

SOUTH AFRICA / JUDGMENT

National Consumer Commission v Vodacom (Pty) Ltd (NCT/260497/2023/73(2)(b)) [2023] ZANCT 44 (13 October 2023)

[2023] ZANCT 44

COURT

National Consumer Tribunal

BEFORE

S Hockey, M Peenze, A Potwana

CASE / FILE NUMBER

NCT/260497/2023/73(2)(b)

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IN

THE NATIONAL CONSUMER TRIBUNAL HELD IN CENTURION

Case

number: NCT/260497/2023/73(2)(b)

In

the matter between:

NATIONAL
CONSUMER COMMISSION
APPLICANT
And
VODACOM
(PTY) LTD
RESPONDENT

Coram: Mr
S Hockey
- Presiding
Tribunal Member
Dr
M Peenze
- Tribunal
Member
Dr
A Potwana
- Tribunal Member
Date
of Hearing -
5 July 2023
Date
of Judgment -
13 October 2023

JUDGMENT

AND REASONS

INTRODUCTION

1. The applicant in this matter is the National Consumer Commission (the NCC), duly established as an organ of state and a juristic person in terms of section 85 of the Consumer Protection Act, 2008 (the CPA).
2. The respondent is Vodacom (Pty) Ltd (Vodacom), a company duly incorporated in terms of the company laws of the Republic of South Africa and a service provider as defined in section 1 of the CPA.
3. This is an application that the NCC referred to the National Consumer Tribunal (the Tribunal) in terms of section 73(2)(b) of the CPA. This section allows the NCC to refer a matter to the Tribunal after an investigation into a complaint received by it if the NCC believes that a person against whom the complaint was lodged engaged in prohibited conduct under the CPA.
4. Any further reference to a section in this judgment shall be a reference to a section of the CPA, and a reference to a rule shall be a reference to the rules of the Tribunal[1]. A reference to a regulation refers to the regulations in the National Credit Regulations, 2006[2] (the regulations).

BACKGROUND

5. According to the NCC, it received various complaints of different kinds against Vodacom for several years. It accordingly decided to investigate a sample of 21 of these complaints received during the 2020/2021 and 2021/2022 financial years.
6. The NCC formed a reasonable suspicion that Vodacom had contravened various provisions of the CPA and its regulations and accordingly directed its inspectors to investigate possible contraventions of the provisions of the CPA and the regulations promulgated under it.
7. The investigation report signed on 18 November 2022 revealed alleged contraventions of 19 of the 21 complaints investigated. As some of the complainants did not grant consent to the NCC for the service of documents by way of email, the present application was only served on 11 complainants, and the NCC proceeded with only those complaints on whom the application was served, i.e. in respect of those complainants who did so consent. The complaints that are to be considered by the Tribunal are in relation to the following consumers, namely Sinethemba Juta, Dudley Sharples, Lara McGillewie, Sashmir Vinodh Mahabeer, Teresa Bhengu, Adhir Sookraj, Nokuthula Majikijela, Honey Xivuri, Fulufhelo Nemaitoni, Nkokone Tema and Armin Spammer. The Tribunal will refer to these consumers by their surnames only, no disrespect intended.
8. It is apt to mention that Vodacom is a well-known enterprise that does business as a cellular phone and internet service provider. It provides these services to millions of South African consumers who are either prepaid customers or have entered into fixed-term contracts with Vodacom.
9. The nature of the complaints against Vodacom essentially relates to a cancellation penalty of 75%, which Vodacom previously charged customers upon prematurely cancelling the fixed-term contracts. There are also other complaints which will be dealt with in this judgment. In some instances, the complaints relate to a delay in the timeous cancellation of the contracts upon request by customers, resulting in the customers being charged for periods after having requested the cancellation of their contracts.
10. As a result of the allegations against Vodacom, the NCC seeks a declaratory order that Vodacom contravened various sections of the CPA and its regulations and that such contraventions be declared prohibited conduct. The sections and regulations are:
 - 10.1. Section 14(3)(b)(i), read with Regulation 5(2) and (3);
 - 10.2. Section 14(2)(c);
 - 10.3. Section 14(2)(b)(i)(bb);
 - 10.4. Section 14(2)(b) and (3);
 - 10.5. Section 14(2)(b)(i);

10.6. Section 40(1)(b) and(d);

10.7. Section 40(1)(c), read with Section 3(1)(c) and (d);

10.8. Section 40(1)(c);

10.9. Section 29(b)(i), (ii) & (v), read with Section 41(3);

10.10. Section 29(a), read with Section 41(3)(f); and

10.11. Section 26(3)(e) and (f).

11. Furthermore, the applicant asks that Vodacom be interdicted from engaging in conduct as detailed above; that Vodacom be directed to refund the complainants the monies paid by them arising from the imposition of the 75% cancellation penalty as well as all monies

improperly charged and paid by the complainant's as set out in the investigation report; that Vodacom be directed to remove the adverse listing of the complainants from all credit bureaus; and that an administrative penalty be imposed on Vodacom equivalent to 10% of Vodacom's annual turnover, but not less than R20 000 000,00.

POINTS IN LIMINE

12. Vodacom raises three preliminary defences as part of its opposition to this matter. As background to the first of the three preliminary defences, Vodacom states that the present matter is a sequel to a matter which the Tribunal decided on 26 February 2022. That matter is referred to as Vodacom 1. Vodacom alleges that Vodacom 1 was dismissed for three separate reasons, two of which remain present and constitute fatal flaws to the present application. They are, firstly, that the investigation was completed only after the authorisation of the investigator had lapsed, which renders the investigation invalid, and secondly, that there has been an unreasonable delay on the part of the NCC. The third preliminary defence raised by Vodacom relates to the service of this application on the various complainants.

13. The Tribunal will deal with each of the three preliminary defences below.

The authorisation

14. Vodacom correctly contends that both the rule of law and administered law require that the exercise of power must be authorised by law. Any action performed by an NCC delegate without lawful authority is beyond the NCC's powers and is, therefore, unlawful. Vodacom points out that the investigation directive by the acting commissioner of the NCC authorised the investigators "to perform such functions and exercise such powers as assigned to or conferred upon an inspector by the [CPA]."[3] This directive was dated 4 May 2022 and was valid for three months, until 3 August 2022.

15. The investigation report is dated 18 November 2022, and Vodacom alleges that it was concluded outside the period of authorisation and is, therefore, unlawful.

