



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 51/24

In the matter between:

VODACOM (PTY) LIMITED

Applicant

and

NKOSANA KENNETH MAKATE

First Respondent

SHAMEEL JOOSUB N.O.

Second Respondent

Neutral citation: *Vodacom (Pty) Ltd v Makate and Another* [2025] ZACC 13

Coram: Maya CJ, Madlanga ADCJ, Majiedt J, Mathopo J, Mhlantla J, Rogers J, Seegobin AJ, Theron J and Tshiqi J

Judgment: Madlanga ADCJ (unanimous)

Heard on: 21 November 2024

Decided on: 31 July 2025

ORDER

On application for leave to appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Gauteng Division, Pretoria):

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Supreme Court of Appeal is set aside.
4. The matter is remitted to the Supreme Court of Appeal to be reheard by a differently constituted panel of Judges of that Court.
5. Each party must pay their own wasted costs in respect of the abortive hearing of the matter in the Supreme Court of Appeal.
6. The first respondent must pay the applicant's costs in this Court, including the costs of three counsel.

JUDGMENT

MADLANGA ADCJ (Maya CJ, Majiedt J, Mathopo J, Mhlantla J, Rogers J, Seegobin AJ, Theron J and Tshiqi J concurring):

Introduction

[1] This application is a sequel to a regrettably unending dispute between Vodacom (Pty) Limited, the applicant, and Mr Nkosana Kenneth Makate, the first respondent. This litigation, which spans just under two decades, concerns compensation owed by Vodacom to Mr Makate for the “Please Call Me” (PCM) idea. The first round of litigation between Vodacom and Mr Makate culminated in this Court declaring that Vodacom was bound by an agreement concluded by Mr Makate and Mr Philip Geissler, the then Director of Product Development and Management at Vodacom, and ordering, inter alia: that Vodacom and Mr Makate negotiate in good faith to determine reasonable compensation in terms of the agreement; and that, in the event of agreement on reasonable compensation not being reached, such compensation be

determined by Vodacom's Chief Executive Officer (CEO), the present second respondent, Mr Shameel Joosub.¹

[2] The negotiation between Vodacom and Mr Makate commenced. At its end, the parties were so far apart that the negotiation understandably came to naught. Mr Makate proposed settling compensation in the sum of R20.2 billion, plus interest. This was considerably less than the higher end of the amounts yielded by the models that Mr Makate used in the negotiations. Vodacom offered R10 million compensation. The deadlock then had to be broken by the CEO. The CEO made a determination in the sum of R47 million. Mr Makate was unhappy. He took the determination on review to the High Court of South Africa, Gauteng Division, Pretoria. The High Court found in Mr Makate's favour, remitting the matter to the CEO for a fresh determination within certain specified parameters. Vodacom was aggrieved by the High Court judgment.² An appeal to the Supreme Court of Appeal was unsuccessful.³ Vodacom is now before us seeking leave to appeal against the Supreme Court of Appeal judgment.

[3] The two main contentions by Vodacom are these. First, the majority in the Supreme Court of Appeal⁴ (unless the context suggests otherwise, simply referred to as the Supreme Court of Appeal) impermissibly strayed onto terrain that required a cross-appeal by Mr Makate, which there was not. Second, it disregarded the true issues before it with the result that there was a total failure of justice. On the first issue, Vodacom submits that a court that determines an issue that is not before it (i.e., an issue in respect of which there ought to have been a cross-appeal, which was not brought) acts beyond its jurisdiction and thus in breach of the rule of law⁵ and the right to a fair hearing protected in section 34 of the Constitution. On the second issue, it argues that

¹ *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13; 2016 (4) SA 121 (CC); 2016 (6) BCLR 709 (CC).

² *Makate v Joosub N.O.* [2022] ZAGPPHC 55; [2022] 2 All SA 226 (GP) (High Court judgment).

³ *Vodacom (Pty) Ltd v Makate* [2024] ZASCA 14; [2024] 2 All SA 1 (SCA); 2024 (3) SA 347 (SCA) (Supreme Court of Appeal judgment).

⁴ The Supreme Court of Appeal was split 3-2.

⁵ Section 1(c) of the Constitution provides that the Republic of South Africa is founded on values that include the supremacy of the Constitution and the rule of law.

the disregard of the true issues between the parties breached the rule of law and its right to a fair hearing guaranteed in section 34.

[4] Those are the two main issues that fall to be determined by this Court. I use “in the main” in my introduction of these two issues advisedly. The application raises many other issues. I will pronounce on the fate of those other issues later in this judgment.

Background

[5] In order for the narrative to be self-contained, I will briefly deal with facts that were at issue when this matter was before this Court on the first occasion. Mr Makate, then a trainee accountant at Vodacom, came up with what Vodacom itself describes as “a brilliant idea”. The idea was that a cell phone user with no airtime could “buzz” a user with airtime and the latter could then call the former. The attraction to the idea was being able to buzz or give a user a missed call whilst the “buzzer” had no airtime. The idea was a trigger for Vodacom to develop PCM.

[6] A dispute arose about whether Vodacom would compensate Mr Makate for his idea. As indicated above, this Court resolved that dispute by holding that a binding agreement for reasonable compensation had been concluded between Mr Geissler, on behalf of Vodacom, and Mr Makate. What remained outstanding was the quantum of compensation, which – as ordered by this Court – was initially to be determined by Mr Makate and Vodacom, through good faith negotiation, failing which, by Vodacom’s CEO. Vodacom and Mr Makate did not agree on compensation. The parties referred the matter to the CEO who engaged in a thoroughgoing process. The CEO afforded the parties an opportunity to file comprehensive written submissions. Those submissions incorporated factual material and expert reports. That was followed by a two-day hearing of oral submissions, after which further written submissions were filed and further written expert evidence adduced.

[7] In his determination, the CEO took into account four models. The first was the “2001 looking forward model”. This posited what a CEO would probably have agreed

as compensation for PCM as at 2001 when Mr Makate made his offer. Based on that model, the present-day value of what Mr Makate was entitled to was R51.5 million. The second was the “model of Mr Makate as an employee”. This concerned what employees are ordinarily paid for ideas that their employers take over. On this model, the present-day value of what would have been payable to Mr Makate was R21.8 million. The third model was the “time window lock model”⁶ (TWL). Here the CEO—

“took the actual TWL customers multiplied by the number of PCMs . . . multiplied by the success rate of 27% as established in the Makate model. The result is then multiplied by the rate per minute and the call length with 100% of the calls deemed incremental.”⁷

The then present-day value on this model was R38.1 million. The last model was the “revenue share model”, which Vodacom labels the “backward-looking revenue share model”. The CEO’s model looked at the revenue to be shared with the benefit of hindsight. The then present-day value on this model was R42.2 million.

[8] At the end of it all, the CEO took the average of present-day values yielded by the models most favourable to Mr Makate, namely the “2001 looking forward model” and “revenue share model looking backwards”. The average, rounded upwards, was R47 million. That is the amount the CEO determined to be the compensation to which Mr Makate was entitled. Dissatisfied, Mr Makate took the determination on review to

⁶ Before some date in 2007 when Vodacom terminated the practice, prepaid and top-up customers had to use their recharge airtime within a limited time (the window) after which “they were locked” and would be in a state of being without airtime (unless they recharged before they were locked) even if their airtime was not fully used up.

⁷ The concept of “incremental calls” is about this. Not all calls made pursuant to a PCM generate revenue for Vodacom. Such calls are not incremental. Examples are the following. A customer has a contract in terms of which they pay, for example, R100 for 100 minutes of talk time per month. Because of PCMs that the customer receives, their normal 80-minute use per month increases to 90 minutes. Because the 90 minutes is within the 100-minute monthly talk time, the PCMs do not generate additional revenue for Vodacom. Also, there are those instances where a customer invariably makes certain calls to a specific person, but the person sometimes sends PCMs instead of waiting for the calls that are sure to come (e.g., where the PCM sender is indicating that they are ready to take the regular call). In both instances, the calls will not be incremental. Calls that do generate revenue are incremental.

the High Court alleging that certain irregularities rendered the CEO's determination manifestly unreasonable, unjust and inequitable.

[9] The main areas of disagreement in the review related to the following topics:⁸ the duration of the period over which Mr Makate was entitled to share in the PCM revenue; interest; procedural unfairness; the model used by the CEO to calculate revenue; and failure to consider relevant evidence.

[10] On the duration of the revenue sharing period, Mr Makate contended that the CEO irregularly limited his share of revenue to five years despite the fact that the PCM product had generated revenue for no less than 18 years and was continuing to do so. He alleged that the agreement on sharing revenue would have spanned the entire period during which Vodacom used the PCM product and generated revenue from it. Effectively, if this were to have lasted in perpetuity, he would be entitled to remuneration in perpetuity. However, he indicated that he was prepared to accept a contract duration and revenue share of 18 years.

