
SOUTH AFRICA / JUDGMENT

Makate v Joosub NO and Another (57882/19) [2020] ZAGPPHC 248 (30 June 2020) [2020] ZAGPPHC 248

COURT

North Gauteng High Court, Pretoria

BEFORE

Kollapen

CASE / FILE NUMBER

57882/19

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 57882/19

IN THE MATTER BETWEEN :-

Nkosana Makate

Applicant

AND

Shameel Joosub N.O,

First Respondent

Vodacom

Second Respondent

JUDGMENT

KOLLAPEN, J

Introduction

- [1] This is the judgment in an interlocutory application in which the applicant seeks against the first respondent an order that the first respondent supplements the record in the Rule 53 proceedings and as against both respondents that they file various documents identified in the Notice of Motion.
- [2] The first respondent has elected to abide the decision of the Court and has filed an explanatory affidavit, while the second respondent opposes the relief that is sought against it.
- [3] There is a long history of litigation between the parties as will appear from the background facts.

The litigation history and background facts

- [4] The applicant who was previously employed by the second respondent is the creator of the 'Please Call Me' concept. The idea was presented to the second respondent who showed a keen interest in developing and exploiting it and so began the commercial exploitation of the 'Please Call Me' concept. The stance of the Applicant is that the concept was the source of considerable revenue that was generated in the hands of the second respondent. The applicant, as creator of the idea sought compensation for the use of the idea in line with what he says was always his intention to exploit the idea for commercial purposes.
- [5] The applicant's claims for compensation were resisted and litigation commenced in the Gauteng Local Division, Johannesburg and culminated in proceedings before the Constitutional Court and an order issued by that Court which in part reads as follows :-

"[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 Makete and Phillip Geissler.
- (b) Vodacom is ordered to commence negotiations in good faith with Mr Kenneth Nkosana Makete 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 costs of two counsel, if applicable, and the costs of the expert, Mr Zatkovick.

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

- [6] The negotiations referred to in paragraph 3(b) of the order of the Constitutional Court did not result in agreement between the parties on the reasonable compensation to be paid to the applicant and the matter was then as contemplated in the order of the Constitutional Court referred to the first respondent for a determination.
- [7] What then followed was an extensive process before the first respondent which involved written submissions made by the parties as well as a two day oral hearing before the first respondent which took place on 4 and 5 October 2018.
- [8] On 9 January 2019 the first respondent made his determination in the matter and fixed the amount of compensation in the sum of R47 000 000.00. It is this decision of the first respondent that the applicant seeks to have reviewed and set aside in the main proceedings and the grounds of review include that the first respondent erred in confining the applicant's revenue share to a five year period and erred in relying on incorrect figures for revenue generated. In addition the Applicant contends that the proceedings before the first respondent was unfair because the second respondent failed to make available information demonstrating the revenue earned by it as a result of the Please Call Me concept.
- [9] It is clear that the revenue base that was to feature in the determination of compensation is central to some of the processes and the models of compensation considered by the first respondent. That issue continues to feature in this interlocutory dispute.

The relief sought

[10] The applicant seeks an order substantially in the following terms:-

[11] That the respondents be ordered to provide the following documents:

[11.1] The source documentation underlying the figures contained in the summery for the period of 1997 to 2000;

[11.2] Copies of the contracts which typically would be concluded with VAS service providers who would have earned 26% to 28% of revenue;

[11.3] The underlying data and financial information which served as the source for figures in Table 1. The financial information should include voice revenue relating to in-bundle minutes which monthly subscribers pay for, as well as out-of-bundle revenue for the entire period 2001-2018;

[11.4] The disclosure analyses for the provisions for Please Call Me in the 2016 and 2017 Vodacom Financial Statements, as re-performed by its Auditors as well as the sensitivity analyses performed by management and confirmed by the auditors for the Please Call Me provision

[11.5] Paragraphs 4.5 – 4.7 (pages 25-27, 39-49) from the forensic KPMG report, dated 3 November 2018.

- [12] That the 1st Respondent be ordered to supplement the Record with the documents accordingly;
- [13] The extent necessary, directing that the provisions of Rule 35 of the Uniform Rules of the Court apply to this application.

A preliminary issue of significance

- [14] Before dealing with the merits of the dispute, I deal with certain allegations made by the applicant in his founding affidavit in these proceedings. In paragraph 12 of his founding affidavit the applicant says the following:-

"I am constrained to point out that the Respondents have resorted to a range of deceitful attempts to thwart my claims during the currency of this application. This is detailed in the Review Application at pages 16-23. As is evident, and as the Constitutional Court found, this deceit extended to the former CEO denying in his biography that I was the inventor of Please Call Me."