16. It must be noted that section 88(1) empowers the commission to appoint a suitable person as an inspector and to issue its inspectors so appointed with a certificate in the prescribed form stating that the person has been appointed. In terms of section 88(2), an inspector must be in possession of a certificate of appointment when performing any functions in terms of the CPA. An inspector's function to conduct an investigation is provided for in section 72(1)(d). The NCC, upon initiating or receiving a complaint, may direct the inspector to investigate the complaint as quickly as practicable.
17. Counsel for Vodacom argues that the investigator's function begins with the appointment and ends when the investigator has discharged this function. The argument goes further to state that the function cannot be said to be complete until a final investigation report has been issued. This argument implies that the investigation is not merely gathering evidence but also involves the analysis of that evidence. In this regard, reference is made to regulation 35(5)(b), which provides that the NCC must "upon completion of its investigation in writing inform the complainant of the outcome thereof...".
18. The NCC argues that the investigation was completed on 25 July 2022 when the investigators, following engagements with Vodacom, sent emails to the complainants enquiring if the various responses received from Vodacom were correct. Since then, no further investigation has been conducted.
19. The NCC further states that after completing the investigation on 25 July 2022, the investigators submitted their report and recommended that the matter be referred to the legal services division for consideration of enforcement action. No further investigation was conducted between 25 July 2022 and the signing of the affidavit by the inspectors. The NCC points out that there is no end date to the certificate in terms of section 88(1)(b) and that the inspectors empowered by that section can continue to perform their functions as an inspector and an employee of the NCC, which includes report writing.
20. The Tribunal has no doubt that the empowering provision for the inspectors to investigate is section 72(1)(d), in terms of which the NCC may direct an inspector to investigate a complaint. The purpose of such investigation is not to make any determination but to gather information to enable the NCC to comply with its objectives in terms of the CPA.
21. According to the Oxford Dictionary,[4] "investigation" as a verb means to "search or inquire into; examine (a matter) systematically or in detail". Bearing in mind that in terms of section 72(1)(d), the NCC authorised the inspectors only to investigate and nothing more, the writing up of the investigation report is not limited to the timeframe stipulated in the investigation directive.

22. In the recent matter of Prudential Authority of the South African Reserve Bank v Msiza and Another⁵, the court dealt with a similar empowering provision in the Financial Sector Regulation Act, 9 of 2017, which provides for the appointment of an investigator for purposes of “carrying out an investigation”. Van Niekerk AJ, writing for the majority, held that the “purpose of such [an] investigation is not to make a determination, but to gather information to enable [the] Appellant to comply with its objects in terms of the Act.”
23. In the Tribunal’s view, the inspectors did precisely what they were empowered to do in terms of the investigation directive, i.e. to gather and record evidence in respect of activities of Vodacom, and did so within the prescribed three-month period. The first point in limine should, therefore, fail.

The unreasonable delay

24. Vodacom contends that the NCC, as an organ of state within the public administration and with the duty to make administrative decisions within a reasonable time, has delayed unreasonably in instituting these proceedings. Reference is made to regulation 35(3), which states that upon initiating or receiving a complaint, the NCC must direct an inspector to investigate the complaint as quickly as possible. Counsel for Vodacom further referred the Tribunal to section 85(2)(c), which requires the NCC to exercise its functions in the most cost-effective and efficient manner and in accordance with the values and principles mentioned in section 195 of the Constitution. Section 195 of the Constitution, in turn, requires public bodies such as the NCC to be accountable, efficient, and effective and foster transparency by providing the public with timely information.
25. Vodacom further relies on Vodacom 1, where the consumers brought the alleged prohibited practice to the NCC’s attention in 2014. The NCC delayed between 2 to 4 years to appoint an investigator to investigate complaints relating to the 75% cancellation fees practice by Vodacom. It was held that the NCC failed to convince the Tribunal that the administrative overload was a substantive reason for the delay in finalising the investigation of the complaints. In Vodacom 1, the Tribunal held that such a lengthy delay was prejudicial to Vodacom and detrimental to those consumers who may be affected by the alleged prohibited practice.
26. The NCC denies that there has been an unreasonable delay in the present matter. It argues that the investigation was authorised on 4 May 2022, and enforcement action commenced on 19 December 2022.
27. In Vodacom 1, the Tribunal found an unreasonable delay in appointing an investigator to investigate the consumer complaints brought to the attention of the NCC in 2014. Even though the nature of the complaint in the present matter is similar to those dealt with in Vodacom 1, they are different complaints. The complaints relating to the present matter are complaints that arose from 2021. The investigation relating to these complaints was initiated in May 2022. The delay is not as pronounced as the delay in Vodacom 1.

28. Just because the Tribunal dismissed the NCC's application in Vodacom 1 for reasons of an unreasonable delay does not mean that similar alleged transgressions should not be referred to and adjudicated by the Tribunal.
29. The Tribunal is of the view that the delay from the time that the complaints in the present matter were brought to the attention of the NCC until the time that the NCC initiated an investigation is not so excessive as to dismiss this application on this basis. The second point in limine should, therefore, fail.

The issue of non-service.

30. As stated above, the NCC initially investigated 21 complaints against Vodacom and concluded that there were transgressions of the CPA in 19 of them. Of the 19 complainants, eight did not grant consent to service by way of email, and consequently, the present application was not served on them. As a result, the NCC elected to proceed in respect of only those cases where the complainants were served with this application by way of email by consent.
31. Vodacom complains that the NCC did not make consequential adjustments to its founding affidavit, which deals with all 19 complaints and invites the Tribunal to draw conclusions against Vodacom on all complaints. In short, Vodacom avers that the non-service on some complainants invalidates the whole application.
32. During the hearing of the matter, the NCC made it clear that it only wants the Tribunal to consider the 11 complaints in respect of which the complainants were served with the application. No order is sought in respect of those complaints where no service was effected on the complainants.
33. The Tribunal agrees with the contention of the NCC that Vodacom is suffering no prejudice in the circumstances. Generally, in motion proceedings, it is not unusual for a party to abandon part of its case before or during a hearing. Parties often ask the court to ignore certain aspects of its original case and concentrate only on those aspects that it persists with.
34. In the Tribunal's view, it would be contrary to the purpose of the NCA to dismiss this application on the basis that not all the complainants were served with the papers as required by the rules or that the founding papers deal with complaints that are not properly before the Tribunal. The third point in limine should, therefore, fail.

FURTHER DEFENCES RAISED BY VODACOM

35. In respect of various contraventions that the NCC alleges Vodacom committed, Vodacom argues that such alleged contraventions did not form part of any complaints made to the NCC or that it did not have the opportunity to respond thereto during the investigation. For these reasons, Vodacom argues that the referral of such complaints to the Tribunal is not lawful and is, therefore, not properly before the Tribunal.