[11] Vodacom's response was that the five-year revenue share period determined by the CEO was reasonable. The period had to be viewed from the perspective of Vodacom considering the nature and duration of the agreement as at the time of deciding whether to conclude the agreement, namely 2001. It was unlikely that at that time Vodacom would have agreed to a revenue share in perpetuity or for 18 years. After all, Mr Makate sought "reasonable remuneration", which was not necessarily remuneration in perpetuity: he is entitled to an amount which reasonably compensates him for his idea; and he is not entitled to an annuity for life, continued Vodacom's contention. Also, according to Vodacom, the period determined by the CEO was consistent with Vodacom's position in relation to untested products. And the five-year period was generous in circumstances where Mr Makate was not rendering an ongoing service to Vodacom.

⁸ These are as summarised by the minority in the Supreme Court of Appeal judgment above n 3 at para 57. Even on Vodacom's responses, I rely on the minority's summary.

[12] Regarding interest, Mr Makate contended that the CEO declined to award any interest on his revenue share, as he had mistakenly assumed that Mr Makate's counsel had abandoned any claim for interest. Vodacom pointed out that Mr Makate's focus only on interest disregarded what actually happened. This, because what the CEO did, instead, was to make provision for the time value of money. That is, compensating for the loss of value in money over time. For that, the CEO applied a 5% inflation rate worked out thus. The CEO looked at the average inflation rate from 2002. That rate came to 5%. He then applied it on an annual basis from 2002 to 2019 in order to arrive at a value that he considered "more than fair" for Mr Makate to preserve his purchasing power over the period.

[13] On procedural unfairness, Mr Makate submitted that the proceedings before the CEO were inherently unfair because Vodacom refused to disclose the revenue earned from the PCM product. Vodacom's counter was that there was no unfairness. Instead, there was no direct revenue that could quantifiably be attributed to the PCM product.

[14] The next review ground was that the CEO used incorrect figures in calculating the revenue and that he used an incorrect revenue model in calculating the compensation due. He ought to have used Mr Makate's fourth revenue share model, the so-called Model 8A, which looked backwards. In the High Court, Mr Makate updated Model 8A as Model 9A, summarised in Model 9B. Vodacom answered that, as the deadlock-breaker, the CEO was given an unfettered discretion to determine reasonable compensation. It disputed that the CEO had relied on incorrect figures and asserted that Mr Makate could not second-guess the revenue model that the CEO had adopted.

[15] Lastly, on the ground that the CEO failed to consider relevant evidence, Mr Makate sought to demonstrate that, on the Vodacom Group's own provision in its 2017 financial statements for material contingent liabilities, it had provided R960 million for his claim. And in the 2016 financial statements Vodafone Group plc (Vodafone), Vodacom's holding company, had provided £180 million (R3.7 billion at

the then applicable exchange rate) for the claim. As I understand it, the point was that, in determining that compensation payable to Mr Makate was R47 million, the CEO ignored Vodacom and Vodafone's own estimates of the contingent liability reflected in the financial statements. In its counter Vodacom stated that the estimates, made by independent auditors, constituted disclosures based on an unquantified existing obligation. At that stage reliable estimates could not be made. Therefore, the thresholds on material contingent liability were irrelevant to the determination of reasonable compensation.

[16] In accordance with his Models 9A and 9B, the capital figure to which Mr Makate claimed to be entitled in terms of his amended notice of motion was (I use rounded figures) R9.74 billion or R14.61 billion, depending on whether his share of the alleged "Total Call Revenue" generated by PCM was set at 5% or 7.5%. On this capital, Mr Makate sought *mora* interest, alternatively interest in terms of section 2A(5) of the Prescribed Rate of Interest Act.⁹ According to his Model 9B, the total claim inclusive of *mora* interest was R28.99 billion or R43.48 billion, depending on the sharing percentage used. On the other hand, the total claim inclusive of interest in terms of section 2A(5) was R36.91 billion or R55.37 billion, again depending on the sharing percentage used. These amounts were based on a contention that Mr Makate was entitled to a share of PCM revenue derived between 2002 and 2020, the period covered by his Models 9A and 9B. In the alternative, Mr Makate sought that compensation be determined by the Court or that the determination be made by a new referee appointed by the Court.

[17] The High Court reviewed and set aside the CEO's determination. However, instead of substituting it with its own or Mr Makate's claimed figure, it remitted the

⁹ 55 of 1975. Section 2A(5) provides:

"Notwithstanding the provisions of this Act but subject to any other law or an agreement between the parties, a court of law, or an arbitrator or an arbitration tribunal may make such order as appears just in respect of the payment of interest on an unliquidated debt, the rate at which interest shall accrue and the date from which interest shall run."

matter to the CEO for a recalculation and fresh determination. In doing so, it set certain parameters within which this should be done.¹⁰ Vodacom appealed to the Supreme Court of Appeal against that remittal order, contending that there was no basis for interfering in the CEO's determination. At the centre of the issues raised on appeal was the High Court's approach on the calculations. After all, it was that approach that informed the parameters set by the High Court in the remittal order. It is understandable, therefore, why Vodacom's appeal challenged the High Court's findings

¹⁰ The High Court order read:

“In the result the following order is made:

- (1) The application to strike out is dismissed with no order as to costs.
- (2) The determination by the CEO is referred back to the first respondent who is obliged to make a fresh determination with the following directives:
 - (a) The applicant is entitled to be paid 5% of the total voice revenue generated from the PCM product from March 2001 to March 2021 by the second respondent;
 - (b) That total voice revenue includes PCM revenue derived from prepaid, contract (both in bundle and out bundle) and interconnect (MTR) fees as set out in the second respondent's annual financial statements as well as the information provided in annexures 16(a)-16(r) produced by the second respondent (CL021-1 to CL021-21) and collated in annexure NM29 (CL034-1 to CL034-2).
- (3) The first respondent must determine the annual effective rate, which effective rate should be a blend between contract effective rate and prepaid effective rate, and in each case the respective rates are not to be less than the published ICASA effective rate:
 - 3.1 The first respondent must assume that the average call duration of the return calls is 2 minutes;
 - 3.2 For the purposes of the first respondent's determination it must not be less than the published ICASA effective rate;
 - 3.3 For the purposes of the first respondent's determination it must be assumed that the PCM count in Model 9A is correct. Model 9A is to be found on NM30, (CL035-1 to CL035-8 and CL036-1);
 - 3.4 The applicant is entitled to 27% of the number of PCMs sent daily as being revenue generated by the return calls to the PCM.
- (4) The applicant is also entitled to the time value of money calculated at 5% for each successive year that the second respondent owes to the applicant and the capital amount or annual portion thereof.
- (5) That the first respondent must finalise his determination within one month of this order.
- (6) Each party is to pay their own costs for the negotiations referred to by the Constitutional Court.
- (7) The costs of this application are to be paid on a party and party scale, which costs shall include the costs of two counsel.”

on the calculations. The substance of Vodacom’s contentions on appeal was to support the CEO’s determination. The Supreme Court of Appeal produced a 3-2 split in favour of Mr Makate.

[18] The Supreme Court of Appeal held that the High Court was correct in holding that the CEO’s determination was contrary to this Court’s mandate. This led to the conclusion that Vodacom’s appeal had to be dismissed. However, the Supreme Court of Appeal did not end there. It went on to hold that the High Court’s order did not accord with what Mr Makate had asked for in his notice of motion, which was setting aside the CEO’s determination and substituting it with the High Court’s own determination, based on Models 9A and 9B. It emphasised that he had sought a substitution, not remittal. Substitution had to be ordered as the parties had dealt extensively with computation issues before the CEO and as there was no evidence that Mr Makate’s computation was wrong, “save that it [did] not take some variables into account”.¹¹ Consequently, the Supreme Court of Appeal held that it could find no reason why Mr Makate’s computation should not be found to be correct.¹²

[19] It proceeded to make a determination. On the percentage of revenue to which Mr Makate was entitled, the order stipulated it as “5%-7.5%”. That range translates to huge differences in the amounts payable across the range. On interest, the Supreme Court of Appeal ordered Vodacom to pay “*mora* interest . . . , alternatively interest in terms of section 2A(5) of the Prescribed Rate of Interest Act”.¹³ Again, the

¹¹ Supreme Court of Appeal judgment above n 3 at para 37.

¹² *Id.*

¹³ The full order reads:

- “1 Save to the extent set out below, the appeal is dismissed with costs, including those of two counsel where so employed.
- 2 The order of the High Court is set aside and substituted with the following:
 - ‘(a) The decision of the first respondent delivered on 9 January 2019, determining the compensation to be paid to the applicant by the second respondent, is reviewed and set aside.
 - (b) The decision referred to in paragraph 1 is substituted with a decision that the applicant is entitled to be paid 5%-7.5% of the total revenue of the PCM product from March 2001 to date of judgment by the second respondent,

difference between interest calculated on the former and the latter bases is vast. It is worth noting that the Supreme Court of Appeal's order substantially adopted the content of Mr Makate's High Court amended notice of motion. Crucially, Mr Makate attained such an order despite the fact that he had not cross-appealed. Of course, as will appear below, Mr Makate argues that a cross-appeal was not necessary.

[20] Vodacom is now before us seeking leave to appeal. Before dealing with the parties' submissions, let me mention that there are averments and counter-averments and arguments and counter-arguments on the impact that a huge monetary payout to Mr Makate will have on Vodacom and its shareholders. I choose not to deal with any of that as the approach I take does not turn on those issues. I next set out Vodacom's submissions.