- [15] The first respondent in his explanatory affidavit says that he is bewildered by the accusation and expressed the hope that the applicant will withdraw it especially in so far as there is no motivation or basis for the making of the accusation against him.
- [16] Counsel for the applicant placed on record during argument that the applicant unreservedly withdrew the allegation of deceitfulness made against the first respondent which withdrawal counsel for the first respondent accepted and which then disposed of the issue.

The determination of the first respondent

- [17] In order to locate the request for the documents that has culminated in this application it may be necessary to make some reference to the determination of the first respondent of 9 January 2019 and the reasoning and considerations that went into his decision. In this regard I will only deal with those parts of the determination that have relevance to the relief sought in these proceedings.

Duration and share of revenue

- [18] The first respondent used five year period as the basis for the determination of compensation while the applicant had suggested a period of 18 years. In his reasoning the first respondent says the following:-

"It seems to me that a better basis for determining duration is to look at typical time periods which would govern third party provision of services and products to Vodacom. This to me seems to a more reasonable basis to determine duration and is in line with the comparison which Makate sought to make between his position and that of a third party service provider. The typical period of 3 to 5 years would generally be used for new products which might then be subject to renewal or put out to tender to ensure a benefit of the best process and technology and so on.

Typically, a service provider (now obsolete) would have earned between 26% and 28% and would itself manage the entire relationship, including distribution and pass on a share of its revenue to its distribution partners, take the bad debt risk, manage the call centres and the relationship with the end user. The role of Vodacom would be to provide its network and services to the service provider. The customer relationship would remain with the service provider in so far as that service is concerned."

- [19] The applicant seeks to have disclosed copies of contracts where indeed those typical time periods and share of revenue are reflected and whose existence it says the first respondent must have relied upon in coming to the conclusion he did in so far as it relates to time periods and share of revenue.
- [20] The stance of the first respondent is that he did not have regard to any contracts but that he reached the conclusion that he did based on his own general and specialised knowledge gained by him throughout his employment with the second respondent and that no specific contracts formed part of the record of the material available to him nor was any referred to by him.
- [21] The second respondent takes the view that as the parties had agreed that the first respondent would bring to bear his insights and knowledge as the Vodacom CEO to the question of fixing fair remuneration, this is precisely what the first respondent did and it cannot be said that the uncovering and disclosure of any such contracts would be relevant as they did not feature in the

determination

made by the first respondent.

Revenue

determination

- [22] The parties submitted different figures in respect voice revenue and in Paragraph 6.4 of his determination the first respondent records the following:-

"I have contrasted those figures with the final information provided by Vodacom showing its voice revenue, i.e the income generated when a Vodacom mobile customer receives a call from a user on Vodacom or another fixed or mobile network. As appears from these comparisons, the percentage portion of the voice revenue that Makate attributes to PCM alone is shown in column 4.

[23] The applicant seeks the underlying data and financial information of the 2nd Respondent which served as the source for the figures used by the first respondent in compiling the table reflecting such revenue and in particular requires voice revenue data relating to in-bundle minutes as well as out of bundle revenue for the period 2001 to 2018 (the period covered by the table following paragraph 6.4.

[24] While the first respondent states that the information and/or data referred to in paragraph 6.4 was drawn directly from information

supplied by the applicant and the second respondent, the applicant persists in his request on the basis that even if the figures were supplied by the second respondent, he is entitled to the underlying data and financial information that he has requested in order to interrogate the figures supplied by the second respondent and used by the first respondent.

[25] The second respondent says that the voice revenue figures over the period in question (2001 to 2018) were extracted from the second respondent's financial systems and records and arise out of billions of call data records. They say it is impossible to provide these billions of call records as these no longer exist on the second respondents systems and that the second respondent only stores six months worth of call data records on a rolling basis.

Sensitivity analysis and disclosure analysis of the financial statements of the 2nd Respondent for 2016 and 2017

[26] The applicant says that the 2016 and 2017 Vodacom financial statements appear to have made provision for a contingent liability

of Vodacom to Mr Makate and given that the minimum materiality threshold for such disclosure was placed at R960 million by the

second respondent, it argues that the second respondent would have placed a value on this claim at least in excess of R960 million.