36. The law relating to complaints and referral to the Tribunal is very similar to that in competition law. The SCA considered these issues in *Competition Commission v Yara (SA) Ltd and Others*[5] (Yara). The main issue for determination in Yara was whether a particular complaint referral to the Competition Tribunal and an amendment to that referral complied with the requirements of the Competition Act, 1988 (the Competition Act). Just as in the case of the CPA, the Competition Act provides two ways in which complaints against alleged prohibited practices can start, i.e. by the Competition Commission or by a private person. In Yara, the SCA held:

“Taken literally ‘initiating a complaint’ appears to be an awkward concept. The Commission does not really ‘initiate’ or start a complaint. What it does is to start a process by directing an investigation, which process may lead to the referral of that complaint to the Tribunal. And it can clearly do so on the basis of information submitted by an informant, like Mrs Malherbe in the Glaxo case; or because of what it gathers from media reports; or because of what it discovers during the course of an investigation into a different complaint and/or against a different respondent.” [6]

37. Further, in its judgment in Yara, the SCA confirmed that there can be no investigation in terms of the Competition Act without a complaint submitted by a complainant or initiated by the Competition Commission against an alleged prohibited practice⁸. It was held that:

“the purpose of the initiating complaint is to trigger an investigation which might eventually lead to a referral. It is merely the preliminary step of a process that does not affect the respondent’s rights. Conversely stated, the purpose of an initiating complaint, and the investigation that follows upon it, is not to offer the suspect firm an opportunity to put its case. The Commission is not even required to give notice of the complaint and of its investigation to the suspect. Least of all is the Commission required to engage with the suspect on the question whether its suspicions are justified. The principles of administrative justice are observed in the referral and the hearing before the Tribunal. That is when the suspect firm becomes entitled to put its side of the case.”

38. In the context of the present matter, what the investigation revealed is not binding but merely prima facie findings that were subject to challenge in the present proceedings in front of the Tribunal. The fact that Vodacom was not given an opportunity to respond to some of the conclusions reached in the investigation report does not render the process unfair. This is no basis for the alleged contraventions to be dismissed.
39. Similarly, neither the NCC nor the Tribunal can ignore alleged transgressions that were revealed during the investigation on the basis that such alleged transgressions were not part of the complaints made by the various consumers against Vodacom. Vodacom is not entitled to a dismissal of such alleged contraventions on the basis that they were not part of a complaint.

THE MERITS

40. In its heads of argument, Vodacom categorises the NCC's complaints against it in two broad categories, which it refers to as "the Cancellation Penalty Complaint" and "the Cancellation Processing Complaint", respectively. For the sake of convenience, the Tribunal will deal with the complaints in these broad categories in turn. Further complaints that may not generally fall into these two categories will also be dealt with below.

The Cancellation Penalty Complaint

41. Section 14 provides for the expiry and renewal of fixed-term agreements. The scheme in this section grants a consumer the right to cancel a fixed-term contract without penalty or charge upon its expiry or at any other time by giving the supplier 20 business days' notice. These provisions are subject to subsections (3)(a) and (b). In the latter instance, the supplier may impose a reasonable cancellation penalty, with respect to any goods supplied, services provided, or discounts granted, to the consumer in contemplation of the agreement enduring for its intended to fixedterm, as provided for in section 14(3)(b)9.
42. Vodacom argues that the cancellation policy imposed on SIM-only contracts (SIMO) is reasonable, fair, and proportionate to customers'

benefits. In arguing so, Vodacom details the costs involved in providing the service to consumers. It also refers to regulation

5(2)10, which the Minister has promulgated as empowered by section

9 The relevant parts of section 14 for present purposes read:

- (2) If a consumer agreement is for a fixed term—
- (a) that term must not exceed the maximum period, if any, prescribed in terms of subsection
- (4) with respect to that category of consumer agreement;
- (b) despite any provision of the consumer agreement to the contrary—
- (i) the consumer may cancel that agreement—
- (aa) upon the expiry of its fixed term, without penalty or charge, but subject to subsection (3)(a);
- or
- (bb) at any other time, by giving the supplier 20 business days' notice in writing or other recorded manner and form, subject to subsection (3)(a) and (b);
- ...
- (3) Upon cancellation of a consumer agreement as contemplated in subsection (1)(b)—
- (a) the consumer remains liable to the supplier for any amounts owed to the supplier in terms of that agreement up to the date of cancellation; and
- (b) the supplier—

(i) may impose a reasonable cancellation penalty with respect to any goods supplied, services provided, or discounts granted, to the consumer in contemplation of the agreement enduring for its intended fixed term, if any; and

(ii) must credit the consumer with any amount that remains the property of the consumer as of the date of cancellation, as prescribed in terms of subsection (4).

10 The regulation provides:

(2) For purposes of section 14(3), a reasonable credit or charge as contemplated in section

14(4)(c) may not exceed a reasonable amount, taking into account-

(a) the amount which the consumer is still liable for to the supplier up to the date of cancellation;

(b) the value of the transaction up to cancellation;

14(4)(c). Regulation 5(2) sets out ten criteria by which to determine a reasonable cancellation penalty. Vodacom's case is that the NCC did not demonstrate that the cancellation penalty exceeded a reasonable amount, taking into account the ten factors in regulation 5(2).

43. Importantly, regulation 5(3) provides that notwithstanding regulation 5(2), a supplier may not charge a charge which would have the effect of negating the consumer's right to cancel a fixed-term consumer agreement.

44. Vodacom submits that the cancellation fee was, in part, a mechanism to recover substantially discounted rates and additional benefits that SIMO contact users enjoyed in comparison with prepaid customers, i.e. customers who choose to access mobile services on a prepaid basis as opposed to those customers who access the service on a contract basis. It is contended that SIMO contracts occasion certain costs to Vodacom that are not incurred if the same services are accessed on a pre-paid basis.

45. Vodacom further contends that SIMO customers enjoy significantly reduced tariff prices for the airtime that Vodacom subsidises in exchange for the guaranteed period that the customer will remain subscribed. It is further argued that when the customer elects to terminate the contract prematurely, Vodacom needs to recover the discount or value add a customer enjoyed on their reduced tariff for airtime. Vodacom estimates that the overall weighted percentage discount SIMO customers enjoy, compared to prepaid customers, is 61%, including VAT.

