

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 08/20980

DATE: 1 JULY 2014

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between:

MAKATE NKOSANA KENNETH

Plaintiff

and

VODACOM(PTY) LIMITED

Defendant

JUDGMENT

COPPIN J:

[1]. The defendant, a major cellular phone service provider, offers a service, appropriately named the “*Please Call Me*” service, which allows a cellular phone user who has run out of airtime to request a call from another cellular phone user. This is an action in which the plaintiff alleges that the service was based on his idea. He is ultimately claiming a share of the revenue generated by the defendant through the service.

[2]. The plaintiff alleges that he disclosed his idea to the defendant in return for payment in terms of an oral agreement which he concluded with the defendant. The relief that the plaintiff is claiming, in essence, at this stage (in addition to costs) is a declaratory order that the oral agreement was entered into by the parties and for an order directing the defendant ‘to commence with bona fide negotiations to determine a reasonable remuneration payable to the plaintiff for the use by the defendant [of] the product known as “Please Call Me”’.

[3]. I shall deal with the pleadings and the detail of the evidence in due course. For now, for the purposes of background, the, facts in matter, broadly stated, were the following. The plaintiff, who was working for the

defendant as a trainee accountant in its accounts department, had an idea in about November 2000, borne out of his personal circumstances, that the use of the cellular network could be increased ,with a concomitant increase in profit for the defendant, if customers of the defendant, who had no airtime, could “buzz” or send a message using the network to another person with airtime to call them back, possibly resulting in those “buzzed”, or to whom the message had been sent, to call back.

[4]. The plaintiff reduced his idea, which was essentially a business idea, to writing. The plaintiff’s intention was to sell this idea. He consulted with a senior employee of the defendant in its accounts department, one Mr Lazarus Mr Muchenje, for advice on how to go about selling the idea to the defendant. Mr Muchenje, a chartered accountant, who was in charge of a section of the accounts department where the plaintiff was employed, advised him on whom to approach.

[5]. It is not disputed that Mr Muchenje referred the plaintiff to another senior employee of the defendant, Mr Geissler, who, at the time, was a director of the defendant and head of its product development section. The plaintiff alleged and testified that he and Mr Geissler, the latter representing the defendant, concluded the oral agreement in terms of which the defendant would take and test the idea and if it was successful, pay the plaintiff an amount to be negotiated between them, but which represented a share of the revenue generated by the product that was to be developed based on the idea.

[6]. Electronic messages (i.e. “emails”) were exchanged between, *inter alios*, the plaintiff and Mr Geissler regarding, *inter alia*, the use and development of the idea. It was common cause that the defendant’s “*Please Call Me*” service was launched during March 2001.

It was also common cause that the plaintiff was not paid for this idea. The plaintiff alleges that it had been agreed between him and Mr Geissler that if the product, that was to be developed from the idea was successful the plaintiff would be paid a revenue share. According to the plaintiff, he proposed to Mr Geissler that he wanted 15% of the revenue generated by the product. He testified that he and Mr Geissler were still to negotiate the amount and that it was agreed that in the event of them not being able to settle on a figure the chief executive officer of the defendant, who then was Mr Alan Mr Knott-Craig, would determine the amount. The plaintiff alleges that the actual amount was never agreed upon and that he got to learn at the time from Mr Muchenje that Mr Knott-Craig had told Mr Geissler that the plaintiff was greedy and would get nothing.

[7]. It is common cause that about two and a half years after the product was developed and launched the plaintiff terminated his employment with defendant and went to work elsewhere. After about four years from that date the plaintiff started to pursue his claim by way of transmitting various letters of demand to the defendant and in July 2008 he instituted the action that culminated in this judgment.

[8]. The defendant denied entering into an agreement with the plaintiff, either on the terms alleged by the plaintiff, or at all. It denies further that Mr Geissler (or Mr Muchenje) had actual authority to bind it, or that they were ostensibly authorised to do so. The defendant, ultimately, contends that in any event, on the facts, the plaintiff's claims had prescribed. The issue of prescription was dealt with at the tail end of the proceedings and more particularly, at the conclusion of argument in the matter.

THE EVIDENCE

[9]. I repeat below, briefly, the pith, or some aspects of evidence given by each of the witnesses. I do not propose to repeat the detail of the evidence given by each of them, although I have taken into account all of the evidence, including the detail, in reaching my conclusions.