While in the main review the Application contends that the failure by the first respondent to consider this evidence constitutes a reviewable irregularity, in these proceedings the applicant seeks access to the underlying data, information, sensitivity analysis and disclosure analysis concerning the disclosures made in the 2016 and 2017 financial statements.

[27] The first respondent says that there is no provision for Please Call Me liability in the Vodacom financial statements submitted to him nor were there any working papers or any sensitivity analysis submitted to him or considered by him in making his determination.

[28] The second respondent says that no such documentation exists and that the applicant merely speculates that such documentation may exist, when in fact it does not.

Paragraphs 4.5 to 4.7 of the KPMG Report

- [29] A report was compiled by the auditing firm KPMG dealing with governance and other issues and is referred to as the KPMG Report. In the run up to the trial an order was made by Spilg J that the second respondent was to make further and better discovery of paragraphs 4.5 and 4.7 of the KPMG Report. That order was never given effect to for a variety of reasons one of which was that it was not ultimately relevant for the trial based on the merits of the matter.
- [30] The applicant contends however that in making his determination the first respondent should have had regard to paragraphs 4.5 and 4.7 of the KPMG Report and that to the extent that he did not, it constitutes a reviewable irregularity. In these proceedings he seeks an order calling upon the Respondents to provide copies of paragraphs 4.5 and 4.7 of the KPMG Report.
- [31] When the matter was argued before me it was impossible to consider, leaving aside the other basis for opposition raised, the relevance of those portions of the KPMG Report the applicant sought. An arrangement was made in terms of which copies of those sections of the KPMG Report were made available to the Court and Counsel for the applicant for perusal.
- [32] Following this the applicant indicated that he continued to persist with the request for copies of the relevant portion of the KPMG Report, a request the second respondent resisted on the basis that the applicant had no entitlement in law to those portions of the KPMG Report and in any event were not relevant for the issue for determination in the main application.
- [33] Further argument was then heard on this crisp issue relating to the KPMG Report. The applicant to the extent that the Report dealt with how the second respondent contracted with a WASP contends that the details of those arrangements are relevant in determining generally the manner and percentage that featured in such agreements and in particular as a basis to compare whether the model and calculation used to determine the applicants compensation can be said to be fair and proportionate if regard is had to the arrangements evidenced in the KPMG Report.
- [34] The second respondent persisted in its stance that the information contained in the relevant paragraphs of the KPMG Report are not relevant to the dispute between the parties and that in addition and to the extent that they refer to a WASP agreement, the determination of the first respondent was clearly not based on a WASP model as the latter model was fundamentally different from the PCM offering. In addition the second respondent argued that the KPMG Report was not a report produced by it and that there exist confidentiality issues in relation to the persons and entities mentioned in the Report all of which would not be adequately catered for by a confidentiality regime in the event the Court was inclined to order production of the Report.

The legal issues

[35] The applicant places reliance on the provisions of Rule 53 and Rule 35 (14) of the Uniform Rules of Court as well as, and if necessary, Section 173 of the Constitution as the legal basis for its entitlement to the documents requested.

Rule 53

[36] The stance of the second respondent is that the applicant is not entitled to review the determination of the first respondent as it does not constitute an administrative decision subject to judicial review as the first respondent acted as a private adjudicator and was not exercising a public power. The question of whether the first respondent was exercising a public power or not is not dispositive of the question.

[37] In *Jockey Club v Forbes* 1993(1) SA 649(A), the Court in dealing with the actions of a voluntary association and where the relationship between the parties was contractual expressed the view that 'rule 53 extends to decisions of domestic tribunals and does not apply only to breaches by officials of duties imposed on them by public law.'

[38] It is not in dispute that even though the first respondent was not exercising a public power, he was required to apply the principles of fairness and reasonableness and that the procedure that he put in place and followed allowed the parties the opportunity to make both written and oral submissions in appearance before him.

[39] Under these circumstances it hardly matters what designation was given to the first respondent (deadlock breaker or private

adjudicator). What matters is that he was required to exercise a power in accordance with the principles of fairness and reasonableness and in a manner consistent with the principles of natural justice. In *Forbes*, the Court in dealing with the exercise of disciplinary powers by the *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A) described these powers as follows:-

"It is common cause that the appellant, in exercising such disciplinary powers, is obliged (i) to act in accordance with its rules and constitution; (ii) to discharge its duties honestly and impartially; (iii) to afford persons charged a proper hearing, including the opportunity to adduce evidence and to contradict or correct adverse statements or allegations; (iv) to listen fairly to both sides and to observe the principles of fair play; (v) to make fair and bona fide findings on the facts; and (iv) to conduct an active investigation into the truth of allegations made against the person charged"

[40] The first respondent would have in coming to the determination that is the subject of the review also been required to act in a similar fashion that is largely underpinned by fairness, the principles of *audi alterem partem*, impartiality and indeed the process before him resembled in many ways the features of a domestic tribunal.

