it clear to Mr Wearing that there was no 2016 agreement and that the only agreement which existed was the 2015 agreement. Wearing's stance on 15 September 2016 was that 'we have requested the old contract to be implemented again.' On the basis of its reliance on the 2016 agreement, the defendant adopted the attitude that it could now unilaterally

terminate/suspend its services to plaintiff without arranging for the reinstatement of a service to plaintiff as provided by ECN or in any other way.

[91] Koekemoer was confronted with an email from Melanie Steyn of ECN on 1 November 2016, the import of which he unsuccessfully sought to explain away as follows:

> 'We have received a port out request for the following number/s:
>
> 27219317299
>
> 27219317825
>
> Please advise within 2 working days if we can/cannot accept this request.
>
> Please provide a VALID rejection reason if rejected
>
> This request will be accepted should we not receive correspondence from you within the timeframe provided.'

[92] It was put to Koekemoer that:

> 'ECN itself had no objection to porting out the number, correct?
>
> MR KOEKEMOER: No, it's incorrect. That's not – they just
>
> No it's not. Incorrect. It is a general mail that they forward, it's not – it's a general mail. They all look like that.
>
> MR WALTHER: Well this looks like an email that Melanie herself has written and it's is extremely clear:
>
> …
>
> MR KOEKEMOER: It's a generic letter.

MR WALTHER: Well I am putting it to you that this letter shows that ECN itself had no objection to the porting out of the number and they were asking you as to whether you had a valid ground for rejection. Correct?

MR KOEKEMOER: Mr Walther, I am confirming again it is a generic letter where all the letters look the same.

MR WALTHER: What I am also suggesting to you is that in terms of this letter it's only the defendant that could prevent porting at this point. Correct?

MR KOEKEMOER: That's why they send the letter to us, yes.

MR WALTHER: And as we know from what you have just said the defendant did reject the port. Correct?

MR KOEKEMOER: Ja. Correct.

MR WALTHER: Now generally speaking plaintiff has a right to choose its own service provider for its telephone services. Would that be correct? Would that be a fair statement?

MR KOEKEMOER: Well in general terms there's a choice for everybody.

MR WALTHER: And I putting it to you that you precluded plaintiff from switching providers based on money owning in terms of the 2016 agreement which we say is a non-existent agreement.

MR KOEKEMOER: There was a dispute. I think it was clear dispute between us.'

[93] It is clear from this ECN email that upon receipt of plaintiff's request to port to Telkom, ECN advised defendant that it required a valid reason not to proceed with the port, failing which it would proceed in two days. ECN claimed no right to refuse to port itself on contractual or other grounds. Once plaintiff paid defendant, the port to Telkom

went ahead, the date on which the numbers were finally restored being 1 December 2016.

[94] When asked whether plaintiff has the right to choose its own service provider Koekemoer confirmed that the port was refused because of the dispute regarding payment. He did not deny that plaintiff did not have the right to port, and that defendant, having gained unlawful control of its numbers, had an obligation in common law to restore such possession to its rightful possessor.

[95] The SAIX lines were only reconnected on 21 November 2016. The reason therefore was the previous act of unlawful termination of the SAIX line without plaintiff consent.

[96] To the extent that defendant contends that it lawfully exercised a lien over the telephone lines, and therefore there was no obligation to port the lines to Telkom, this argument must be rejected for absence of legality of the 2016 agreement. Only after defendant was paid R81 567, 00, did it decide to instruct ECN to port the members back to plaintiff.

Conclusion

[97] Once it is accepted, on the probabilities, that Flandorp did not have the requisite authority to conclude the 2016 agreement on behalf of plaintiff, defendant terminated

the 2015 ECN agreement in circumstances where it had no right to do so. In the event, the infrastructure, which was required for plaintiff's telephone, was not available, namely the SAIX lines, as a result of the ECN agreement, having been unlawfully terminated without plaintiff's consent. As a result of defendant's reliance upon what turned out to be an invalid agreement, that is the 2016 agreement, Koekemoer himself testified that the SAIX lines were only reconnected on 21 November 2016.