Vodacom's submissions

[21] Vodacom argues that our constitutional jurisdiction is engaged on a few fronts. The Supreme Court of Appeal granted Mr Makate an appeal he never sought. Mr Makate did not cross-appeal and claim that there was anything the matter with the High Court order. For this proposition, Vodacom relies on *F Von Steinaecker*.¹⁴ The possibility of the substituted order that the Supreme Court of Appeal granted was never an issue before that Court. Thus the Supreme Court of Appeal lacked jurisdiction in

together with the *mora* interest thereon, alternatively interest in terms of section 2A(5) of the Prescribed Rate of Interest Act 55 of 1975 as amended, and that the total revenue of the PCM product shall be that set out in Model 9A, 9B & 9BB submitted to the first respondent by the applicant (annexure NM30–NM32 to the supplementary founding affidavit).

- (c) It is directed that first respondent represented by the second respondent shall bear the costs of the negotiations referred to in the Constitutional Court judgment, which costs shall include:
 - (i) drafting of the submissions;
 - (ii) preparation for and the hearing before the first respondent;
 - (iii) reservation, preparation and qualifying fees of experts involved in the negotiations and hearing on an attorney and own client scale.
- (d) The costs of this application are to be paid, jointly and severally, by the first and second respondents, the one absolving the other.”

¹⁴ *F Von Steinaecker v C F Kneisel* (1898) 19 NLR 153.

this regard, something which constitutes a breach of the rule of law entrenched in section 1(c) of the Constitution.

[22] Insofar as the Supreme Court of Appeal set aside the High Court order and substituted its own, Vodacom contends that the Supreme Court of Appeal breached its right to a fair hearing guaranteed in section 34 of the Constitution.

[23] Vodacom avers that there was a long list of issues that were seriously disputed between it and Mr Makate, examples being: PCM volumes; incremental revenue; call duration; effective call rate; duration of the revenue-share contract; and *mora* interest or time value of money. Vodacom contends that, despite the fact that each side adduced swathes of evidence on all the disputed issues and presented written and oral argument on them, the Supreme Court of Appeal disregarded all this. Relying on *Rand Refinery*,¹⁵ Vodacom then argues that the Court's disregard of these factual issues implicates its right guaranteed under section 34 of the Constitution.

[24] Vodacom submits that the disregard or mischaracterisation of the issues and ignoring of the true facts by the Supreme Court of Appeal constitutes a total failure of justice and thus a breach of the right to a fair hearing guaranteed in section 34 of the Constitution.

[25] Vodacom also contends that, in some parts, the Supreme Court of Appeal order is "unduly vague". In this regard, it cites the fact that the order declared that Mr Makate was entitled to "5%-7.5%" of PCM revenue. To award Mr Makate a range from 5%-7.5% "is hopelessly vague". And Vodacom bemoans the fact that the Supreme Court of Appeal did this despite the fact that Mr Makate accepted the 5% figure and this fact was common cause before that Court.

¹⁵ *Rand Refinery (Pty) Ltd v Sehunane N.O.* [2023] ZACC 28; (2023) 44 ILJ 2434 (CC); 2023 (12) BCLR 1511 (CC); [2023] 12 BLLR 1235 (CC) at para 19.

[26] Still on vagueness, Vodacom next focusses on the fact that the Supreme Court of Appeal ordered it to pay *mora* interest or interest in terms of section 2A(5) of the Prescribed Rate of Interest Act. Its argument then proceeds thus. The question is: how can an order have alternative rates of interest? Which rate must apply in the end? Vodacom points out that on one of Mr Makate's calculation models, his capital plus *mora* interest ranges from R28.98 billion to R43.48 billion, whereas the capital amount plus the section 2A(5) interest ranges from R36.91 billion to R55.37 billion.

[27] Vodacom concludes by submitting that these two parts of the Supreme Court of Appeal's order "are thus so vague as to preclude an identifiable decision that is capable of implementation or enforcement" and are, as a consequence, "in breach of the rule of law and Vodacom's right to a fair hearing".

[28] Beyond jurisdiction, Vodacom submits that, to succeed, Mr Makate must satisfy the requirements of the *Bekker*¹⁶ test, which – according to Vodacom – he has not. This is the test applicable where there is a challenge to the determination of a person appointed to fix a price or make a valuation. In *Perdikis*¹⁷ the test formulated in *Bekker* was captured thus:

"It was held in *Bekker* . . . that a valuation can be rectified on equitable grounds where the valuer does not exercise the judgement of a reasonable [person], that is, [their] judgement is exercised unreasonably, irregularly or wrongly so as to lead to a patently inequitable result."¹⁸

[29] The effect of this test, argues Vodacom, is to ask whether the CEO's determination accords with that of a reasonable person. If it does, that is the end of the complaint. If it does not, the next question is whether the CEO's determination is patently inequitable.

¹⁶ *Bekker v RSA Factors* 1983 (4) SA 568 (T) at 573E-F.

¹⁷ *Perdikis v Jamieson* 2002 (6) SA 356 (W).

¹⁸ *Id* at 364H-I.

[30] In seeking to demonstrate that the CEO exercised the judgement of a reasonable person, Vodacom then deals with the evidence extensively. In respect of each piece of crucial evidence in this regard, Vodacom seeks to demonstrate that the Supreme Court of Appeal was guilty of one or more of the following: it ignored the evidence; it was unaware of the evidence; it misunderstood the evidence; and it profoundly mistook the substance of the nature of the evidentiary dispute between the parties.

Mr Makate's submissions

[31] Mr Makate's written submissions were one day late. He seeks condonation. The explanation for the delay is adequate. And there is no prejudice to Vodacom. Unsurprisingly, Vodacom does not oppose. It is in the interests of justice to grant condonation, and it is granted.

[32] Mr Makate takes issue with the argument that this Court's jurisdiction is engaged. According to him, Vodacom does not raise any constitutional issues or arguable points of law of general public importance. He submits that the arguments on jurisdiction fail to raise legal issues and are instead veiled factual disputes.

[33] He contends that the Supreme Court of Appeal did not exceed its jurisdiction, as the issue of substitution was pleaded before the High Court and was relevant to the order made by the High Court and to the proceedings before the Supreme Court of Appeal. The argument continues that Vodacom's complaint was that, in effect, the High Court order was a substitution. As a result, the appropriateness of that substitution was fully ventilated by the parties before the Supreme Court of Appeal. It is incorrect, therefore, for Vodacom to claim that it was not called upon to answer a case of possible substitution, concludes the argument. Mr Makate then called in aid this Court's judgment in *Saratoga Avenue*¹⁹ to argue that an appellate court is empowered to make

¹⁹ *Occupiers of Saratoga Avenue v City of Johannesburg Metropolitan Municipality* [2012] ZACC 9; 2012 (9) BCLR 951 (CC) at para 7.

the order that the court below should have made, and the latter order becomes the order of the court below. He also submitted that, because the Supreme Court of Appeal concluded that the High Court had misapplied the second leg of the *Bekker* test, it (the Supreme Court of Appeal) was at liberty to consider the question of remedy and costs afresh.

[34] Mr Makate takes issue with Vodacom's argument that the portions of the Supreme Court of Appeal order relating to a range of PCM revenue (5%-7.5%) and the interest alternatives are vague. He submits that, in any event, this vagueness question is moot as he has abandoned the higher figures that feature in the range or alternatives, thus confining himself to a revenue-share of 5% (rather than anything beyond that point up to 7.5%) and *mora* interest (rather than section 2A(5) interest).

[35] Finally, Mr Makate disputes the argument that the Supreme Court of Appeal disregarded issues and evidence. He submits that the Supreme Court of Appeal's decision was entirely consistent with the evidence presented. Mr Makate submits that Vodacom's list of disputed facts was adequately addressed by the Supreme Court of Appeal. Although that Court's judgment "is concise, in parts", sight should not be lost of the fact that the judgment was written in a context where several previous judgments had already made factual and legal findings. He avers that he had adduced evidence which was largely undisputed by Vodacom. According to Mr Makate, this ground of appeal is nothing but a divergence on the evaluation of the facts. On this Court's authority, that is not a matter that must be entertained by this Court. Moreover, the complaints about the factual and legal findings do not infringe the fair hearing right protected by section 34 of the Constitution. That right has been complied with in this case. Vodacom is invoking section 34 purely because it disagrees with the outcome of the Supreme Court of Appeal decision and aligns more closely with the minority view, which it cannot do.

[36] Mr Makate then proceeds to demonstrate extensively that Vodacom's "factual appeal" is, in any event, without merit.

[37] I turn to deal with the issues that arise from the submissions. First, jurisdiction.