[41] In my view and for the reasons given the decision he arrived at as well as the proceedings before him would fall within the scope of Rule 53 and in principle I can see no reason why Rule 53 would not be applicable. Indeed if it was argued that the adjudicator did not apply the principles of fairness and reasonableness that he was obliged to do in coming to his decision, other than Rule 53, what other recourse would the applicant have in such circumstances, in particular where it is clear that the Promotion of Just

Administrative Justice Act No 3 of 2000 would not apply?

The case for production against the first respondent in terms of Rule 53

[42] Having reached the conclusion on the applicability of Rule 53, I proceed to examine whether the documents in question should have been included as part of the record and whether the first respondent should be ordered to produce them.

[43] Our Courts have adopted a broad understanding of what is to be included in a record of proceedings. In *Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (CC) , the Court said:-

"[T]he record contains all information relevant to the impugned decision or proceedings. Information is relevant if it throws light on the decision-making process and the factors that were likely at play in the mind of the decision -maker."

Endorsing the approach taken in *Johannesburg City Council v The Administrator Transvaal* (1) 1970 (2) SA 89 (T) to the effect that:-

"The words 'record of proceedings' cannot be otherwise construed, in my view, than as a loose description of the documents, evidence, arguments and other information before the tribunal relating to the matter under review, at the time of the making of the decision in question. It may be a formal record and dossier of what has happened before the tribunal, but it may also be a disjointed indication of the material that was at the tribunal's disposal. In the latter case it would, I venture to think, include every scrap of paper throwing light, however indirectly, on what the proceedings were, both procedurally and evidentially..."

[44] That being the case and leaving aside for a moment the question of the relevance of the documents sought, it is clear from the explanatory affidavit of the first respondent that he prepared the record on the basis of the documents that he had received from the parties as well as documents that he had referred to in coming to his determination. On this basis he says in relation to the documents sought that:-

- a) He did not have regard to any VAS (Value Added Service) provider contracts but relied in forming the view that he did on his knowledge and experience gained over the years.
- b) He did not see any need to seek out any other information or underlying data in relation to the financial information on voice revenue other than that provided to him.

- c) He says no information including sensitivity analysis and disclosure analysis relating to the provision for Please Call Me liability was provided or considered by him and finally
- d) He did not consider the KPMG Report and says that neither of the parties suggested that the report be disclosed to him as part of him performing his functions.

[45] Given the explanation of the first respondent one must accept that the documents sought did not feature in his determination. Whether they should have is another matter but I do not understand the scope of Rule 53 is to extend to documents that should have been considered but were not. To suggest that they were at his disposal, as the applicant has and therefore should be included as part of the record, would suggest that the first respondent would have had to exercise his powers as CEO to access those documents (if they existed) .

[46] To my understanding and while it is so that the first respondent was selected as deadlock breaker because of his extensive knowledge of the workings of Vodacom and its internal systems, he was not acting as CEO when he made his determination and those documents, to the extent that they existed were not at his disposal in that respect . In any event the very existence of some of the documents and information in question is in dispute and my view is that the record as provided is indeed the complete record in the sense and understanding contemplated by Rule 53.

[47] In Helen Suzman, the Court in dealing with the purpose and relevance of the record said the following:-

"The purpose of rule 53 is to 'facilitate and regulate applications for review'. The requirement in rule 53(1)(b) that the decision-maker file the record of decision is primarily intended to operate in favour of the applicant in review proceedings. It helps ensure that review proceedings are not launched in the dark. The record enables the applicant and the court fully and properly to assess the lawfulness of the decision making process. It allows an applicant to interrogate the decision and, if necessary, to amend its notice of motion and supplement its grounds for review.

Our courts have recognised that rule 53 plays a vital role in enabling a court to perform its constitutionally entrenched review functions:

‘Without the record a court cannot perform its constitutionally entrenched review function, with the result that a litigant’s right in terms of section 34 of the Constitution to have a justiciable dispute decided in a fair public hearing before a court with all the issues being ventilated, would be infringed.’