(c) the value of the goods which will remain in the possession of the consumer after cancellation;

(d) the value of the goods that are returned to the supplier;

(e) the duration of the consumer agreement as initially agreed;

- (f) losses suffered or benefits accrued by consumer as a result of the consumer entering into the consumer agreement;
- (g) the nature of the goods or services that were reserved or booked;
- (h) the length of notice of cancellation provided by the consumer;
- (i) the reasonable potential for the service provider, acting diligently, to find an alternative consumer between the time of receiving the cancellation notice and the time of the cancelled reservation; and
- (j) the general practice of the relevant industry.

46. Vodacom submits that there are direct costs involved in SIMO contracts, such as upfront commission paid to partners (such as

franchisees) when contracts are opened, and that such commission is effectively a lost investment when contracts are prematurely

cancelled. Other costs involved are staffing and systems costs, for example, costs associated with the credit rating of contract

customers; costs associated with a customer acquisition division and Vodacom's head office where staff are employed to manage the vetting and manual referral processes; the monthly accounting costs; and contract services necessitating debt collection costs in respect of outsourced collection agencies.

47. During a discussion with counsel for Vodacom during the hearing, it was confirmed that the discount alleged to be applied to SIMO contracts is relative to prepaid contracts. Counsel conceded that prepaid contracts are inflated to encourage or incentivise customers to enter into fixed-term contracts. The Tribunal is of the view that the alleged discount on this basis is erroneously calculated. There cannot be any doubt that there are costs associated with attracting prepaid customers that have not been dealt with. Some of the costs alleged to be specific to SIMO contracts may well apply to prepaid customers as well.

48. The issue of the "discount granted" provided for in section 14(3)(b)(i) is discussed in an advisory note issued by the Consumer Goods and Service Ombud[7] (the advisory note) and was described to mean that "if any discount was provided on goods or services thanks to the length of the contract, there can be a recalculation based on what the consumer would have paid had a shorter period been agreed upon initially". The problem with the way that Vodacom applies the discount, is that it applies upon a "one-size-fits-all" basis, irrespective

of the length of time that the contracts have run and the juncture at which they were cancelled. Vodacom also fails to take into account the factors that are set out in regulation 5(2).

49. The Tribunal agrees with what is stated in the advisory note that the reasonable cancellation penalty does not refer to loss of future profits. If the legislature intended to entitle the supplier to future profits, it would have been easy to use such words as “service yet to be provided/which would have been provided in the future” or “future access to services”, as suggested in the advisory note. The Tribunal is not implying that counsel for Vodacom argued that future profit is a consideration.
50. One of the justifications for the cancellation penalty proffered by Vodacom is the infrastructure costs, which Vodacom avers is a set of costs for contract customers. Vodacom submits that it makes significant network investments, which are capital intensive, to accommodate contract customers for the duration of the contracts. However, the same network with its associated cost is used for prepaid customers and is not specific to SIMO contracts.
51. Despite the supposed commercial rationale put up by Vodacom for the 75% cancellation fee, it is noted that as of 1 October 2022, Vodacom amended its cancellation penalty of its own accord. As of that date, SIMO customers who wish to cancel their contracts are required to give one calendar month’s notice as per the amended terms of conditions, which read:
- “... in respect of the cancellation charges which Vodacom will charge where there is no Apparatus linked to the contract and the contract relates to a Sim card only package, then Vodacom will charge a cancellation charge equivalent to one month of the monthly subscription fee. Notice under these circumstances can be given that any month during the contract period by the one-month notice period will be calculated from the last day of the month that notice was given...”*
52. The amendment referred to above may have been effected before the investigation of the current matter began. This does not negate a finding that Vodacom may have contravened provisions of section 14 relating to the negation of a consumer’s right to cancel a contract.
53. The Tribunal finds that a 75% cancellation fee is not justifiable in the circumstances and negates the consumers’ right to cancel their fixed-term contracts. Accordingly, the Tribunal finds that Vodacom had contravened section 14(3)(b)(i), read with regulation 5(2) and (3) in respect of the following consumers:
- 53.1. Juta wanted to cancel his contract with Vodacom, who refused a cancellation and insisted on payment of a cancellation fee of 75% before the contract could be cancelled. Effectively, the high (75%) cancellation fee and the insistence on payment before cancellation negated Juta’s right to cancel the contract in terms of section 14(2)(b)(bb).
- 53.2. When Sharples sought to cancel his two contracts with Vodacom, he was charged a cancellation penalty of 75%. Vodacom refused to cancel the contracts if they were in arrears and/or if the consumer could not afford the cancellation penalty. Included in the two contracts were two devices which, in the Tribunal’s view, were correctly considered as “goods supplied” to Sharples. The cancellation quote included what was owed on these devices, but a portion of the cost related to other services in respect of which, in the Tribunal’s view, a cancellation penalty of

75% was unreasonable and therefore unlawful.

53.3. Spammer relocated to Germany and cancelled his contracts with Vodacom, which included devices. He was charged a fixed cancellation penalty of 75% on the balance of the contract. His cancellation quote of R41 382.39 included R13 159.98 for the devices, and the balance was in respect of the premature cancellation of the service part of the contract, which the Tribunal finds is unreasonable and therefore unlawful.

53.4. It is noted that the NCC also persists with a contravention by Vodacom of section 14(3)(b)(i) read with regulation 5(2) and (3) in respect of the cancellation of the contract of Sookraj. It appears, however, that due to a systems glitch, Vodacom sent him a quote with a zero-cancellation penalty. Sookraj was afterward submitted with a

new cancellation quote, but Vodacom eventually settled the matter by honouring the nil-value cancellation quote. The Tribunal, therefore, finds no contravention of section 14(3)(b)(i) read with regulations 5(2) and (3) in respect of Sookraj.