[98] In the event that, as a result of a reliance on an agreement which had been unlawfully procured through Flandorp, who, on the probabilities did not have the requisite authority, the infrastructure which was required in order for plaintiff to have access to its telephone lines was not available from 15 September 2016 to 21 November 2016.

[99] I have found that defendant knew well that Burgess was key to the lawful conclusion of the 2016 contract. The contractual documents that I have analysed clearly provided that the person authorised to represent plaintiff was Burgess. The subscriber application described Burgess as the authorised signatory. No verification of Flandorp's authority was ever undertaken by defendant. It follows that defendant's employees did not act in the fashion of reasonable sales people placed in their situation. They could not reasonably have believed that Flandorp had the authority to conclude the 2016 agreement. Furthermore, but for the approach defendant adopted, namely that the 2016 agreement was valid, the suspension of plaintiff's telephone lines would never have occurred. Indeed, had plaintiff not obtained control of plaintiffs telephone

service and the geographically numbers allocated to it, plaintiff would not have suffered a disconnection of its telephone service

[100] Crucial to the evaluation of this dispute are the competing versions of the relevant events described by Flandorp and Titus. On the probabilities, the evidence, as I have outlined, it supports Flandorp's version. Titus, an aggressive and defensive witness under cross examination was clearly determined to conclude a sale. In this endeavour, Flandorp was a *deus ex machina* in order for him to achieve his goal and thus earn commission. He was not candid with the Court and his version thus stands to be rejected. On a clear balance of probabilities, it conflicts with the documentary evidence, the manner in which clients such as plaintiff should have been approached as set out in the evidence of Isaac and a number of concessions which were made by Koekemoer in his summary judgment papers which was never satisfactorily explained. To the contrary, Koekemoer was often defensive, vague and elusive in answering key questions.

[101] As illustrative, when confronted with the obvious question of Burgess appearing as the authorised signatory, Koekemoer was typically evasive. The following passage is illustrative:

> 'Well I'm basing it on the proposition that if the professor had been prepared to sign the resolution before your implemented the contract and before you signed it, then you would have known that Beaulah Flandorp was authorised. It is a very simple proposition.

MR KOEKEMOER: On the 25th June when we sent the paperwork through to the professor she had a decision to make there. Either the paperwork was not in place, the agreement was not in place or notify us accordingly but nobody did that until September/October.

MR WALTHER: I'm actually going to argue that you are being non responsive and that this affects your credibility Mr Koekemoer.

MR KOEKEMOER: Hundred percent.

MR WALTHER: And by the same reason I'm just going to ask the opposite question, just to place it on record and clarify. If you, before signing the 2016 agreement and implementing it, had approached Professor Burgess and she had declined to sign it, because then you would have known that there was a problem. Correct?

MR KOEKEMOER: Completely irrelevant question.'

[102] When asked by the Court about Burgess appearing as the authorised signatory Koekemoer conceded that;

> 'If we do have a resolution and surety, although it is not a necessity for us on that agreement and that is why we started on insisting on it and as the case progressed over the couple of months you would realise that there was a lot of insistence on the surety and resolution. And our verification one of the other processes was those two documents and the reason why we asked that if at some stage that happened that we knew we could fall back and we knew we had verification at that stage as well.'

[103] But there was no answer to the key point: if Burgess appeared as the authorised signatory and was being pressurised to sign the suretyship agreement, on what basis did he conclude that Flandorp was duly authorised to conclude the contract?

[104] It follows that the 2016 agreement was *void ab initio*. In addition, plaintiffs claim for the sum of R 81 567.00 paid to defendant under protest must succeed.

[105] In the circumstances the following order is made:

1. In terms of claim A:

   1.1 Defendant is liable to plaintiff for such damages as it may prove which were occasioned by disruptions of its telephonic services during 15 September 2016 and 1 December 2016 to the trial in respect of the quantum of plaintiff's claim should be postponed for later determination.

2. In terms of claim B, defendant is to pay sum of R 81 567.00 to plaintiff.
3. The defendant is ordered to pay plaintiff's costs.

_____

DAVIS J