The filing of the full record furthers an applicant’s right of access to court by ensuring both that the court has relevant information before it and that there is equality of arms between the person challenging a decision and the decision-maker. Equality of arms requires that parties to the review proceedings must each have a reasonable opportunity of presenting their case under conditions that do not place them at the substantial disadvantage vis-à-vis their opponents..."

[48] There can be little doubt that in the context of these proceedings the record supplied by the first respondent gives effect to the rationale espoused above in the sense that it fully allows the applicant to understand, interrogate and take issue with the decision in the full knowledge of what was before the decision maker in considering and reaching the decision that he did.

[49] Thus, while I conclude that the provisions of Rule 53 would be applicable to the decision under review, the documents sought would not fall into the purview of what would constitute the record of the decision.

[51] Whether the applicant has the right to access the documents sought outside of Rule 53 is another matter which I now proceed to deal with.

Rule 35(14)

[52] Rule 35(14) provides as follows:-

"After appearance to defend has been entered, any party to any action may, for purposes of pleading, require any other party to make available for inspection within five days a clearly specified document or tape recording in his possession which is relevant to a reasonably anticipated issue in the action and to allow a copy or transcription to be made thereof."

[53] Rule 35(13) in turn provides as follows:-

"The provisions of the rule relating to discovery shall *mutatis mutandis* apply, in so far as the court may direct, to applications."

[54] The applicant relies on Rule 35 as above in seeking the documents set out in the Notice of Motion and avers that they are all relevant in the determination of the main issue in the review – whether the first respondent's determination of compensation falls to be reviewed.

[55] While Rule 35 (13) provides that the provisions of the Rule applies, in so far as the Court may direct, to applications, our Courts have cautioned that the use of the rule in applications should only be ordered in exceptional circumstances.

[56] In Erasmus, Superior Court practise Volume 2 at D1-482C the following commentary on what would constitute exceptional

circumstances is offered :-

"The notion of exceptional circumstances does not exist in a vacuum: it is to be gauged within the broader context of the values of fairness, equity, openness and transparency. The factors taken into consideration include that the claim was for a substantial amount of money, the nature of the defendant's defence, the relevance of the documentation requested, whether the application was a fishing expedition, the timing of the application, that there was a reasonable apprehension that not all documentation was before the court for the just and fair resolution of the dispute. In addition, the court will take into account the caution sounded in *The MV Urgub: Owners of the MV Urgub v Western Bulk Carriers (Australi) (Pty) Ltd* that discovery is not intended to be used as

a sniping weapon in preliminary skirmishes."

[57] Many of those factors present themselves in the main review – this is a claim for a substantial amount, the only issue in dispute is the manner and method by which the compensation was determined and generally speaking even in the absence of answering affidavits, it is clear if regard is had to the proceedings before the first respondent as well as the papers in this interlocutory application that the method of determining the compensation and the revenue base to be used are central to the dispute between the parties.

[58] The review Court will firstly have to determine if a proper case is made out for the setting aside of the determination and if so satisfied, is called upon to substitute that determination with one of its own. In that process while the record may be primarily

relevant in the first part of the relief sought, if the Court is to make its own determination of compensation then in such event the parties may well wish to have the Court consider documents that fall outside of the record provided they are relevant of course.

[59] Therefore it appears, in the context of the relief sought perfectly compatible in principle for the provisions of Rule 53 to live alongside those of Rule 35(14) and while in practise the provisions of Rule 35(14) are generally activated once all the affidavits are in, there is no bar to its use at an earlier stage of the proceedings especially where the issues in dispute can be reasonably contemplated or are clearly defined as is the case in these proceedings.

[60] Under those circumstances the prematurity argument would have little force as the issues are defined or capable of being reasonably

contemplated. Therefore it would practically be more expeditious in such circumstances to allow Rule 35(14) to be triggered early so as to avoid a multiplicity of affidavits after discovery has taken place as opposed to fitting it in to the ordinary process of filing affidavits that Rule 53 provides for. I make these observations only in the context of this application given how the disputed issues have largely crystallised. I also do so in the light of the remarks made by the Constitutional Court in the matter of PFE International And Others v Industrial Development Corporation of South Africa Ltd 2013

(1) SA 1 (CC) where the Court said:-

"[30] Since the rules are made for courts to facilitate the adjudication of cases, the superior courts enjoy the power to regulate their processes, taking into account the interests of justice. It is this power that makes every superior court the master of its own process. It enables the superior court to lay down a process to be followed in particular cases, even if that process deviates from what its rules prescribe. Consistent with that power, this court may in the interest of justice depart from its own rules.

