



CONSTITUTIONAL COURT OF SOUTH AFRICA

Kenneth Nkosana Makate v Vodacom (Pty) Limited

CCT 52/15

Date of hearing: 1 September 2015

Date of judgment: 26 April 2016

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

Today the Constitutional Court handed down judgment in a matter concerning the payment of compensation for an idea that was disclosed pursuant to an oral agreement.

The applicant, Mr Kenneth Nkosana Makate, was employed by the respondent, Vodacom (Pty) Limited (Vodacom), as a trainee accountant. In November 2000 he conceived the Please Call Me idea which he intended to sell to a willing buyer. After seeking advice from within Vodacom, he approached Mr Geissler, who at the time was Vodacom's Director and Head of Product Development. They reached an oral agreement that Vodacom would experiment with the idea and, if it proved commercially viable, Mr Makate would be paid a share of proceeds from the product subject to terms to be negotiated between him and Mr Geissler. Vodacom implemented the idea in March 2001. After Mr Makate's demands on Vodacom to honour the oral agreement were unsuccessful, he instituted a claim against Vodacom in July 2008 in the then South Gauteng High Court (High Court).

The High Court found that Mr Makate had proved that he had entered into an agreement with Mr Geissler. However, it dismissed the claim on the basis that Mr Makate did not plead the ostensible authority (the seeming or apparent authority) of Mr Geissler to contract on behalf of Vodacom, and further had failed to demonstrate that Mr Geissler had such authority. Additionally, it found that Mr Makate's claim against Vodacom had prescribed. The Supreme Court of Appeal dismissed Mr Makate's application for leave to appeal for lack of reasonable prospects of success.

Before this Court, Mr Makate argued that the High Court erred in finding that ostensible authority had not been pleaded and that any claim or debt owed by Vodacom had prescribed in 2004. He also argued that the High Court's failure to determine his case on ostensible authority violated his right of access to courts. Vodacom claimed that no facts were pleaded in the High Court to support a case for ostensible authority and in any case, ostensible authority was not proved. Vodacom also argued that Mr Makate's claim had prescribed.

In the majority judgment, written by Jafta J (Mogoeng CJ, Moseneke DCJ, Khampepe J, Matojane AJ, Nkabinde J and Zondo J concurring), this Court upheld the High Court's finding that Mr Makate had entered into an agreement with Mr Geissler. The Court identified two main issues for determination: whether ostensible authority had been properly pleaded and established by Mr Makate; and whether his claim had prescribed.

This majority judgment held that the High Court adopted an incorrect approach to the pleadings. By holding that ostensible authority had not been pleaded, the High Court had conflated ostensible authority with estoppel. On application of the elements of ostensible authority to the facts, the majority judgment found that ostensible authority had been established. Given Mr Geissler's position at Vodacom; the organisational structure within which he exercised his power; and his role in the process which had to be followed before a new product could be introduced at Vodacom, the judgment held that Mr Geissler had ostensible authority to bind Vodacom.

On the issue of prescription, the majority judgment held that because Mr Makate's claim was not a debt as contemplated by the Prescription Act, the claim had not prescribed. The Court held that the meaning of "debt" had to be construed in light of section 39(2) of the Constitution, which imposes an obligation on the courts to interpret statutes in a manner consistent with the Bill of Rights. Thus, a provision that limits a right in the Bill of Rights (in this case, the right to access the courts) is to be interpreted narrowly. The majority judgment concluded that the High Court had incorrectly interpreted "debt" which did not extend to the present claim.

In a concurring judgment, Wallis AJ (Cameron J, Madlanga J and van der Westhuizen J concurring) agreed that Mr Makate was entitled to the relief in the majority judgment. The concurring judgment agreed that the key issue was whether Vodacom represented that Mr Geissler had authority to conclude the agreement with Mr Makate. However, it reached a different conclusion on the issue of ostensible authority.

Wallis AJ disagreed on the juristic nature of ostensible authority where there is no actual authority. He argued that it was settled law that ostensible authority was a form or instance of estoppel, which was why it was commonly referred to as agency by estoppel. Wallis AJ held that there are cases in which ostensible authority coincides with actual authority arising by implication, and where actual authority and ostensible authority would be two sides of the same coin. But this was a case where it was accepted that there was no authority at all, express or implied. That took it into the realm of estoppel.

The concurring judgment then concluded that Mr Makate had to prove that Vodacom represented to him that Mr Geissler had the necessary authority to conclude the agreement for remuneration with him. It held that that the board represented to the world, including Mr Makate that Mr Geissler had authority to conclude such an agreement on behalf of the company. He may have had actual authority, but it was sufficient to say that it was represented that he had authority, in other words, ostensible authority. The consequence was that Mr Geissler had ostensible authority to conclude a contract with Mr Makate and Vodacom was estopped from denying that authority. It was bound by the contract Mr Geissler concluded on its behalf.

In the result, leave to appeal was granted and the application was upheld with costs.