[10]. The plaintiff testified himself and called Mr Muchenje and an American computer science and telecommunication expert, Mr Zatkovich, as witnesses. An erstwhile attorney of the plaintiff, Mr Masilo, was called by the plaintiff, after the defendant had closed its case, to give evidence on an issue relating to the alleged cancellation of the agreement, which was an issue, which point the defendant raised and pursued strongly at some point during the trial, but subsequently, appears to have abandoned. The defendant only called Mr Knott-Craig as a witness.

[11]. The plaintiff criticised the defendant for not calling Mr Geissler, Mr Mtembu (the managing director of the defendant at the time of the launch of the defendant's "*Please Call Me*" product) and for not calling Mr Sotiriades, who was also employed by the defendant and who the defendant had indicated, by notice, was to give expert evidence, in effect, to counter that given by the plaintiff's expert, Mr Zatkovich. I shall deal with the question of the failure to call witnesses in due course.

[12]. In brief, Mr Zatkovich's testimony covered the nature of the defendant's "*Please Call Me*" product, including the infrastructural support provided by the Global System for Communications ("*GSM*") in South Africa; its relationship to the plaintiff's "*buzz*" idea; the meaning and explanation of various technical terms; pricing comparison of voice and Short Message Services ("*SMS*"); the viability of the plaintiff's idea; similar services provided by other service providers and how other businesses would reward for such a concept. The essence of his testimony, however, concerned the novelty of the plaintiff's idea. He testified in that regard that the novelty vested in the business model proposed and not in the technical aspects that went into creating the service proposed by the idea.

[13]. Mr Zatkovich holds academic qualifications in computer science and has, for a period of about 12 years, given expert testimony in the United States of America and internationally in, *inter alia*, patent litigation and contractual disputes which involve computer software.

[14]. I shall now transverse at this juncture all the definitions of various technical terms given by the witness and will mention them in the course of judgment if and when necessary. Mr Zatkovich testified *inter alia* that the acronym “USSD” stands for “*unstructured supplementary service data*”. It refers to single packet transmissions, usually from mobile devices to a central computer, as opposed to something like a ‘Short Message Service’ (“SMS”), which is a single packet message from a cellular phone, usually to another cellular phone. The USSD messages were designed to enable one to communicate with the internal infrastructure of a telephone company, for example, to enable a subscriber to send messages, or to divert his calls to another number when ordered to report service problems experienced with his cellular phone.

[15]. The witness testified, *inter alia*, that the term “VAS” stood for “*Value Added Service*”. Of the earlier value added services, within the field of telephony, were services like call- forwarding, call- waiting or call-blocking. At present there are many more value added services available through telecommunication operators. In the case of mobile, or cellular phones, services offered include SMS and MMS services (“*Multi Media Services*”), such as the ability to send photos or videos electronically. The witness opined that the defendant’s “*Please Call Me*” service was also a VAS. The entity or person that provides the VAS is referred to as “*the Value Added Service Provider*”³. It could be the carrier itself, such as the defendant in relation to the “*Please Call Me*” service, or a third party that provides a service, such as a web service, or music or multimedia, from a web service.

[16]. The witness testified that a ¹¹ WASP’ refers to a “*Wireless Service Provider*”, which traditionally was the telephone carrier itself. The witness opined that in the case of the “*Please Call Me*” product, the defendant was the WASP.

[17]. The witness also explained what was meant by an “IVR system”. It was not disputed that the defendant’s main competitor in South Africa, namely MTN, provided a similar service to the “*Please Call Me*” service, but its service was based on an IVR system. The “IVR” stands for “*Interactive Voice Response*”. The witness said that an example of this was the automated voice menu presented to you when calling an institution, such as a bank or insurance company to query something, a voice would come on, saying “press 1 to check your account balance” or “press 2 to talk to customer services”, etc. To initiate a message in such a system, an initiation mechanism has to be used. In the case of the system of MTN, they initiated the message by having the user call an IVR system and then enter a key code and then enter the recipient’s phone number in order to initiate the “*Please Call Me*”. The witness explained that this was more cumbersome and expensive than the defendant’s “*Please Call Me*” system which utilised the USSD message system.

[18]. Mr Zatkovich opined that the plaintiff’s idea, encapsulated and explained in a memorandum that the plaintiff submitted to, *inter alios*, Mr Geissler, was a patentable idea, because, in the memorandum, the

problem that was to be solved was addressed, the solution was suggested, and the objective to be achieved, was stated. According to the witness, the problem the plaintiff identified was that, at the time, persons with no airtime on their cellular phones could not send a message to someone else with a cellular phone to call them back. The solution, as plaintiff saw it, although not in technical terms, was to enable someone with a cellular phone, but no airtime, to initiate a call from a receiver by means of “*buzzing*” This meant that the former who had no airtime, could at least buzz (dial) the latter and allow the latter to see the phone number of the former. This method was one way of initiating a call. Other methods were the USSD and IVR methods. The objectives identified by the plaintiff, were to increase revenue resulting from the call back and getting cellular phone subscribers, who otherwise had no airtime, to make calls. The witness explained further, that the plaintiff’s idea was cost-efficient and held great benefits for a telephone carrier such as the defendant.