- [31] It is the flexibility of the interpretation and application of the rules of the court that affords the applicants access to the same documents they sought under PAIA. In some cases a mechanical application of a particular rule may lead to an injustice."
- [61] For these reasons I am of the view that as a matter of principle the provisions of the Rule would find application in this matter and in relation to the second respondent. The issue in dispute is quite narrowly circumscribed, the requests for the documentation does not constitute a fishing expedition but is relevant to what may be described as a reasonably anticipated issue in the main application.

Relevance

The appropriate model to be used to determine the compensation

- [62] At the outset it warrants mention that there is no recognised model for the determination of compensation in instances such as these. The second respondent took the position that the order of the Constitutional Court makes allowance for a variety of models including specifically an employee remuneration model by reference to best international practise. The applicant on the other hand was of the view that the order of the Court required that the compensation made to him should be assessed by calculating a share of the actual revenue generated by the Please Call Me idea. That dispute on the appropriate modelling continues and the review court, should it get there, may well have regard to one or more models. To that extent the issue of relevance may well have to span across the terrain of numerous models.
- [63] The first respondent considered four models including the two models advanced by the parties but significantly observed that all the models he considered but for the employee remuneration model would have been based on a share of the revenue generated by the Please Call Me idea. To this extent the amount of the share and the revenue generated would continue to remain relevant determinants in the ultimate calculation.
- [64] What must follow is that given the absence of either an agreed or accepted model of compensation, the task of determining compensation
- that was neither 'manifestly unjust' or 'patently inequitable' would require a broad consideration of many
- factors including past practise, revenue share, the revenue base and the nature of the product and the first respondent appeared to accept the broad range of matters that fell to be considered.
- [65] I make the point to illustrate that under these circumstances the question of relevance takes on a wider and more expanded meaning given largely that the determination enters what may be described as uncharted waters. On the one hand it cannot translate into a license to seek anything and everything while on the other hand the wide nature of the task must result in a generous notion of what may be relevant. This will no doubt have an impact on the consideration of the relief sought in these proceedings.

[66] In this regard the stance of the applicant has always been that the calculation of appropriate compensation was to be a determination

based on a percentage of the revenue earned by the second respondent from the Please Call Me product. Different models were considered in this regard by the first respondent and implicit in most of them was to determine a share of the revenue generated by the Please Call Me idea. Therefore the amount of the share, the period over which such share would be calculated and the amount of the revenue on which the share would be calculated remain pivotal in that process and in the determination of the relief sought.

[67] There accordingly can be little argument that in general documents and information that go to the proper determination of the various components of the calculation of compensation would be relevant to what has been described as a reasonably anticipated issue and that our Courts have articulated the need for a generous interpretation of the rules in order to enhance access to information as well as to advance the process of litigation.

See *Nova Property Group Holdings v Cobbet* 2016 (4) SA 317 (SCA) *PFE International And Others v Industrial Development Corporation of South Africa Ltd* 2013 (1) SA 1 (CC)

[68] Having reached the above conclusion, I now proceed to deal with the relief sought in respect of each of the four categories of documents whose discovery is sought.

a) The VAS Contracts

[69] While the contracts whose disclosure are sought were not before the first respondent when he made his determination, the arrangements that would have been evidenced in such contracts would have been a significant feature of his determination both in respect of the period for which compensation would be paid as well as the percentage that would be used.

[70] That they served as a benchmark for the first respondent is beyond doubt and while he may not have looked at specific contracts in this regard, his knowledge that he relied upon must have been drawn from the arrangements the second respondent would have entered into from time to time with third parties, including instances where such arrangements were reduced to writing.

[71] Clearly they would have relevance in these proceedings from a number of perspectives including whether they properly served as a basis of comparison, and if they did were they so similar in nature that they warranted comparison and use as a benchmark, whether the period the first respondent ultimately used was in line with and consistent with that provided for in the contracts in question regard being had in particular to the nature of the product in question.

[72] I would accordingly grant the relief sought in Paragraphs 1.2 of Annexure A and in this regard Counsel for the applicant in response to a request by the Court proposed a draft order to cover Paragraphs 1.2 that would not render the relief sought unnecessarily wide ,overwhelming and ambiguous. They relate to some thirteen contracts and provide in my view a reasonably circumscribed approach.

b) Voice revenue data

[73] The first respondent as part of his overview of the various models for compensation had regard to the total Vodacom mobile voice revenue as a base and then made an assessment as to what component of that revenue could be attributed to the Please Call Me idea. Given that there are numerous variables that would have to be considered in seeking to make the connection between a Please Call Me and a subsequent call that generated revenue, the component of the Please Call Me would at best, according to the first respondent be arrived at by making an assessment as opposed to a precise mathematical calculation.