Jurisdiction

[38] Vodacom pleads that the Supreme Court of Appeal judgment is characterised by fundamental flaws that point to a Court that totally failed to appreciate the facts and issues before it with the result that there was a failure of justice. As a result, Vodacom was denied a fair hearing guaranteed in section 34 of the Constitution. Vodacom argues that, by granting Mr Makate an appeal he never sought, the Supreme Court of Appeal breached the rule of law entrenched in section 1(c) of the Constitution. This also infringed Vodacom's section 34 right to a fair hearing, continues the argument. This, because a decision was taken on a case Vodacom was never required to meet. Lastly, Vodacom submits that the parts of the order concerning the range on the PCM revenue share and the interest payable are so vague as to be incapable of enforcement and, as a consequence, breach the rule of law and the right to a fair hearing. Obviously, this Court's constitutional jurisdiction is engaged on all the pleaded bases.²⁰ Whether they will be sustained on the merits is another question.

Leave to appeal

[39] As will appear below, there are prospects of success on appeal. Also, Vodacom's application raises important constitutional issues, in particular the question whether it is open to this Court to set aside the decision of a court on the basis of that court's failure to appreciate the facts and issues before it. It is thus in the interests of justice that leave to appeal be granted.

[40] I proceed to deal with what I consider to be the central question in this appeal – the question of failure of justice.

²⁰ Jurisdiction is determined by the pleadings. See *Gcaba v Minister for Safety and Security* [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC) at para 75 where this Court said that "[j]urisdiction is determined on the basis of the pleadings . . . and not the substantive merits of the case".

Failure of justice

[41] As indicated more than once before, this ground of appeal concerns Vodacom's contention that the Supreme Court of Appeal disregarded facts and issues. The two, i.e., the facts and issues, are closely bound up. Vodacom highlights the fact that the Supreme Court of Appeal "seems to have been unaware [of], or disregarded, a long list of serious disputes about Mr Makate's calculations and a vast body of evidence on those disputes". This tends to give the impression that Vodacom's complaint is about the Supreme Court of Appeal's assessment of facts. Viewed in that light, the matter appears – at first blush – to present some difficulties.

[42] How flawed must an assessment be for it to cross the line to constitute a failure of justice and, thus, a violation of the rule of law and the right to a fair hearing guaranteed in section 34 of the Constitution? Put differently, what is the threshold above which our constitutional jurisdiction is engaged? In what circumstances does the assessment fall short of that threshold so as to be hit by the *Boesak*²¹ or *Mbatha*²² principle to the effect that dissatisfaction with a court's assessment of facts does not engage our jurisdiction? On the face of it, Vodacom's argument seems to take us to a slippery slope that will result in the reach of the *Boesak* and *Mbatha* principle being difficult, if not impossible, to implement. Will that principle not be unacceptably attenuated?

[43] Whatever the attendant difficulties, is the real question not whether there has been a total failure of justice? In this context, I am not concerned with esoteric debates about what justice is. I am concerned with justice in the sense of a reasonable expectation that – within the bounds of human fallibility – courts will do what is expected of them. Justice and, indeed, the court process are not about perfection; courts

²¹ *S v Boesak* [2000] ZACC 25; 2001 (1) BCLR 36 (CC); 2001 (1) SA 912 (CC).

²² *Mbatha v University of Zululand* [2013] ZACC 43; 2014 (2) BCLR 123 (CC); 2014 (4) BLLR 307 (CC); (2014) 35 ILJ 349 (CC).

are not to be held “to some abstract standard of perfection”.²³ It is unsurprising that in *Bernert* this Court held that “[j]udicial officers are not superhuman beings who do not make mistakes. This is why there is an appellate process to correct mistaken findings on law or facts”.²⁴ And in *Basson* it had this to say, “[I]t is important to bear in mind that it is inevitable that, from time to time, a Judge may make an error of law”.²⁵ If – with that in mind – there has been a failure of justice, I find it difficult to understand why that does not constitute a denial of the right to a fair hearing protected by section 34 of the Constitution. It matters not that the failure of justice may manifest itself through an improper factual assessment. What is important is that the flaws in the assessment must be so fundamental and pervasive as to vitiate the court’s judgment. There must have been a failure in the performance of what I will call a duty of proper consideration.

[44] Once vitiated by flaws of the nature I have described, a court’s decision is a non-decision. Without a decision, a court will have failed in its very *raison d’être*. Litigants go to court to have their legal disputes decided there. And the need for a court to decide the dispute is an important component of the fair hearing right. That much is plain from the verb “decided” in section 34 of the Constitution. A decision that is vitiated by malperformance of the duty of proper consideration is not a decision as envisaged in section 34. *Social Justice Coalition* is useful in this regard:

“The right to access to court is more than simply the right to approach a court and initiate a case in support of a justiciable dispute. The object of going to court is to secure a *decision* on a dispute and the language of section 34 [of the Constitution] expressly extends to the right to have a dispute *decided*. Similarly, the process by which a *decision* is reached is also covered by the right in its reference to a ‘fair hearing’. Put differently, section 34 is a right that guarantees access to court to have a dispute *decided* in a fair public hearing.”²⁶ (Emphasis added.)

²³ *R v Sheppard* 2002 SCC 26; [2002] 1 SCR 869 at para 55.

²⁴ *Bernert v Absa Bank Ltd* [2010] ZACC 28; 2011 (3) SA 92 (CC); 2011 (4) BCLR 329 (CC) at para 102.

²⁵ *S v Basson* [2005] ZACC 10; 2005 (12) BCLR 1192 (CC); 2007 (1) SACR 566 (CC); 2007 (3) SA 582 (CC) at para 69.

²⁶ *Social Justice Coalition v Minister of Police* [2022] ZACC 27; 2022 (10) BCLR 1267 (CC) at para 51.

[45] The duty of proper consideration is an integral component of the fair hearing right. The founding constitutional value of the rule of law and section 34 of the Bill of Rights require, in my view, that a court should have regard to all material evidence and all material submissions bearing on the issues it must decide. And the court must bring its reasoning to bear on those material issues and reach a conclusion on them. The evaluation of the evidence and reasoning may – as I say – be erroneous, but there cannot be a fair hearing in compliance with the rule of law and section 34 if proper consideration of the matter before the court has not occurred.

[46] The close bond between the fair hearing right and the rule of law was highlighted by this Court in *De Beer N.O.* where it was held:

“This section 34 fair hearing right affirms the rule of law, which is a founding value of our Constitution. The right to a fair hearing before a court lies at the heart of the rule of law. A fair hearing before a court as a prerequisite to an order being made against anyone is fundamental to a just and credible legal order. Courts in our country are obliged to ensure that the proceedings before them are always fair.”²⁷

[47] The court speaks publicly through its judgment. It is thus in the judgment that one expects to find evidence that the court discharged the duty of proper consideration the way it should. An indicative factor – albeit not exclusive – of the performance of the duty of proper consideration is providing adequate reasons for a judgment (the duty to provide reasons).²⁸ Woefully lacking reasons are symptomatic of a flawed assessment of facts and issues. For present purposes, flawed in the sense that amounts to a failure of justice. We must not lose sight of the fact that the adequacy of reasons relates to a proper consideration of the evidence and issues and – based on that – taking a reasoned decision. That, in no way, means that the reasons must be correct. I accept

²⁷ *De Beer N.O. v North-Central Local Council and South-Central Local Council* [2001] ZACC 9; 2001 (11) BCLR 1109 (CC); 2002 (1) SA 429 (CC) at para 11.

²⁸ There are exceptions to the duty to provide reasons, a ready example being that apex courts do not have to give reasons for refusing leave to appeal.

that unsatisfactory reasoning does not necessarily equal failure to discharge the duty of proper consideration.

[48] In *Mphahlele* this Court said the following about the duty to provide reasons, which is closely connected to the duty of proper consideration:²⁹

“The rule of law undoubtedly requires Judges not to act arbitrarily and to be accountable. The manner in which they ordinarily account for their decisions is by furnishing reasons. This serves a number of purposes. It explains to the parties, and to the public at large which has an interest in courts being open and transparent, why a case is decided as it is. It is a discipline which curbs arbitrary judicial decisions. Then, too, it is essential for the appeal process, enabling the losing party to make an informed decision as to whether or not to appeal or, where necessary, seek leave to appeal. It assists the appeal Court to decide whether or not the order of the lower court is correct. And finally, it provides guidance to the public in respect of similar matters. It may well be, too, that where a decision is subject to appeal it would be a violation of the constitutional right of access to courts if reasons for such a decision were to be withheld by a judicial officer.”³⁰

[49] Although the duty of proper consideration and the duty to give adequate reasons are closely connected, they are conceptually different. Notionally, a court could discharge its duty of proper consideration and yet fail in its duty to give adequate reasons. In practice, however, attention almost always falls on the alleged breach of the duty to give adequate reasons. This is because litigants and the public do not have insight into the court’s private processes of evaluation and reasoning.

[50] Is there direct jurisprudential support for the approach that says malperformance of the duty of proper consideration in the court’s decision-making breaches the fair

²⁹ I say the two duties are closely connected because it is through the articulated reasons that we can actually see that there was compliance with the duty of proper consideration.

³⁰ *Mphahlele v First National Bank of South Africa Ltd* [1999] ZACC 1; 1999 (2) SA 667 (CC); 1999 (3) BCLR 253 (CC) at para 12.

hearing right? *Social Justice Coalition, De Beer and Mphahlele* – to which I have just referred – are not as direct.