[19]. According to Mr Zatkovich, the defendant utilised the plaintiff’s idea, but used a USSD method. One reason for using that method was because USSD messages are allowed to go into the Telkom system, regardless of whether the user has airtime. USSD messages were generally used for internal maintenance and service messages. In short, a USSD message, which includes Party A and Party B’s phone numbers, gets sent from the cellular phone of Party A (i.e. the person with no airtime) to the internal USSD server, which then extracts Party A’s and Party B’s phone numbers, composes a message in the form of an actual text message, which reads “*please call Party A’s phone number*” (and gives the number). This message is then sent by the USSD server to the SMS server which causes Party B to receive the message.

[20]. The witness explained that if Party B, in response, calls Party A, the service provider, in this instance the defendant, earns revenue from that call. Even if the return call is made by party B from a landline, i.e. in the case of South Africa, a Telkom line. The amount earned by Vodacom from the terminating call of Party B is greatest if Party B made a call from a cellular phone subscribed to the defendant. The witness further testified concerning revenue: that it was possible to track the cost and the revenue generated by such a service. In the case of the “*Please Call Me*” service a number of “*call backs*” received for every “*Please Call Me*” message could be tracked by means of cross-referencing and by setting a time for a call back although this would not be completely accurate.

[21]. With reference to a patent registered in the United Kingdom by Orange Personal Communication Services (Pty) Ltd (“*the orange patent*”) Mr Zatkovich testified that while the plaintiff’s idea (or invention) seemed similar to that patent on the face of it, there were material differences in the detail between the two. The objectives were also different The purpose of the “orange patent” was to allow an international traveller to avoid charges when making calls while travelling abroad. Although the traveller calls from outside the country it is as if he called from within the country. He still pays for the call, but at a lower rate. In the case of the plaintiff’s idea, a subscriber without airtime (i.e. Party A) incurs no charges in the process of getting

the other party to call him. Party B incurs charges in respect of the responding call.

[22]. The witness also described the differences between the patent of MTN and the plaintiff's idea. The MTN patent, according to the witness, was focussed on a shortcut method of sending SMS messages from one person to another, by way of coded messages through an IRV system.

[23]. The plaintiff testified about his interaction with Mr Mr Sotiriades and in particular, with regard to the preparation of the experts' minutes. As pointed out earlier, Mr Mr Sotiriades was not called as a witness. Mr Zatkovich also testified that the objectives of the plaintiff's idea were met by the defendant's "*Please Call Me*" service. The witness explained that the term "*buzz*" in South Africa, refers to a missed call, but has a definite meaning in the United States and Europe.

[24]. Mr Zatkovich explained that before the "*Please Call Me*" service, if a party with a cellular phone and no airtime, wanted to be called he could not call (or SMS) Party B and ask Party B to call him back. The witness explained that the defendant's technical solution in using the USSD system was a way of avoiding traffic on the voice network, and that while the plaintiff's idea or proposal did not focus on technical aspects, it contained a business objective. His idea was that the service should be focused on a particular market, namely, that of people with prepaid cellular phones who were out of airtime. The basic difference between the defendant's idea (proposal) and the MTN patent was that the former identified a particular market and a particular problem that needed to be solved. The MTN patent, on the other hand gave no indication of what market it was directed at. The defendant's "*Please Call Me*" product eventually resolved to target people who had no airtime.

[25]. The witness also testified concerning the meaning of a "*Dutch*" or "*Scotch*" call. He said that this was a well-known method of getting a message to somebody else, but it was not a business model. He went on to describe the plaintiff's idea as "*a genius*" idea and that it was one of five great South African innovations of this decade because it targeted the poor. The witness testified that the term "*soft locking*", in telecommunications parlance, meant that a subscriber who ran out of airtime cannot use his or her cellular until airtime was loaded.

[26]. Mr Zatkovich also testified that in 2001 MTN and the defendant were the key players in the cellular phone industry in south Africa and must have been constantly monitoring each other's products. He said that someone must have seen the value in the business model proposed by the plaintiff and that the defendant found the correct technical solution. The defendant and MTN followed a model in terms of which they initially allowed free access to a service and once users became *llhookecf* on the service, they would then charge a fee for the service.