The Cancellation Processing Complaint

54. The NCC complains that Vodacom contravened section 14(2)(b)(i)(bb) by not timeously processing cancellation requests and by billing customers after the point in time when their contracts had to be cancelled in terms of their requests. In terms of section 14(2)(b)(i)(bb), a consumer may cancel a fixed-term contract in operation by giving 20 days' notice. Initially, eight complaints in this regard had been raised, but in its replying affidavit, the NCC asks for relief only in respect of three of the complaints, namely those of Bhengu, Majikijela, and Tema.
55. Vodacom does not deny that the cancellation requests for the three customers were not timeously processed and explains that the root cause of the issue lay with the third-party call centre agents to whom Vodacom outsourced its cancellation function. Vodacom states that it discovered that individual call centre agents deliberately did not process cancellation requests timeously to earn incentives from Vodacom. The NCC, however, avers that to the extent that the call centre agents may have contravened the CPA, Vodacom is liable for such contraventions and actions of its call centre agents as provided for in section 113[8].
56. Counsel for Vodacom argues that the NCC misapplied section 113. It is argued that the section only arises for acts or omissions in the course of employment. Counsel further argues that our law recognises that there must be a sufficiently close connection between the employment relationship and the harm caused. In this regard, the Tribunal is referred to *Stallion Security (Pty) Ltd v Van Staden* 2020 (1) SA 64 (SCA), where the Supreme Court of Appeal discussed international case law and the common law principle of vicarious liability as applicable in our law. It was concluded[9]:

“These judgments show that it is now firmly established in Canada and the United Kingdom that the creation of a risk that eventuated, is an important consideration in determining vicarious liability of an employer under the ‘close connection’ test. The reasoning in these judgments is compelling and provides valuable guidance for the development of our similar law on the subject.

Leading South African academic commentators also support this proposition.” (Underlining inserted).

57. In the present matter, however, we are not dealing with the common law concept of vicarious liability but rather the statutory position as provided for in section 113. The principles of statutory interpretation are now well established. In *Natal Joint Pension Fund v Endumeni Municipality*[10] (Endumeni), the SCA restated the proper approach to statutory interpretation and explained that it is the objective process of attributing meaning to words used in a written instrument under consideration. The SCA emphasised that this process entails a consideration of (a) the languages used in the light of the ordinary rules of grammar and syntax, (b) the context in which the provision appears, and (c) the apparent purpose to which it is directed¹⁵.

58. The approach to statutory interpretation post-Endumeni by the Constitutional Court bears mention. In *Cool Ideas 1186 CC v Hubbard and Another*[11], it was held:

“A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:

- (a) that statutory provisions should always be interpreted purposively;
- (b) the relevant statutory provision must be properly contextualised; and
- (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive

approach referred to in (a).”

59. When interpreting the CPA, provisions contained in sections 2, 3, and 4 must be considered. In this regard, section 2(1) provides that the CPA must be interpreted in a manner that gives effect to the purposes set out in section 3. Section 3(1) provides that the purposes of the CPA are to promote and advance the social and economic welfare of consumers in South Africa by, amongst others, establishing a legal framework for the achievement and maintenance of the consumer market that is fair, accessible, efficient, sustainable, and responsible for the benefits of consumers generally. Section 4(3) provides that if any provision of the CPA, read in its context, can reasonably be construed to have more than one meaning, the Tribunal or court must prefer the meaning that best promotes the spirit and purposes of the CPA, and will best improve the realisation and enjoyment of consumer rights generally.

60. There is no mention of a “close connection” test in section 113. The meaning of section 113 is clear, and Vodacom must be held liable for any acts or omissions of the call centre agents. It would be contrary to the purpose of the CPA for the Tribunal to find that Vodacom should be excused on the basis that the call centre agents deviated fundamentally from Vodacom’s instructions. This interpretation is also in line with the provisions in sections 2(1), 3(1) and 4(3).

61. We now turn to the question of whether Vodacom contravened section 14(2)(b)(i)(bb) with respect to the consumers concerned.

61.1. Regarding the complaint relating to Bhengu, Section 14(2)(b)(i)(bb) pertains to the premature cancellation of a fixed-term contract before its expiry. In Bhengu’s case, her fixed-term contract had expired, following which she was on a month-to-month contract. The cancellation of Bhengu’s contract, albeit belatedly, therefore, does not support the pleaded case of the NCC and does not support a case for a contravention of section 14(2)(b)(i)(bb).

61.2. In relation to the case of Majikijela, it is common cause that she requested cancellation of her contract as the contract she applied for did not exist. An alternative contract was offered, which she did not want. The cancellation request was made on 4 May 2021. Vodacom raised an invoice on 1 June 2021, which was valid until the end of May 2021. However, further invoices were raised in July 2021 and August 2021. Vodacom only processed the cancellation after it received the complaint on 4 August 2021, which is unacceptable and in contravention of section 14(2)(b)(i)(bb). The cancellation should have been processed after the request of 4 May 2021, as the wrong data contract was applied in her case, and an immediate cancellation should have been effected when it was requested.

61.3. In Tema’s case, Vodacom failed to process the cancellation request timeously and billed Tema for two months after his cancellation request, in contravention of section 14(2)(b)(i)(bb).

The refusal to cancel contracts

62. The NCC avers that Vodacom contravened section 14(2)(b) and (3) in that it refused to cancel contracts if the contract was in arrears and/or if the consumer was unable to pay the cancellation penalty.

63. Vodacom’s response to the above averment is a denial that the conduct referred to breached section 14(2)(b) and (3) in that the right to cancel a fixed-term contract is subject to the conditions in section 14(3), including the imposition of a cancellation penalty[12].

64. Counsel for Vodacom referred the Tribunal to the decision in *Steve Tshwete Local Municipality v Fedbond Participation Mortgage Bond Managers (Pty) Ltd*[13] where the SCA held:

“The expression ‘subject to’ has no a priori meaning. While it is often used in a statutory context to establish what is dominant and what is subservient, its meaning in a statutory context is not confined thereto and it frequently means no more than that a qualification or limitation is introduced so that it can be read as meaning ‘except as curtailed by’.”

65. Vodacom’s denial that its conduct in refusing to cancel contracts where a consumer owes it outstanding fees is untenable.

Section 14(3) states that upon cancellation of a consumer agreement, the consumer remains liable to the supplier for any amounts owed to the supply in terms of that agreement up to the date of cancellation and that the supplier may impose a reasonable cancellation penalty with respect to any goods supplied, services provided, or discounts granted to the consumer in contemplation of the agreement enduring for its intended fixed term. This does not mean that a supplier may refuse cancellation, in other words, deny a consumer its right to cancel in terms of section 14(2)(b)(bb). Upon cancellation in terms of the latter section, a supplier may take legal steps to recover any monies owed under the contract. The use of the words “upon cancellation” in section 14(3) is instructive. It implies that when a cancellation occurs, the consumer remains liable for the amounts provided for in subsections (a) and (b).