[51] I think the best starting point is a case that – as is the case now before us – was concerned with the right to a fair hearing. For that reason, the case of *Zayidov*³¹ is instructive. At the heart of that case was Article 6(1) of the European Convention on Human Rights. Article 6(1) of the Convention provides that “[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”. The European Court of Human Rights (ECHR) held:

“[I]n view of the principle that the [European Convention on Human Rights] is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective, the right to a fair trial cannot be seen as effective unless the requests and observations of the parties are truly ‘heard’, that is to say, properly examined by the tribunal. Judgments of courts and tribunals should adequately state the reasons on which they are based. Without requiring a detailed answer to every argument advanced by the complainant, this obligation to give reasons presupposes that parties to judicial proceedings can expect to receive a specific and explicit reply to the arguments which are decisive for the outcome of those proceedings.”³²

[52] From this, I want to underscore the statement that the right to a fair hearing is effective if the “requests and observations of parties are *truly ‘heard’, that is to say properly examined by the tribunal*”.³³ A statement that is consonant with the duty of proper consideration. This statement ties in with Vodacom’s complaint that the Supreme Court of Appeal did not truly hear or properly examine the facts and issues before it.

³¹ *Zayidov v Azerbaijan (No.2)*, no 5386/10, ECHR 2022.

³² *Zayidov* above n 31 at para 91.

³³ *Id* (emphasis added).

[53] Citing *Van de Hurk*,³⁴ the Court of Appeal of England and Wales (EWCA) in *English* said that—

“the [ECHR] . . . observed that Article 6(1) placed the ‘tribunal’ under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties. The [ECHR] will hold that Article 6(1) has been violated if a judgment leaves it unclear whether the court in question has addressed a contention advanced by a party that is fundamental to the resolution of the litigation.”³⁵

[54] Reasons given for a court’s decision help demonstrate that there was or wasn’t proper performance of the duty of proper consideration. If the facts are simple and straightforward, not much may be required by way of reasons to support the conclusion reached. But the reasons must still be enough to demonstrate sufficiently that there was compliance with the duty. As the matter gets more complex with the need to canvass more issues, more will be required of the judge adequately to set out their assessment of the evidence and issues and to explain how their conclusion is reached. In *Flannery* the EWCA held:

“[W]here the dispute involves something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, the judge must enter into the issues canvassed before him and explain why he prefers one case over the other. This is likely to apply particularly in litigation where as here there is disputed expert evidence, but it is not necessarily limited to such cases.”³⁶

[55] Just as a footnote for now, the matter before us is not only fact-laden, but also characterised by complex, hotly contested expert evidence. A question that arises then is whether in this matter the Supreme Court of Appeal grappled with the complex and

³⁴ *Van de Hurk v The Netherlands*, no 16034/90, ECHR 1994 at para 59.

³⁵ *English v Emery Reimbold and Strick Ltd* [2002] EWCA Civ 605 at para 9.

³⁶ *Flannery and Anor v Halifax Estate Agencies Ltd* [1999] EWCA Civ 811, quoted in *English* id at para 6.

hotly contested issues in the manner laid down in *Flannery*. More on that later. Similarly, as in *Flannery*, the ECHR held in *Ruiz Torija*:

“The Court reiterates that Article 6(1) . . . obliges the courts to give reasons for their judgments, but cannot be understood as requiring a detailed answer to every argument. . . . The extent to which this duty to give reasons applies may vary according to the nature of the decision. It is moreover necessary to take into account, inter alia, the diversity of the submissions that a litigant may bring before the courts and the differences existing in the Contracting States with regard to statutory provisions, customary rules, legal opinion and the presentation and drafting of judgments.”³⁷

[56] It is worth noting yet again that this obligation is articulated in connection with the right to a fair hearing protected, of course, in Article 6(1). Whether a court has fulfilled the obligation to give reasons depends on the facts and circumstances of each case.³⁸ While that is so—

“the reasons should deal with the substantial points which have been raised; include findings on material questions of fact; refer to the evidence or other material upon which those findings are based; and provide an intelligible explanation of the process of reasoning that has led the judge from the evidence to the findings and from the findings to the ultimate conclusion.”³⁹

[57] Of critical importance is that “there is no duty on a judge in giving . . . reasons to deal with every argument presented by counsel in support of [their] case”.⁴⁰ I say of “critical importance” because some litigants may find this statement of the law attractive for nitpickingly arguing that a court’s judgment failed to deal with this or that point and that, therefore, there was a breach of the right to a fair hearing. Let them be warned that they will not succeed. That is not what this statement of the law is about.

³⁷ *Ruiz Torija v Spain*, no 18390/91, ECHR 1994 at para 29. See also *Garcia Ruiz v Spain*, no 30544/96, ECHR 1999 at para 26.

³⁸ *Ruiz Torija* id at para 29.

³⁹ *Hunter v Transport Accident Commission* [2005] VSCA 1 at para 21.

⁴⁰ *English* above n 35 at para 17.

It is about the substance of a judgment viewed holistically. So viewed, does the judgment tell a reasonable, if not discerning, reader that there was compliance with the duty of proper consideration? In that regard, it is enough if the judgment identifies the issues that were vital to the determination of the matter and then shows how they were determined. One or two issues may not necessarily be critical for that holistic look at the substance of the judgment.

[58] In the context of the need for a judgment to explain its reasoning for purposes of appeal, the EWCA held in *English*:

“[I]f the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the Judge reached his decision. This does not mean that every factor which weighed with the Judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the Judge’s conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the Judge to identify and record those matters which were critical to his decision.”⁴¹

[59] The fact that there are defects in a judgment does not necessarily mean that there was non-compliance with the duty of proper consideration.⁴²

[60] I am alive to the fact that, unlike the ECHR cases on the fair hearing right,⁴³ the judgments from other countries deal with the duties to provide reasons and give proper consideration in contexts that are unrelated to the fair hearing right. That notwithstanding, I find the cases quite useful.

⁴¹ *English* above n 35 at para 19.

⁴² Compare *Crinion v IG Markets Ltd* [2013] EWCA Civ 587 at para 17 where the Court, commenting on what it described as “seriously defective” judgments that were the subjects of appeal in *English*, held that – in respect of those judgments – the courts concerned were still found to have performed their judicial function properly.

⁴³ *Zayidov* above n 31 and *Ruiz Torija* above n 37.

[61] To sum up, a court will have failed in its constitutional duties to give the case proper consideration and to give reasons for its decision if the court's judgment does not contain adequate reasons evidencing such proper consideration.

[62] Whether a court's reasons are adequate will depend on the nature of the case, the issues and the ambit of the evidence and submissions. The test is not perfection but adequacy. Adequate reasons do not necessarily have to be lengthy; the focus is on the essential import or gist of the matters to be addressed. The Supreme Court of Canada had this to say:

“It is now plain from Canadian jurisprudence that a trial judge is not required to give extensive reasons for a decision, but is bound to indicate what he or she understands the nature of the case to be so that the parties are aware that the case they argued was the one decided.”⁴⁴

[63] The adequacy of reasons is not concerned with whether the reasons are sound or correct but whether they sufficiently explain how the court reached its ultimate conclusions. The reasons must be “responsive to the case's live issues and the parties' key arguments”.⁴⁵ The more complex and extensive the evidence and arguments, the more extensive will the reasons normally need to be in order to meet the test of adequacy. The reasons must be such as to enable the losing party to see that the court has decided the case that was argued and to understand why that party lost. Reasons must also be such as to enable an appellate court to follow the court's reasoning with a view to assessing whether it was right or wrong; reasons must disclose the “path of reasoning”. The Victorian Supreme Court of Appeal (Australia) held that “the mere recitation of evidence followed by a statement of findings, without any commentary as to why the evidence is said to lead to the findings, is insufficient to disclose a path of reasoning”.⁴⁶

⁴⁴ *R v Deschamplain* 2004 SCC 76; [2004] 3 SCR 601 at para 34.

⁴⁵ *R v Walker* 2008 SCC 34; [2008] 2 SCR 245 at para 20.

⁴⁶ *Transport Accident Commission v Kamel* [2011] VSCA 110 at para 73.

[64] In general, adequate reasons must at least deal with each of the main issues in the case by: (a) identifying, in respect of each such issue, the essential import of the evidence on each side; (b) explaining how and why the court has resolved any material factual disputes in a particular way; (c) identifying, where applicable, the essential import of competing submissions on the law applicable to the facts; (d) explaining how and why the court has resolved any material disputes on the law in a particular way; and (e) explaining how and with what result the court has applied the law to the facts. The judgment must also explain how and why, pursuant to the resolution of the material issues, the court reached its conclusion on the disposition of the case and the orders made. In general, the more peripheral the issue, evidence or argument, the less likely it is that a court's failure to address it fully or at all will justify a conclusion that its reasons for judgment are inadequate.

[65] The principles enunciated in this judgment are not an open sesame for litigants to subject adverse judgments to nitpicking analysis with a view to trying to show the inadequacy of reasons.

[66] In sum, flaws in the assessment during the adjudicative process that are so fundamental and pervasive as to vitiate the court's judgment constitute a failure of justice and, thus, a breach of the rule of law and the fair hearing right guaranteed in section 34 of the Constitution.