[74] The applicant seeks the underlying data and financial information which served as the source of the figures provided by the second respondent and which appear in Table 1 Column 3 of the first respondent's determination.

[75] The stance of the second respondent is that it did not place the first respondent in possession of the data and financial information

that the applicant seeks. They say that the revenue figures would have been drawn from billions of data call records arising from every single call made on the second respondents network and that it is impossible to provide those billions of call records as they no longer exists as the second respondent only stores six months worth of call data records on a rolling basis.

[76] The applicant disputes that the underlying data and financial information is not available and in this regard relies on a statement

made by Mr Teboho Motaung an erstwhile employee of Vodacom who held the position of Senior Analyst. In that statement he says that during the phase of the litigation in the Constitutional Court in 2015 he was requested by his previous supervisor at Vodacom, Ms Hannelie Patterson to investigate, identify and calculate the revenue streams from various ledgers showing sources of income related to Please Call Me and that the exercise endured for about two weeks. The applicant relies on this to resist the suggestion by the second respondent that the underlying data and financial information simply does not exist.

[77] On this score and while it may be so that the raw data that relates to the millions of individual calls would no longer exists, it must however also be reasonable to expect that if the second respondent provided the first respondent with its voice revenue income as reflected in Table 1 of the first respondent's determination, those figures would have had to be sourced from some source even if not necessarily in all the billions of voice calls data. In addition the statement of Mr Motaung (mindful that it is not under oath and therefore has limited value) may be suggestive that a process of analysis is possible to disaggregate the

revenue income.

[78] This issue will no doubt feature significantly in the main review and while my view is that it would be unreasonable to require of the second respondent to produce the records of billions of voice calls over a long period of time (under circumstances where the second respondent says they do not exist). On the other hand and on the reasonable assumption that the figures provided would have been sourced from some underlying data, it would not be unreasonable to require of the second respondent to produce the source data or documents that served to inform the revenue figures provided to the second respondent and which appear in Table 1 of his

determination.

c) The underlying data, information and sensitivity and disclosure analysis of the 2016 and 2017 Vodacom financial statements

[79] While the financial statements of the second respondent makes mention of the order of the Constitutional Court and raises a balance sheet note that is not quantified, the applicant persists in seeking what he describes as the underlying data and sensitivity analysis in respect of what he describes as a contingent liability.

[80] The second respondent denies the existence of such data or disclosure or sensitivity analysis and in any event disputes any entitlement on the part of the applicant to such data even if it existed.

[81] A contingent liability is understood to be liability or a potential loss that may occur in the future depending on the outcome of some future event. Following the order of the Constitutional Court, it was clear that the second respondent was entitled to raise a note in their financial statements to this effect. The quantification of what such liability however, would not have been known then. In addition I am not aware that the second respondent own quantification of this liability (if it did exist) would also be relevant. Ultimately the amount of that liability lay outside of the control of the second respondent. It would have been determined either by the negotiations and, failing that the determination by the first respondent and then in the event of the review succeeding by the Court or another entity appointed by it.

[82] To that extent the number of variables in fixing the amount of that future liability would have simply meant that any analysis, if so made, would have been speculative and therefore to seek to use that in arguing that it may have represented the second respondent's own views on its liability would strictly not be accurate. It is after all not the second respondent's views at the time as to what the liability may have been but rather whether it was possible to provide an accurate estimate of what the revenue outflow for the second respondent would have been. Given that there was not even agreement between the parties as to the model to be used in determining the amount of compensation, it would have been an impossible task to have sought to provide an estimate of the compensation that would ultimately have been

paid. Therefore reflecting it as balance sheet note appears to have been the correct approach in that it was beyond estimation.

[83] The fact that there was a materiality threshold would not change the position or somehow suggest that the amount in mind may have reached such a threshold. The disclosure in the financial statements may not generally speaking only be justified by a quantitative threshold but may also be justified by a qualitative threshold. Therefore the materiality argument offers little value and cannot be dispositive of the matter.

[84] I therefore see no need to make a determination as to whether that data exists or not as I take the view that even if it does exist, it is not relevant in the determination of any issue in the main review for the reasons I have advanced.