66. It appears from the record that on a premature cancellation request of a fixed-term contract from a consumer, Vodacom prepares a cancellation quotation that contains the amounts owing[14] to Vodacom by the consumer. In the quotation letter, Vodacom states that the consumer must sign the acceptance thereof and return it to Vodacom with proof of payment and other documentation. The letter then goes on to state that the offer contained therein is valid for a period of 12 days and that should the required documentation (including the proof of payment) not be received by Vodacom, the contract will remain in force for the remaining period of the 24-month agreement, after which it will continue a month-to-month basis until Vodacom is notified otherwise.
67. Letters containing cancellation quotes with the proviso that the fixed-term contracts would remain in force unless payment of the cancellation fee and other documentation have been received were sent out to several consumers whose cases are presently under consideration by the Tribunal. Examples of these letters are in respect of Juta[15], Mahabeer[16], Sookraj[17] and Spammer23. The NCC averred that Vodacom also required settlement payments from Sharples, Bhengu, McGillewie and Xivuri. Vodacom does not dispute that it required settlement payments from these consumers but instead wrongly contends that it was entitled to require these payments before cancellation of the fixed terms contacts. In the circumstances, the allegation of the NCC must be accepted, and the Tribunal accordingly holds that Vodacom contravened sections 14(2)(b) and (3) in respect of all its customers mentioned in this paragraph.

Other complaints

The failure to inform consumers of the impending termination date of a fixed-term contract.

68. Section 14(2)(c) provides that, in the case of a fixed-term consumer agreement, the supplier must inform the consumer in writing or other recordable form not more than 80 nor less than 40 business days before the expiry of the contract of the impending expiry date, including any material changes that would apply if the agreement is to be renewed or may otherwise continue beyond the expiry date and the options available to the consumer.
69. In the case of Bhengu, Vodacom failed to inform her of the expiry date in terms of section 14(2)(c).
70. Vodacom's answer to the NCC's allegation regarding the above is that Bhengu's complaint to the NCC did not refer to this alleged contravention, and the investigator did not put this allegation to Vodacom during the investigation, resulting in Vodacom not having been afforded an opportunity to respond thereto. As already discussed, Vodacom's position in relation to this allegation does not constitute a defence. Since Vodacom did not respond to the factual allegations regarding this section, the version of the NCC must be accepted, and the Tribunal accordingly holds that Vodacom contravened sections 14(2)(c).

Unconscionable conduct

71. The NCC alleges that Vodacom contravened provisions of section 40(1) in respect of certain consumers whose complaints are under consideration. This section is headed "unconscionable conduct" and falls under Chapter II[18], Part F, dealing with the right to fair and honest dealings.
72. Section 1 defines "unconscionable", when used with reference to any conduct, to mean:
- “(a) *having a character contemplated in section 40; or*
- (b) *otherwise, unethical or improper to a degree that would shock the conscience of a reasonable person*”.
73. It is sub-paragraph (a) of the definition that is relevant for present purposes as the NCC alleges that Vodacom contravened

provisions under section 40(1), which reads:

“A supplier or an agent of the supplier must not use physical force against a consumer, coercion, undue influence, pressure, duress or harassment, unfair tactics or any other similar conduct, in connection with any —

- (a) *marketing of any goods;*
- (b) *supply of goods or services to a consumer;*
- (c) *negotiation, conclusion, execution, or enforcement of an agreement to supply any goods or services to a consumer;*
- (d) *demand for, or collection of, payment for goods or services by a consumer; or*

(e) recovery of goods from a consumer.”

74. For a finding of unconscionable conduct to be present in the sense of section 40(1), the section requires the presence of one or more of the following jurisdictional factors, namely the use of physical force against the consumer, coercion, undue influence, pressure, duress or harassment, or unfair tactics. This is not a closed list of factors, as the section also prohibits “any other similar conduct”. These factors may not be used in connection with any purpose set out in paragraphs (a) to (e) of section 40(1).
75. Subsections (a) to (e) of section 40(1) contain a list of activities in which a supplier may not engage with the use of the factors referred to above. The Tribunal only needs to concern itself with subsections (b), (d), and (c), as these are the subsections which the NCC alleges were contravened by Vodacom.
76. Before considering the conduct that the NCC alleges falls foul of section 40(1), it is necessary to consider Vodacom’s

submissions regarding the alleged contraventions. Vodacom’s general approach is that unconscionable conduct requires knowledge

and intention on its part. It is submitted further that there is nothing inherently unconscionable about enforcing the provisions of a contract, sending a letter of demand, or blacklisting a debtor and that these activities only become unconscionable when they are undertaken in the knowledge that the debt is not due.

77. What Vodacom’s argument misses is that there is no reference to “unconscionable conduct” in section 40(1) and that the sections should be statutorily interpreted. Knowledge on the part of the supplier is required under section 40(2), but there is no reference to “knowledge” in subsection (1). An ordinary interpretation of section 40(1) is that the use of any of the factors listed or any similar conduct for the purposes listed under (a) to (e) is a contravention. This, in the Tribunal’s view, is in line with the purpose of the CPA[19] and the context in which the provision appears.
78. In respect of the complaints persisted with, the NCC alleges that Vodacom contravened section 40(1) as follows²⁶:

78.1. Section 40(1)(b) and (d) in that Vodacom continued to bill consumers after cancellation or an attempt to cancel a contract, and that Vodacom referred accounts to debt collectors, blacklisted and or threatened consumers with legal action when they stopped payments despite having cancelled or attempted to cancel the contracts.

78.2. Section 40(1)(c), read with section 3(1)(c) and (d) in that Vodacom used a monthly rate higher than the monthly contract price in determining the cancellation penalty or charged consumers a cancellation charge in excess of the unit price multiplied by the outstanding.

78.3. Section 40(1)(c), in that Vodacom locked consumers’ phones for no valid reason.

79. The allegations by the NCC regarding contraventions of section 40(1) are made without any reference to what factors Vodacom employed and for the purposes set out in subsections (a) to (e). The Tribunal finds that demanding payment when consumers cancelled or attempted to cancel their contracts and threatening legal action against such consumers and backlisting them not only infringed their rights to cancel their fixed-term contracts but that these measures were used to coerce and pressurise the consumers in connection with the supply of services[20] and the demand for, or collection of, payment for services²⁸. It follows that such action is in contravention of sections 40(1)(b) and (d). These contraventions occurred in relation to Mahabeer,

Bhengu, and Xivuri,

80. As for the alleged contraventions of section 40(1)(c), the Tribunal finds that the facts alleged are not consistent with the provisions of this section.

The allegation relating to the marketing of services.