[67] Now the central question: has the Supreme Court of Appeal judgment breached the rule of law and fair hearing right?

[68] Unfortunately, I cannot but say that the judgment is thinly reasoned. At times it is characterised by confusing reasoning. At other times it is characterised by statements that evince a disregard for or lack of awareness of the facts and issues. Some examples of the confusing reasoning are these. The judgment says that Vodacom was not happy with the fact that in its 2016 judgment this Court "finally dealt with the matter on the

5% of ‘revenue generated’ basis”.⁴⁷ This Court never determined a percentage. Mr Makate pushed for a 15% revenue share. This Court declined to award that. Instead, it held that reasonable compensation had to be arrived at through negotiation between Vodacom and Mr Makate, failing which it had to be determined by the CEO.

[69] The Supreme Court of Appeal went on to say that “when the CEO considered the computation, he instinctively or by design . . . fell back to Vodacom’s original stance of sharing on a 5% profit basis, contrary to the operative order” (i.e., this Court’s 2016 order).⁴⁸ The 5% revenue share was, in fact, agreed by the parties; that is common cause. It is unsurprising that the CEO applied it. It passes more than strange that the Supreme Court of Appeal referred to the 5% as this Court’s stipulation and, in the same breath, as Vodacom’s “original stance”. But the confusion relates to the source: was the source this Court’s order or Vodacom’s original stance? More strange is that later the Supreme Court of Appeal does recognise that the parties had agreed on the 5% share of revenue.⁴⁹

[70] From both the majority⁵⁰ and minority⁵¹ judgments it is plain that there was argument on the need (or otherwise) to apply the *Plascon-Evans* rule.⁵² The majority was totally confused as to the issue or issues to which the application of the rule related. It held that the applicability of the rule did not arise at all in the appeal because the parties were agreed on the issue in respect of which the rule was raised. That issue, according to the majority, was the percentage on which the revenue share was to be pegged. That was wrong. The *Plascon-Evans* rule was raised in totally different

⁴⁷ Supreme Court of Appeal judgment above n 3 at para 26.

⁴⁸ *Id.*

⁴⁹ *Id.* at para 35.

⁵⁰ *Id.* at para 21.

⁵¹ *Id.* at paras 110-12, 125, 165 and 167.

⁵² On the rule, see *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; [1984] 2 All SA 366 (A); 1984 (3) SA 623 (A).

contexts. That much is clear from the minority's engagement with the subject.⁵³ Indeed, it would not have made sense for Vodacom to invoke *Plascon-Evans* in the context of *the agreed* percentage at which revenue was to be shared. As a result of its confusion on the applicability of the *Plascon-Evans* rule, the majority failed altogether to address *and decide important questions* to which the applicability of the rule related.⁵⁴ That constituted a breach of the duty of proper consideration. I say the questions were important because the theme around them was the quantification of the compensation due to Mr Makate. A central issue, indeed. The need for addressing and deciding these questions is made plain by the minority judgment.⁵⁵

[71] Yet another instance of confusion is a statement by the Supreme Court of Appeal that Vodacom's counsel conceded that the CEO's determination was not reasonable.⁵⁶ One need not have been at the Supreme Court of Appeal to realise that such a concession would have been senseless. In context, that was a key question in the contest at the Supreme Court of Appeal: was the CEO's determination reasonable? The parties adopted opposite sides on this question, with Vodacom defending the determination and Mr Makate challenging it.

[72] The matters of confusion on the part of the Supreme Court of Appeal are not mundane. They are symptomatic of a Court that did not appreciate the facts and issues it had to determine. That goes to the important question whether the Supreme Court of Appeal considered and decided all issues that were germane to the dispute before it, a matter that is fundamental to the duty of proper consideration.

[73] Moving on, what was crucial to the Supreme Court of Appeal's determination against Vodacom was the question whether the R47 million awarded by the CEO was

⁵³ Supreme Court of Appeal judgment above n 3 at paras 110-12, 125, 165 and 167.

⁵⁴ As authority relied on above shows, it is a breach of the duty of proper consideration not to consider issues that are fundamental to the determination of a matter.

⁵⁵ Supreme Court of Appeal judgment above n 3 at paras 110-12, 125, 165 and 167.

⁵⁶ Id at para 22.

inequitable. This question was concerned with the second leg of the *Bekker* test.⁵⁷ The Supreme Court of Appeal obviously asked this question because it was key to Vodacom's appeal. Vodacom was supporting the CEO's determination in the sum of R47 million. It was thus arguing that the amount was equitable. An answer that said the amount was inequitable meant that Vodacom's appeal had to fail. That is how crucial the question was. Crucial though the question was to the determination of the appeal, all that the Supreme Court of Appeal did was to set out the parties' arguments in this regard without pronouncing on them.⁵⁸ Strangely, therefore, despite saying that the High Court did not undertake the second leg of the *Bekker* test, the Supreme Court of Appeal did not do so either. It was not enough merely to highlight the parties' submissions. A shortcoming of this nature on so crucial an issue constitutes a breach of the duty of proper consideration.⁵⁹

[74] The Supreme Court of Appeal is also guilty of failing to assess evidence or being unaware of evidence that it ought to have assessed. First, in paragraphs 6.1-6.8 of his determination, the CEO dealt with evidence on "PCM revenue in the context of Vodacom's voice revenue". He dealt with the evidence extensively. As part of this, he referred to calculations of voice revenue in one of Mr Makate's models and said those calculations or estimates "need to be carefully examined". The Supreme Court of Appeal said that this word of caution or conclusion was expressed "without saying why".⁶⁰ The truth is that in the same sentence in which this quote appears, the CEO continued and said that this is so "because if [the estimates] are inconsistent with the publicly available financial data, the model would be discredited". The CEO did not

⁵⁷ To recapitulate, the *Bekker* test, as paraphrased in *Perdikis* above n 17 at para 7, is to this effect:

"It was held in *Bekker* . . . that a valuation can be rectified on equitable grounds where the valuer does not exercise the judgement of a reasonable [person] that is, [their] judgement is exercised unreasonably, irregularly or wrongly so as to lead to a patently inequitable result."

⁵⁸ Supreme Court of Appeal judgment above n 3 at paras 23-4.

⁵⁹ Compare *English* above n 35 at para 6 with reference to *Flannery* above n 36 at 381 where it was held:

"But where the dispute involves something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, the judge must enter into the issues canvassed before him and explain why he prefers one case over the other."

⁶⁰ Supreme Court of Appeal judgment above n 3 at para 18.

end there. He proceeded to deal with the subject and to explain himself fairly extensively in paragraphs 6.4-6.14.

[75] He concluded that – on Mr Makate’s calculations – PCM revenue made up more than 80% of Vodacom’s total mobile voice revenue, and in five of those years, more than 90%. In paragraph 6.5 the CEO said that Mr Makate’s figures thus suggested that an overwhelming percentage of Vodacom’s voice revenue was generated as a direct result of PCM. This, according to the CEO, ignored many other variables which went into generating revenue for a telecommunication operator, namely: investment into the network; other products and services offered by Vodacom; growth in customer numbers; and growth in spend by existing customers. He concluded that the numbers in the model used by Mr Makate were unrealistic and on this ground alone no reliance could be placed on the model. In paragraphs 6.6-6.14 he proceeded to do an in-depth analysis of Mr Makate’s model, identifying where, in his view, it had gone seriously wrong.

[76] Mr Makate contested Vodacom’s voice revenue figures that the CEO used in the analysis set out above, and a great deal of evidence from the parties was adduced on this aspect. In his explanatory affidavit the CEO substantiated his reasons for rejecting Mr Makate’s models in no fewer than 27 paragraphs.

[77] With all this in mind, it is difficult to comprehend how the Supreme Court of Appeal came to the conclusion that what the CEO had said was unexplained. The Supreme Court of Appeal was either not aware of the CEO’s explanation or disregarded it. Whatever the position, its conclusion is inexplicable.

[78] Immediately after this incorrect conclusion, the Supreme Court of Appeal gave three examples of errors in the determination which, according to Mr Makate’s counsel, “the CEO could not refute”. One of these was the supposed “arbitrary 70% reduction that the CEO introduced”. By way of background, in argument before the CEO the parties were eventually in agreement that a return call made to a PCM sender within

one hour of sending the PCM should be treated as causally prompted by the PCM and that 27% of all PCMs fell within this parameter. Mr Makate's complaint was that the CEO had arbitrarily reduced the 27% by a further 70%. The result – continued the complaint – was that only 8.1% (30% of 27%) of PCMs generated revenue in which Mr Makate was entitled to share.

[79] The Supreme Court of Appeal dealt with this criticism in four sentences, the last of which reads: “The CEO provides no answer for this in his reasons for the determination”. It is unclear whether – in this quoted sentence – the Supreme Court of Appeal was still summarising Mr Makate's criticism or whether it was expressing its own conclusion. The Supreme Court of Appeal did not return to the subject later in its judgment. One is forced to conclude that it accepted the criticism without further reasoning, and agreed that the CEO had given no reasons for the reduction.