[85] Accordingly the relief sought under this paragraph must be refused.

d) The KPMG Report

[86] Mindful of the confidentiality issues that relate to the Report and the circumstances under which the extracts that the applicant sought disclosure of were introduced into these proceedings, I will deal with this aspect of the matter in terms that seek to protect the confidentiality of the KPMG Report.

[87] The relevant portion of the KPMG Report deals with the relationship between the second respondent and one service provider and traverses a number of issues including governance, the model for sharing revenue and generally the relationship between the second respondent and the service provider in question.

[88] The applicant says that given that the review is about the relationship between the second respondent and those that provide or supplement its services the Report is relevant and should be disclosed to the extent that it enables a better understanding of how the second respondent structures its relationship between service providers and others. It says that the particular features of the agreement between the second respondent and the service provider in relation to the specific product involved will provide a basis by which one can determine whether the compensation determined by the first respondent was not 'manifestly unjust' nor 'patently inequitable'.

[89] The second respondent, beyond contending that there is any legal basis to warrant disclosure, also resists disclosure on the basis that the KPMG Report is not relevant and that to the extent that it deals with a WASP agreement, the first respondent's determination did not follow the model of a WASP Agreement but that akin to a VAS service provider. I am not sure if this distinction can be

dispositive of the relevance argument. It may well be that regard may well be had to VAS Agreements as well as WASP agreements in determining what the most appropriate model of computing compensation should be.

[90] Given that this matter is ultimately about the construction of a particular and fact suited model to determine compensation in the absence of any guiding precedent, comparisons while not binding have value in assessing how the second respondent approached its relationship with service providers in general as well as in particular instances regard being had to the product and the nature

of the service and benefit it received. I have already indicated that the question of relevance may well assume a wider remit in these proceedings given the somewhat unique nature of the facts and to that extent I take the view that the Report to the extent that it helps to understand how the second respondent approaches and structures its relationships with those who provide services remain relevant and I intend to grant the relief under this head subject to a suitable confidentiality regime.

Costs

[91] The question of costs always remains in the discretion of the Court which discretion must of course be judicially exercised. The applicant achieved substantial success and there is no reason why the ordinary rule that costs should follow the result should be departed from.

Order

[92] I have already indicated why no relief should be granted against the first respondent. The relief that I intend granting is competent as against the second respondent in terms of the provisions of Rule 35 (14).

[92] In the result I make the following the following order:-

1 The Second Respondent be ordered to provide the Applicant's attorneys within 21 days of this order the following documents:-

Copies of the following contracts:

1.1.1 VAS contracts signed with Cointell VAS (Pty) Ltd

(a) Simtransact

(b) Vodacom Paypoint

(c) Messaging Services (Bulk Messaging)

(d) Prepaid Recharge or Dealer autocharge

(e) Vodago (Prepaid) – Autocharge. Auto recharge (Currently Instant Top-up)

(f) Sigi (Prepaid Public Phones) – Autocharge

1.1.2 Smart Call

1.1.3 Cell-Find

1.1.4 Diloran

1.1.5 Sure Group

1.1.6 Going Up (100 Cars 100 days)

1.1.7 Gateway

1.1.8 Look4me

1.1.9 Look4Help

1.1.10 iBurst

1.1.11 Netcare 082911

1.1.12 Centriq Insurance

1.1.13 Mobile trip Sheet

1.2 All the available underlying data and financial information which served as the source for figures in Table 1 and which were provided by the second respondent to the first respondent for the entire period of 2001 – 2018;

1.3 Paragraph 4.5 (pages 25 – 37) from the forensic KPMG Report, dated 3 November 2008, provided that this item shall be subject to the following confidentiality regime:

1.3.1 This item shall be filed in a separate confidential Rule 53 record which shall only be disclosed to applicant's attorneys and counsel and not to the applicant or any third party; and

1.3.2 In the review proceedings, this item shall be dealt with by means of separate confidential supplementary, answering and replying affidavits which shall only be disclosed to applicant's attorneys and counsel and not to the applicant or any third party.

2 That the costs of this application be paid by the second respondent, including the costs of two counsel.

NJ. KOLLAPEN

JUDGE OF THE HIGH COURT, PRETORIA

APPEARANCES

DATE OF HEARING

: 4 JUNE 2020

DATE OF JUDGMENT

:

APPLICANT

: Adv Puckrin SC

Adv S Budlender SC

1ST RESPONDENTS COUNSEL

:

2ND RESPONDENTS COUNSEL

: Adv RA Solomon SC

Adv A MacManus

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