[27]. Mr Muchenje testified that he was a chartered accountant. He worked for the defendant from January 1998 to March 2001, after which he joined Vodacom International. At the time when he testified, he was residing in the Isle of Wight in the United Kingdom. When he was employed at the defendant he first worked as a Financial Manager and then became the Executive Head of Income Financial Control. He knew the plaintiff, who, during the period November 2000 to March 2001, was working as a subordinate in the witness's section and particularly, as an accountant in the Income Finance Control Division. Mr Muchenje testified that the plaintiff's duties included dealing with Value Added Service Providers (i.e. VAS providers); making payments to them for their services. One of such a provider was a Mark Attieh who owned a business called "*Smart Calf*" and co-owned another service provider business called "*Cointef*". Mr Ahmed Ayob was the Managing Director of Cointel. He previously worked for the defendant in its Product Services Department. In 2000 to 2001 there was a product called "*Sigi Auto Charge*", which was designed to help the defendant with payments made to it by community franchisees. When the franchisee made the payment at a bank the '*Sigi Auto Charge*' enabled the defendant to become aware of the payment quicker; it was enabled to identify and credit the franchisee's account quicker and in a more orderly fashion. Before that product was employed, the defendant had difficulties linking a deposit (i.e. a payment) to a particular franchisee, because banks were not capturing the details of the franchisee completely. There was also a problem with fraud, in particular, persons were falsifying deposit slips. The product "*Sigi Auto Charge*" resolved the problem by allocating a virtual credit card number to each customer which had to be captured by the bank when the customer made a deposit. Based on those numbers the defendant was able to allocate the customer and the account. According to the witness, Cointel was an independent VAS, which shared revenue with the defendant, possibly on a 70/30% basis, but the amount of revenue was significant and it was on a continuous payment basis.

[28]. The witness testified that community franchisees had booths with cellular phones from which members of the public could make calls. The franchisees would buy airtime from the defendant at a specific price and charge customers making calls from those phones a slightly higher price than would have been charged by Vodacom.

[29]. Mr Muchenje testified that in November 2000 the plaintiff came to see him in his office with the "*buzzing option*" idea and sought the witness's opinion on various aspects pertaining to the commercial exploitation of the idea. The plaintiff wanted to know whether he could make money from his idea and, if so, whether he had to do business with the defendant or with an independent value added provider or even join the defendant's competitor, MTN? Mr Muchenje stated that he advised the plaintiff to give the defendant preference, because he was an employee of the defendant and because the defendant had the biggest network which would ensure greater success with the idea. He testified that the plaintiff wanted to be compensated for this idea, but he (i.e. the witness) was not able to give the plaintiff an answer regarding compensation and

discussed the matter with Group Products Development and, in particular, with Mr Geissler, including the fact that the plaintiff had an idea that he wanted to give to the defendant in exchange for a reward commensurate, or proportionate to the successful use of the idea.

[30]. Mr Muchenje testified that the defendant showed him written a memorandum, which was addressed to the witness, and for also addressed for distribution to Mr Knott-Craig, the CEO of the defendant at the time, Mr Andrew Mtembu, the Managing Director of the defendant at the time, Mr Leon Krause, the Group Finance Director of Vodacom at the time and Mr Johan van der Walt, the Executive Head of Financial Management of the defendant at the time, who also dealt with new products, business case analysis and reporting. According to Mr Muchenje, he and the plaintiff discussed the memorandum and he advised the plaintiff that the document was to pass through the Group Products Development Department (“Products Development”) first, before it could go to the Group Executives, that is the Managing Director and the Chief Executive Officer, because if it was not passed by Products Development, there would be no need for the Managing Director and the Chief Executive Officer to see the memorandum. According to Mr Muchenje, he suggested other persons to whom the memorandum had to be distributed and as per the amended memorandum, namely Mr Geissler, Mr Van der Watt and Mr Xolani Mthabela. According to Mr Muchenje, the plaintiff amended the distribution list on the memorandum in accordance with his advice.