[80] Once again, the Supreme Court of Appeal seems to have been unaware of what the CEO had said on the 70% reduction, and – as result – it failed to deal with any of the evidence adduced by the parties on the subject of incremental revenue. In his determination, the CEO said that the parties were in agreement that the revenue in which Mr Makate was entitled to share was confined to incremental revenue generated by PCM; in other words, as the CEO said, “only that revenue which but for the PCM, would not have been generated”. The CEO proceeded to give examples to illustrate why not all of the 27% return calls would generate incremental revenue for Vodacom.⁶¹

[81] Addressing the revenue share model, the CEO emphasised that the relevant responding calls were those which were incremental in nature, and commented: “There can never be any data which can tell whether a responding call would have been made anyway and I can only rely on my best estimate made on the strength of my insights and impressions over the years”. On this basis, he assumed that 30% of the causally

⁶¹ I have explained the concept of incremental calls above at n 7.

relevant return calls would have been incremental, “although this is very generous” (i.e., in Mr Makate’s favour).

[82] The CEO’s views did not go uncontested. Post the determination and during the litigation, Mr Makate filed the affidavit of Professor Harvey Wainer, an accountancy expert. The purpose of the affidavit was to attack the CEO’s view that return calls made by certain contract customers did not generate incremental revenue. The CEO responded to Professor Wainer’s views in a supplementary explanatory affidavit. There is nothing in the Supreme Court of Appeal judgment to show that it was aware of or gave consideration to any of this evidence. The judgment does not disclose a “path of reasoning” that explains why, in determining a 30% allowance on the 27% return calls, the CEO had (in the language of the *Bekker* test) exercised his judgement “unreasonably, irregularly or wrongly” so as to lead to a “patently inequitable result”. It must be emphasised that, even if Mr Makate’s Model 9A were preferred to the CEO’s revenue share model, the need for a reduction in order to limit the revenue to incremental revenue would still have to be *considered* by the Supreme Court of Appeal, even if it was thereafter rejected on a reasoned basis.

[83] I continue with other examples of the Supreme Court of Appeal disregarding evidence on fundamental issues. I say disregarding when, in fact, it may well not even have been aware of the evidence. The Supreme Court of Appeal said that it could find no objection by Vodacom to Mr Makate’s models on compensation similar to that of a third-party service provider.⁶² In similar vein, the Supreme Court of Appeal said that “*absent* any evidence that Mr Makate’s computation is wrong . . . I can find no reason why Mr Makate’s computation should not be accepted as correct”.⁶³ This is astounding.

[84] First, Mr Makate’s models, which the Supreme Court of Appeal says were not objected to by Vodacom, concerned the hotly contested issue of the computation of

⁶² Supreme Court of Appeal judgment above n 3 at para 34.

⁶³ Id at para 37 (emphasis added).

compensation. Why would Vodacom have appealed at all if it was not contesting Mr Makate's models? Unsurprisingly, Vodacom submits that "[t]he entire debate in [the Supreme Court of Appeal] turned on the question whether the models presented by Mr Makate or those of the CEO should be preferred". In what is a clear demonstration that Mr Makate's models were at issue, the minority engages with this debate at great length in paragraphs 62-202.

[85] Second, with all this in mind, how could the Supreme Court of Appeal say that evidence that Mr Makate's computation was wrong was *absent*? In argument before us, Vodacom cites examples of the issues that it addressed countering Mr Makate's models and, therefore, computation. It does so with reference to the CEO's determination. These examples were: PCM volumes; incremental revenue; call duration; effective call rate; duration of the contract; and *mora* interest and the time value of money.

[86] How – in the face of all of this – the Supreme Court of Appeal held that it could find no objection to Mr Makate's models and that there was no evidence that his computation was wrong escapes me. This is a very fundamental issue because the computation is what the entire litigation was about. This means the Supreme Court of Appeal was unaware of or disregarded evidence on what the entire case was about. If that is not a total failure in the performance of the duty of proper consideration, I do not know what is.

[87] Another feature that I must touch on is the apparent readiness of the Supreme Court of Appeal to accept whatever Mr Makate said. This may already be apparent in parts of what I have said above. But here is what I want to deal with now:

“[The High Court] did not undertake the second leg of the *Bekker* test. What compounds the matter is that the remedy as crafted, is not what Mr Makate sought because, as is evidenced from the amended notice of motion delivered on 9 January 2019, Mr Makate sought that the determination of the CEO be set aside and substituted,

instead of remitting it for reconsideration to the CEO. To that extent it erred. It follows, therefore, that this Court is at large to interfere with the order of the High Court.”⁶⁴

[88] I cannot conceive of any basis on which Mr Makate was – as the Supreme Court of Appeal seems to suggest – automatically entitled to whatever he asked for. The Supreme Court of Appeal makes this bald statement without explaining it. It also seems to have given no consideration to the fact that, in granting Mr Makate what he wanted – under paragraph 2(b) of its order⁶⁵ – it was granting an order which had not been sought by way of cross-appeal and was thus not properly before it. I explain why this was not properly before the Supreme Court of Appeal later. It may well be that in the end Mr Makate will get what he is asking for. But that is a conclusion which must be reached after a proper consideration of the issues.

[89] The Supreme Court of Appeal also appears not to have considered the substantive content of the substituted order it impermissibly granted in favour of Mr Makate. The Supreme Court of Appeal simply copied paragraph 2 of Mr Makate’s High Court notice of motion verbatim, thus incorporating the revenue-sharing range of 5%-7.5% and the two alternative forms of interest. If the Supreme Court of Appeal had properly considered the relief, it would have realised that – although a litigant can claim relief across a range or in the alternative – a court has to fix the relief with precision. As previously mentioned, the range and alternatives resulted in huge monetary differences.

[90] There is the question of call duration and its relevance to the revenue share. Mr Makate’s Model 9A distinguished between “Total Call Revenue” and “Total PCM Revenue”, the latter being the sum of total call revenue plus additional items described as “PCM Advertising Revenue”, “Please Recharge Me Revenue” and “Vodacom Operating Countries”. The Total Call Revenue was (in round figures) R196.84 billion

⁶⁴ Supreme Court of Appeal judgment above n 3 at para 36.

⁶⁵ This is the paragraph that provides for a range of 5%-7.5% revenue share and *mora* interest or interest in terms of section 2A(5) of the Prescribed Rate of Interest Act.

while the Total PCM Revenue was R273.39 billion. However, according to the CEO, Mr Makate abandoned the additional items at the hearing before him, pressing for a share only of Total Call Revenue. As a result, the High Court's order was confined to the Total Call Revenue. Mr Makate's Model 9B, described as a "brief summary of Model 9A", was likewise confined to Total Call Revenue. So, the Supreme Court of Appeal seems not to have been aware of the distinction between Total Call Revenue and Total PCM Revenue and that, as a result of the additional items, a share of the latter would be vastly higher than a share of the former.

[91] In Model 9A, the average duration of an incremental call ranged from 3.68 minutes to 7.61 minutes over the 18-year period. However, the High Court directed the CEO to determine Mr Makate's compensation afresh on the basis, *inter alia*, of an average call duration of two minutes, noting in its judgment that in argument Mr Makate "eventually agreed that he is not opposed to the application of a call duration of two minutes".⁶⁶ Unsurprisingly, therefore, call duration was not an issue in the Supreme Court of Appeal.

[92] There is a broadly linear relationship between Total Call Revenue and the assumed average duration of a call. If in a particular year the average call duration were assumed to be six minutes, the resultant Total Call Revenue would be about three times higher than if one assumed an average call duration of two minutes. The average call duration (not weighted) across the full period covered by Model 9A is 5.9 minutes. In short, the Total Call Revenue ordered by the Supreme Court of Appeal, and the resultant pre-interest compensation to which Mr Makate would be entitled, is likely to be around three times higher than revenue based on the call duration of two minutes that was uncontested before the Supreme Court of Appeal. Reference in the order to Model 9A, 9B and 9BB effectively meant that the order incorporated the significantly higher call duration – and not the uncontested two-minute call duration. Notably, though, the Supreme Court of Appeal did not mention call duration at all in its judgment. One is

⁶⁶ High Court judgment above n 2 at para 106.

driven to conclude that – insofar as the model it ordered should be applicable related to call duration – the Supreme Court of Appeal was unaware of the content of that model. It is easy to make this conclusion regard being had to the significant difference between the call duration in that model and the uncontested call duration.

[93] To conclude, the evidentiary matters and legal questions highlighted above and which the Supreme Court of Appeal disregarded or of which it was unaware or on which it was confused were key to the determination of the contest between the disputants. The confusion or disregard or lack of awareness of the evidence and arguments led to the Supreme Court of Appeal not assessing and deciding on central issues and crucial evidence. As indicated above, it cannot do that. To put it bluntly, the real appeal was not decided. That constituted a total failure of justice in breach of the rule of law and the fair hearing right protected in section 34 of the Constitution.