81. The NCC alleges that in the case of Majikijela, Vodacom marketed and sold products to the consumer that it did not provide, thereby contravening section 29(b)(i)(ii) and (v), read with section 41(3)[21]. The investigation report reveals that on 4 May 2021, Majikijela was offered a SIMO contract for 120 gigabytes of data (gigs), of which 80 gigs would be allocated during the daytime and 40 gigs at night. However, only 40 gigs daytime and 40 gigs night time were allocated when the contract commenced. When Majikijela queried this with Vodacom, she was told that the 120 gigs package did not exist, and an alternative package was offered to her, which she did not accept.
82. Vodacom's response to the above allegations is a bare denial, and furthermore that it was not afforded an opportunity to address these allegations during the investigation. As previously discussed, the fact that Vodacom was not given an opportunity to address a specific allegation during the investigation does not absolve Vodacom if the allegation is found to have been validly raised. With the employment of the PlasconEvans rule[22], the Tribunal finds that Vodacom contravened section 29(b)(i)(ii) and (v), read with section 41(3). The contract that was marketed and sold to Majikijela was unavailable and should not have been sold to her in the first place.

Further complaints

83. In its heads of argument, the NCC dealt with certain contraventions which are not properly before the Tribunal. These are alleged

contraventions of section 29(a), read with section 41(3)(f) and section 47(2). The consumers in respect of whom these complaints

pertain were part of the 21 consumers who were initially part of the investigation but not part of the 11 consumers whose complaints were persisted with in these proceedings.

84. The NCC alleges that Vodacom contravened section 26(3)(e) and (f) by providing a premature cancellation quotation that falsely reflected a monthly charge of R0.00 or where the number of months is reflected as nil. Section 26, as indicated by its heading, deals with sales records. Subsection (3) provides that the record contemplated in the section must at least reflect information set out in subsections (a) to (i). The two subsections Vodacom are alleged to have contravened, namely (e) and (f) require the unit price of any particular goods or services supplied or to be supplied and the quality of any particular goods or service applied to be supplied respectively. Clearly, the alleged contravention does not fall within the provisions of the sections relied upon by the NCC. The Tribunal finds that no contravention as pleaded occurred and it is not necessary to give any attention to this issue.

CONCLUSION

85. In conclusion, the Tribunal finds that Vodacom contravened the following provisions of the CPA:

- 85.1. Section 14(3)(b)(i), by imposing a cancellation penalty that is not reasonable.

This contravention occurred in relation to Juta, Sharples and Spammer;

- 85.2. Section 14(2)(b)(i)(bb), by not timeously cancelling consumers' contracts after having been duly notified to do so. This contravention occurred in relation to Majikijela and Tema;

- 85.3. Section 14(2)(b) and (3), by refusing to cancel consumers' contracts on request on the basis that any cancellation is subject to payment of cancellation fees and other fees before the cancellation can be effected. This contravention occurred in relation to Juta, Mahabeer, Sookraj, Spammer, Sharples Bhengu, McGillewie and Xivuri;

- 85.4. Section 14(2)(c), by not notifying Bhengu in writing within the prescribed period that her contract was about to expire and advising her of any material changes that would apply on renewal or that may exist beyond the expiry;

- 85.5. Section 40(1)(b) and (d), in that Vodacom's conduct is unconscionable in that it continued to bill consumers after they duly cancelled their contracts or attempted to do so, and by referring such consumers to debt collectors, blacklisting them with credit bureaus, and threatening them with legal action. This occurred in relation to Mahabeer, Bhengu and Xivuri; and

- 85.6. Section 29(b)(i)(ii) and (v) read with section 41(3), by marketing a data bundle package to Majikijela, which was not available and not provided.

86. The contraventions by Vodacom, as outlined in the preceding paragraph, are hereby declared as prohibited conduct.

THE FURTHER RELIEF SOUGHT

The interdict

87. The NCC requests that the Tribunal interdicts Vodacom from engaging in the conduct in contravention of the CPA. It is trite that an interdict is directed at future conduct. If there is no risk of future conduct which may be interdicted, an interdict should not be granted[23]. Vodacom no longer charges a 75% cancellation penalty on SIMO contracts, so there is no risk that the conduct in this regard will

be repeated. The test for a final interdict is well settled. The requisites are a clear right, an injury actually committed or reasonably apprehended, and an absence of an alternative remedy³². Unfortunately, the NCC has not addressed any of these requirements for an interdict to be granted and has not shown on a balance of probability that Vodacom will likely repeat any of the conduct the Tribunal finds prohibited. In the circumstances, the Tribunal is not disposed to the granting of an interdict.

Refunds to consumers

88. The NCC asks for an order that Vodacom be directed to refund the complainants all monies paid by them arising from the imposition of the 75% cancellation penalty and a refund to the complainants of all monies improperly charged and paid by them as detailed in the investigation report. The problem with these prayers is that they are not specific but rather overly broad and would be difficult to implement if ordered. As for the refund of the 75% cancellation penalty, some of the complainants elected not to cancel and continued to accept the services provided by Vodacom. As for the improper charges, these are not set out in the investigation report, and in any event, Vodacom avers that some of the complainants have been credited with certain amounts. The Tribunal is of the view that the orders asked for are too vague and that they should accordingly not be granted.

Administrative fine

89. Lastly, the NCC requests that an administrative fine be imposed on Vodacom, equivalent to 10% of its annual turnover, but not less than R20 000 000.00.
90. Section 112 empowers the Tribunal to impose an administrative fine in respect of prohibited or required conduct. Such fine may not exceed the greater of 10% of the respondent's annual turnover during the preceding financial year, or R1 000 000.00.
91. The Tribunal has the discretion whether to impose a penalty or not. The contraventions by Vodacom are considered serious and contrary to the purpose of the CPA. An administrative fine in the circumstances is appropriate. The issue that requires consideration is what would be an appropriate amount.

92. Before considering an appropriate fine, it is necessary to record that the parties agreed that this matter is confined only to the eleven complainants under consideration by the Tribunal. It is noted, however, that in its motivation for an appropriate fine, the NCC referred the Tribunal to the circumstances detailed in its founding affidavit. The relevant averments in the founding affidavit[24], however, are not confined to the eleven complainants but assume that the conduct of Vodacom affects “thousands and potentially

millions of consumers”. It must be stated clearly that the Tribunal is constrained by what the parties agreed during the

hearing, namely that the matter is confined to the complaints of the eleven consumers only.

