



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 06 February 2024

Status: Immediate

The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal

Vodacom (Pty) Ltd v Makate and Another (401/2022) [2024] ZASCA 14
(06 February 2024)

Today, the Supreme Court of Appeal (SCA) dismissed an appeal from the Gauteng Division of the High Court, Pretoria (high court). The order of the high court was set aside and substituted with one determining that a decision that the applicant (respondent before this Court) is entitled to be paid 5% to 7.5% of the total revenue of the Please Call Me (PCM) product as well as the time value of money calculated at 5% for each successive year which was owed to the applicant and the capital amount or annual portion thereof. The first respondent in the high court was ordered to finalise his determination within one month of the order.

The appeal revolved around a long-time dispute between the respondent, Kenneth Makate (Makate) and Vodacom, the applicant, regarding the invention of the PCM product. On 26 April 2016, the Constitutional Court ordered that the parties enter into good faith negotiations in order to determine reasonable compensation for the invention and use of PCM. If the negotiations reached a deadlock, the second respondent before this Court, the CEO of Vodacom, was instructed to determine a reasonable amount in compensation. Ultimately, negotiations did break down and the CEO was required to perform in terms of the order of the Constitutional Court. The amount determined by the CEO was unsatisfactory, which prompted Makate to institute proceedings in the high court. The high court found in favour of Makate but the matter was remitted to the CEO to determine a fair amount.

The issue for determination by this Court was the interpretation of the Constitutional Court order, in relation to the CEO's mandate and ultimate determination. In conjunction therewith, this Court had to determine whether the high court was correct when it granted the order it did, particularly with regards to the conduct it imposed on the CEO.

This Court examined jurisprudence from South Africa as well as abroad which dealt with the determination of a valuation and confirmed that the standard of review applicable was the judgment exercise by a reasonable person. However, where the standard exercised was one that was unreasonable, irregular or one wrongly constituting an inequitable outcome, the valuation was without force and was bound to be rectified on equitable grounds. The implications hereof were that, although the determination of an expert valuer was to be binding, such valuation could be rectified if it was marred by unfairness and *mala fides*. However, before this Court, counsel for the applicant contended that the decision of the CEO was not one subject to the provisions of the Promotion of Administrative Justice Act 3 of 2000; his determination was subject to a wide discretion, informed by his experience and expertise. The courts were therefore not at liberty to prescribe or second guess the valuation made.

This Court concurred with the views expressed by the high court that the valuation of the CEO was not reasonable. However, even though the high court was correct in holding the valuation unreasonable, it should have established whether the ultimate amount of compensation arrived at was manifestly inequitable. To determine whether it was or not, counsel for the applicant accepted that the determinant percentage was 5% of the revenue generated by the applicant. The CEO, in his determination, also accepted this fact. Counsel for the applicant emphasised the various unpredictable variables which the CEO reflected upon in his determination, and that the determination is a forward looking one in terms of the law of contract based on specific performance, which Makate claimed. Having regard to this,

counsel argued that, in the absence of any attack on the CEO's honesty in the exercise of his mandate, there was no basis to challenge the CEO's determination. On the contrary, counsel strongly asserted that the amount proposed by Makate was outrageous and that the CEO was generous to go over the maximum contractual period of three years, which was the term generally applied to contracts with third parties, to grant Makate a five-year contractual period. On the other hand, counsel for Makate argued that the approach which the CEO adopted in making the determination was a superficial reconciliation, as he failed to properly identify the references which he took into account to compute the valuation. It was also argued that the CEO ignored information, which was both in his own domain and in the public domain, on the revenue the applicant raked in since 2001 to 2021, which included that generated by PCM. Makate submitted that the CEO's determination was pointedly to his detriment, and was accordingly manifestly inequitable.

This Court found that the aforementioned must be considered in the context of the duration of the agreement between Makate and the applicant. The valuation was premised on the CEO capping the duration of the contract at five years, which the CEO deemed generous. This was based on a three-year standard contract, but stretched to five years. Counsel for Makate indicated that certain service providers were contracted to the applicant well past the generous five year period but counsel for the applicant contended that this comparison is without basis as those service providers provided products that were complete and that they had added technical expertise. However, this Court found this reasoning wanting on the basis that the applicant could not explain, when making the valuation looking backward to 2001, why the applicant was still using PCM and generating revenue from it, if the contract would never have been extended past the original generous five years. This Court emphasised that it would have been an eminently un-businesslike and an unreasonable decision by the CEO not to have extended the contract it made with Makate. As such, this Court determined that the valuation was flawed and inequitable.

Furthermore, this Court considered the order of the Constitutional Court and considering the language, context and purpose of the operative order, held that reference to compensation by the Constitutional Court referred to payment from the applicant in terms of a 'special contract' outside the context of a traditional employer-employee relationship, and that this arrangement would last for the duration of the contract. It was therefore clear that the agreement envisaged compensation for the use of his invention for the duration of the contract, which the respondent contended ought to have been 18 years.

In conclusion, this court determined that although the high court was correct in finding that the CEO acted contrary to the order of the Constitutional Court, it failed to determine whether the ultimate decision was equitable and reasonable. This Court also deemed it a fruitless endeavour to remit the matter to the CEO to determine an equitable outcome as this was not what was originally sought by Makate in the high court. In the result, the order of the high court was set aside and substituted with one determining that a decision that the respondent is entitled to be paid 5% to 7.5% of the total revenue of the PCM product as well as the time value of money calculated at 5% for each successive year which was owed to the applicant and the capital amount or annual portion thereof.

In a separate dissent, the minority held that the matter ought to have been remitted to the CEO for determination as that would have given effect to the order of the Constitutional Court which determined that, in the event of a deadlock, the CEO was to determine compensation payable to Makate. The minority agreed that the determination by the CEO was unreasonable and inequitable, but only in so far as the duration of the contract was concerned. In the result, the minority would have ordered that the appeal succeeds and that the order of the high court was to be set aside and replaced with one setting aside the determination of the CEO. The matter would have been referred back to the CEO for redetermination with the directive to consider the time value of money for a period of 18 years.

~~~~ends~~~~