[94] On the factual issues, here is what differentiates the above analysis from what was at issue in *Boesak*,⁶⁷ *Mbatha*⁶⁸ and similar cases. In each of those cases, the factual perspective that was being advanced was calculated to demonstrate that the facts ought to have been decided in favour of the party concerned. Of course, this Court held that the contest on the factual matter did not engage its jurisdiction. In the present case, the treatment of the facts is not about which version should take precedence. Rather, it seeks to demonstrate that the Supreme Court of Appeal misunderstood, disregarded, was confused about, or was unaware of the facts to the extent that it failed to decide the appeal before it. This judgment does not pronounce one way or the other on the factual issues that have been dealt with.

Absence of cross-appeal

[95] Although my conclusion on the failure of justice point is dispositive of the appeal and thus renders moot the ground of appeal that – absent a cross-appeal by Mr Makate

⁶⁷ *Boesak* above n 21.

⁶⁸ *Mbatha* above n 22.

– the Supreme Court of Appeal lacked jurisdiction, I believe that it is necessary to deal with this ground of appeal, albeit briefly. That is so because it is desirable to correct any misapprehension which the Supreme Court of Appeal’s judgment may have brought about. And full argument was presented on this ground. The correction will be of assistance to courts that are bound by decisions of the Supreme Court of Appeal.

[96] The central issue in Vodacom’s appeal before the Supreme Court of Appeal was whether the CEO’s determination was reasonable in accordance with the *Bekker* test.⁶⁹ As stated above, Vodacom supported that determination. The Supreme Court of Appeal held that – based on the *Bekker* test – the CEO’s determination “was wrong”.⁷⁰ It did not end there. It went on to hold that the High Court’s order did not accord with what Mr Makate had asked for in his notice of motion, which was that the CEO’s determination be set aside and substituted with the High Court’s own determination.⁷¹ The Supreme Court of Appeal emphasised that Mr Makate sought a substitution, not remittal. It then held that it could find no reason why Mr Makate’s computation of reasonable compensation should not be accepted. For that reason, instead of remittal, Mr Makate’s calculation should have been accepted. It proceeded to make the substituted order. That is the order that has the strange features mentioned above.⁷²

[97] Earlier I highlighted that Mr Makate did not cross-appeal to the Supreme Court of Appeal. Before us Vodacom argued that the Supreme Court of Appeal lacked jurisdiction to grant the substituted order in the absence of a cross-appeal. I agree. Mr Makate argued that the Supreme Court of Appeal did not exceed its jurisdiction. That is so because the issue of substitution was pleaded before the High Court. And it was relevant to the order made by that Court and to the proceedings before the

⁶⁹ *Bekker* above n 16.

⁷⁰ Supreme Court of Appeal judgment above n 3 at para 34.

⁷¹ *Id* at para 36.

⁷² On the percentage of revenue to which Mr Makate is entitled, the order stipulates it as 5%-7.5%. That range translates to huge differences in the amounts payable across the range. The order should have made one specific choice. Also, on interest the order states two alternatives. On that too, which rate takes precedence?

Supreme Court of Appeal. The argument continues that Vodacom's complaint was that, in effect, the High Court order was a substitution. As a result, the appropriateness of that substitution was fully ventilated by the parties before the Supreme Court of Appeal, concludes the argument. In support of his argument, Mr Makate relied on this Court's judgment in *Saratoga Avenue*.⁷³ He argued that an appellate court is empowered to make the order that the court below should have made, and the latter order becomes the order of the court below.

[98] This argument is unavailing. If I understand it correctly, the debate about substitution that Mr Makate says took place in the Supreme Court of Appeal concerned the High Court order which, according to him, Vodacom considered to be a substitution of the CEO's determination. That is the substitution that was fully ventilated. It is not, and could not have been, the same as the substituted order made by the Supreme Court of Appeal.

[99] So, the Supreme Court of Appeal decided a case that was not before it and which Vodacom was not called upon to answer. In *Gent* the Supreme Court of Appeal held:

“In *Shatz Investments (Pty) Ltd v Kalovyrrnas* [1976 (2) SA 545 (A)] this court was confronted with the question whether, without any cross-appeal, it could correct an order of a trial court by making a prayer for interest, which that court had not granted. Trollip JA said the following:

‘The court a quo did not award it, possibly because it was not claimed in the pleadings. But, be that as it may, in the absence of any cross-appeal to correct the order of the court a quo to plaintiff's advantage and defendant's detriment by including an award of such interest, we cannot deal with it.’

This dictum reaffirmed trite principles. These are that a respondent in an appeal may support the order appealed against on any ground that properly appears from the record. In order to obtain a variation of the order, however, a respondent must cross-appeal

⁷³ *Saratoga Avenue* above n 19 at para 7.

with the necessary leave, save perhaps in exceptional circumstances where there is no prejudice to the appellant.”⁷⁴

[100] This principle predates the Constitution. In the current constitutional era, the principle assumes a constitutional dimension. It fits squarely within the dictates of the section 34 guarantee of a fair hearing. It is at variance with a fair hearing for a court to decide an issue that has not been pleaded and which the affected party was not called upon to answer. In *Koch & Kruger Brokers* this Court held:

“Jurisdiction is determined by an applicant’s pleaded case. I am satisfied that the complaint that the High Court strayed beyond the separated issue and thereby violated the applicants’ section 34 rights engages our constitutional jurisdiction.”⁷⁵

[101] The *Gent* quotation above refers to the question of prejudice: “In order to obtain a variation of the order . . . a respondent must cross-appeal . . . , save perhaps in exceptional circumstances where there is no prejudice to the appellant”.⁷⁶ Vodacom and Mr Makate adopt contrasting views on the impact of the order of the Supreme Court of Appeal. The difference hinges on the nature of prejudice suffered by Vodacom as a result of the order. On the one hand, Mr Makate argues that no prejudice is suffered by Vodacom because the amount due from Vodacom under the order of the Supreme Court of Appeal is lower than the amount due under the High Court’s order. On the other hand, Vodacom contends that the Court should not follow this utilitarian understanding of prejudice and argues that prejudice is not about the outcome but consists in the violation of the court process.

[102] In accordance with the High Court remittal order, the CEO is yet to make fresh calculations followed by a second determination. I am loath to engage in any comparisons of the amounts involved in the manner suggested by Mr Makate. Overall,

⁷⁴ *Gent v Du Plessis* [2020] ZASCA 184 at paras 15-16.

⁷⁵ *Koch & Kruger Brokers CC v Financial Sector Conduct Authority* [2023] ZACC 27; 2023 (11) BCLR 1329 (CC) at para 24.

⁷⁶ *Gent* above n 74 at para 16.

I find Vodacom's approach on prejudice more convincing as it accords with section 34 of the Constitution and the right to have a fair process. By deciding a case that was not before it, the Supreme Court of Appeal deprived Vodacom of the opportunity to make submissions on whatever issue it might have been minded to on the possibility of a substituted order.

[103] I do not find it necessary to deal with the remaining grounds of appeal.

Remedy

[104] This judgment merely highlights the fatal shortcomings in the Supreme Court of Appeal's judgment. It does not make its own decision on any of the attendant issues. Those are the very issues that ought to have been decided by the Supreme Court of Appeal. It seems to me the just and equitable remedy⁷⁷ is for the appeal to be decided on its merits by the Court that ought to have decided it. More importantly, in the main, what remain for determination in the appeal are factual questions that do not ordinarily fall for determination by this Court. The jurisdiction of this Court is confined to constitutional issues and arguable points of law of general public importance which ought to be considered by it.⁷⁸ In this judgment we dealt with factual issues, without deciding them, purely to demonstrate the Supreme Court of Appeal's failure to comply with the duty of proper consideration. We cannot suddenly be at large, as the legal language says, to determine those factual issues.

[105] In sum, it seems to me, therefore, that the matter must be remitted to the Supreme Court of Appeal for a proper determination of the appeal. And that must be before a differently constituted panel of that Court.

⁷⁷ Section 172(1)(b) of the Constitution provides that "[w]hen deciding a constitutional matter within its power, a court . . . may make any order that is just and equitable".

⁷⁸ Section 167(3)(b) of the Constitution.

Costs

[106] Obviously, costs in this Court must follow the result. About costs of the abortive Supreme Court of Appeal hearing, none of the parties is to blame. It seems to me that an appropriate costs order is that each party must bear their own costs. Those wasted costs are confined to the costs directly relating to the abortive hearing in the Supreme Court of Appeal. The other costs incurred to date in the Supreme Court of Appeal – in particular, the preparation of the record and written argument – have not been wasted, and will be determined when the Supreme Court of Appeal, upon remittal, decides the appeal.

[107] Vodacom asked for costs of three counsel. Having regard to the size of the record,⁷⁹ the complexity and novelty of the issues and the very large amount at stake, I think that is a fair and just request. Mr Makate himself saw the need to take the precaution of having three counsel appear for him before us. His written argument was settled by six counsel, three of whom were silks. So, costs of three counsel will be awarded.

Order

[108] Accordingly, the following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Supreme Court of Appeal is set aside.
4. The matter is remitted to the Supreme Court of Appeal to be reheard by a differently constituted panel of Judges of that Court.
5. Each party must pay their own wasted costs in respect of the abortive hearing of the matter in the Supreme Court of Appeal.
6. The first respondent must pay the applicant's costs in this Court, including the costs of three counsel.

⁷⁹ The record totalled 27 volumes and just under 3 000 pages.

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