93. Section 112(3) outlines seven factors the Tribunal must consider when determining an appropriate administrative fine. These factors will be considered in the order that they are alphabetised in section 112(3):

93.1. The nature, duration, gravity and extent of the contraventions

The contraventions committed by Vodacom are of a serious nature. Vodacom disregarded various provisions of the CPA, and its actions negated the right of consumers to cancel their fixed-term contracts by imposing an unreasonable cancellation penalty. Moreover, Vodacom required payment of all outstanding fees and the cancellation penalty before contracts were terminated on request. The Tribunal has found some of the conduct in contravention of the provisions of section 40(1) and, therefore, unconscionable if one reads this section with the definition of unconscionable in section 1.

The Tribunal notes that in respect of many of the complaints, Vodacom credited consumers in respect of charges that should not have been invoiced. Also, Vodacom amended its cancellation policy in that it no longer imposes a penalty in respect of SIMO contracts. These are factors which are considered as mitigation in favour of Vodacom.

93.2. Any loss or damage suffered as a result of the contraventions

The loss or damage suffered by consumers varies. In some instances, consumers attempted to cancel the contracts because of financial stress, which was aggravated by Vodacom’s charging of an unreasonable cancellation fee and refusing to cancel the contracts. The consequences of the damages suffered by the consumers are relative, but when consumers cancelled or attempted to cancel the contract because of financial stress, the consequences must have aggravated their dire financial situations.

93.3. The behaviour of Vodacom

Vodacom acted in disregard of the CPA's provisions and the consumers' rights. The conduct of Vodacom can be regarded as unconscionable in the sense of paragraph (b) of the definition of unconscionable^[25] in section 1, in particular, the conduct which negated the consumer's right to cancel the fixed-term contracts and requirement to settle accounts and pay cancellation fees before contracts would be cancelled.

93.4. The market circumstances in which the contraventions took place

In modern-day society, consumers from all walks of life depend on mobile phones and data contracts in their day-to-day lives. The service providers of these products can easily exploit these needs. Vodacom disregarded those rights enacted to protect consumers in this market. In a market consisting of millions of consumers, service providers such as Vodacom have a responsibility to apply the provisions of the CPA and not to exploit consumers or disregard their rights and the protection they have under the CPA. In the case of Juta, for example, the consumer lost his employment and, as a result, had to cancel his fixed-term contract with Vodacom due to his financial strain.

Vodacom had no regard for his right to cancel.

93.5. The level of profit derived from the contraventions

Since this matter is only confined to those consumers whose matters are before the Tribunal, it is safe to state that the profit derived by Vodacom is negligible for Vodacom.

93.6. The degree to which Vodacom has cooperated with the commission and the Tribunal

The NCC acknowledged that Vodacom has cooperated with it during the investigation. The same can be said regarding Vodacom's participation in the proceedings before the Tribunal.

93.7. Whether Vodacom has previously been found in contravention of the CPA The NCC drew attention to the fact that Vodacom was previously referred to the Tribunal and that referral was dismissed on a technicality. The Tribunal considers the previous referral as being of no consequence as there was no finding of any contravention of the CPA by Vodacom. The Tribunal, therefore, treats this matter as if there has been no previous finding of any contraventions of the CPA by Vodacom.

94. After careful consideration of the above factors, the Tribunal concludes that an administrative fine of R1 000 000.00 would be appropriate.

THE ORDER

95. In the result, the Tribunal makes the following order:

95.1. It is declared that Vodacom contravened:

95.1.1. Section 14(3)(b)(i), read with regulation 5(2) and (3);

95.1.2. Section 14(2)(b)(i)(bb);

95.1.3. Section 14(2)(b) and (3);

95.1.4. Section 14(2)(c);

95.1.5. Section 40(1)(b)(b) and (d); and

95.1.6. Section 41(3).

95.2. The contraventions listed in paragraph 95.1 above are declared prohibited conduct.

95.3. The respondent shall pay an administrative fine of R1 000 000.00 (one million rands) within one month of the issuing of this judgment into the bank account of the National Revenue Fund, the details of which are as follows:

Bank: The Standard Bank of South Africa Account holder: Department of Trade and Industry

Branch name: Sunnyside Branch code: 010645 Account number: 3[...] Reference:

NCT/260497/2023/73(2)(b) and name of the person or business making the payment.

95.4. There is no order as to costs.

S Hockey (Tribunal member)

Tribunal members Dr A Potwana and Dr M Peenze concur.

[1] The full title of the rules is “Regulations for matters relating to the functions of the Tribunal and Rules for the conduct

of matters before the National Consumer Tribunal, 2007”, as published GN 789 of 28 August 2007 (Government Gazette No. 30225).

[2] Published under Government Notice R489 in Government Gazette 28864 dated 13 May 2006.

[3] Record page 478.

[4] Shorter Oxford Dictionary, Oxford University Press, 2007. 5

[2023] ZAGPPHC 313 (2 May 2023).

[5] 2013 (6) SA 404 (SCA).

[6] Ibid at para [21]. 8 Ibid at para [26].

[7] Advisory note 12: Cancellation of Contracts and Charging of Penalties, issued on 1 March 2021.

[8] Section 113(1) provides: “If an employee or agent of a person is liable in terms of this Act for anything done or omitted in the course of that person’s

employment or activities on behalf of their principal, the employer or principal is jointly and severally liable with that person.”.

[9] At para [31].

- [10] 2012 (4) SA 593 (SCA) 15 Ibid, para 18.
- [11] 2014 (4) SA 474 (CC) at para 28.
- [12] Answering affidavit, paragraph 237 on page 725 of the record.
- [13] 2013 (3) SA 611 (SCA).
- [14] This includes the cancellation penalty which Vodacom terms the subscription amount for the period remaining on the contract, less a discount of 25%.
- [15] Record p 138.
- [16] Record p 236.
- [17] Record pp 314, 316, 318 and 321. 23 Record p 465.
- [18] Chapter II is headed “Fundamental Consumer Rights”.
- [19] The purpose of the CPA is contained in section (3) and includes the promotion of fair business practices and protecting consumers from unconscionable, unfair, unreasonable, unjust, or otherwise improper trade practices. 26 Record, page 29.
- [20] Section 40(1)(b). 28 Section 40(1)(d).
- [21] Section 41(3) provides, amongst others that it is a false, misleading or deceptive representation to falsely state or imply that any goods or services are available or can be delivered or performed within a specified time.
- [22] Formulated in *Plascon-Evans (Tvl) Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623.
- [23] See *Malema v Rawula* (139/2020) [2021 ZACSA 88 (23 June 2021). 32 See *Setlego v Setlego* 1914 AD 221 at 227.
- [24] Record pages 17 to 20.
- [25] In this sense, unconscionable is defined as conduct which is 'unethical or improper to a degree that would shock the conscience of a reasonable person”.

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