[31]. Mr Muchenje testified that he had a discussion with Mr Geissler, who was amenable to remunerating the plaintiff for his idea, but could not decide on the amount or percentage. He was also not certain at the time whether the idea was workable or whether it was going to pass Product Development. Mr Muchenje’s stated that he gave the plaintiff feedback of this discussion with Mr Geissler and on that basis the plaintiff agreed to release the idea to the defendant. The witness identified an email that he had sent to the plaintiff congratulating him for coming up with the “buzz /ofea”, when he had heard that the defendant was going to introduce a product, similar in concept to the “buzzef project. Mr Muchenje stated that he got information of what the defendant was going to do, from two sources, namely the Financial Executive meetings where Mr Van der Watt (the Executive Head of Financial Management) would have talked about it and from Mr Geissler, with whom he had a good relationship. In an email from MrGeissler, which was sent to the plaintiff and copied to Mr Muchenje, Mr Geissler said: “*I will keep you guys in the loop*”, implying that he would keep them updated in respect of the development of the “Please Call Me” product.

[32]. The witness testified *inter alia* that he does not remember seeing at the time the defendant’s product description document. Vodacom (Pty) Ltd and Vodacom Services Provider Company were, at that stage, separate companies. The defendant was the network and the VSP. The witness remembered receiving an email which was sent on 9 February 2001 from Mr Geissler, which was also addressed to all people working at Vodacom at various locations and to the VSP staff. The email was about a new product to be launched the

weekend by Vodacom. The email reads:

“Dear Overall Good Staff, Vodacom is launching a new project this weekend (Sunday Times) which will hopefully stimulate all traffic on the network as well as assist some of our subscribers who do not have balances on their Vodago accounts to be able to communicate with friends and family. This service will be free until the end of the year and then will go to 15c per transaction. Kenneth Makate from our Finance Department came up with this idea a few months ago and brought it to the Product Development Division. We wish to thank Kenneth for bringing his idea to our attention.”

[33]. Mr Muchenje testified, *inter alia*, that in March 2001 he left the Division (i.e. Vodacom (Pty) Ltd) where he was working. He had occasion to discuss with the plaintiff the question of remuneration for his idea. The plaintiff would occasionally, whenever they met, ask the witness about remuneration. The witness testified that he spoke to Mr Geissler about the remuneration. Mr Geissler was amenable to speak about it, but at the time of the discussion, it was not known whether the plaintiff’s idea was going to be a success or not. Mr Geissler was accordingly not willing to commit to remuneration of 15% (i.e. in the Rand), but was prepared to discuss the figure depending on the success of the idea. Mr Muchenje testified that the plaintiff had raised the amount (about 15%) with him when they first discussed the idea and the two of them discussed the rationale behind that amount. He testified further, that the plaintiff’s idea was developed into a commercially feasible product; that he subsequently, after the successful launch of the “Please Call Me” product, spoke to Mr Geissler about remuneration for the plaintiff and Mr Geissler informed him that he had discussed the matter with Mr Mr Knott-Craig, the CEO, who thought that the plaintiff’s demand was exorbitant and had said that the plaintiff was greedy and would get nothing.

[34]. Mr Muchenje testified that while he was at Vodacom it was a dynamic and growing company and that Mr Knott-Craig was a forceful and dynamic person. In those times at Vodacom, because of the pace of development, a lot of reliance was placed on trust because certain things had to be done urgently. Because of pressure “*to get the market earl/, before formal agreements could be concluded, the parties involved, proceeded on the basis of trust. The witness expressed himself thus: “Sometimes one could not get through all the paperwork on time, but the imperative was to be first at any cost”* The witness gave actual examples of this. He mentioned instances where he got calls from Mr Attieh requesting payment for something that he (i.e. the witness) did not even know about and when no agreement or deal was yet in place. The witness would then enquire from the Sales Director (Mr Blackbird) why there was no agreement in place. At times he would know the reason, but at other times Mr Blackbird would first consult Mr Knott-Craig about the matter. According to the witness, service providers were paid without a contract being in place. He mentioned “*Smart Calf*”, which was owned by Mr Attieh, as one such service provider. He testified that even if he was not able to make payment because there was no contract in place he would be instructed by Mr Knott-Craig

to nevertheless make the payment.

[35]. Mr Muchenje testified that in 2001 he received the Chief Executive Officer's award which is given to persons who have exceeded what was expected of them in respect of their work. He testified that "*Talk Time*" is an internal newsletter that was issued from time to time by the defendant. The witness read a portion from the March 2001 edition of "*Talk Time*" pertaining to the plaintiff and confirmed the correctness of what was stated there and related that he also shared the sentiments expressed in the article concerning the plaintiff.

[36]. A portion of the newsletter which he read from was accompanied by a portrait photograph of the plaintiff, the text states:

"Vodacom has launched a new product 'call me', thanks to Kenneth Makate from our Finance Department Kenneth suggested this service to the Product Development Team, which immediately took up the idea.

'Call me' is a world first and allows Vodago prepaid users to send a free text message to other Vodacom customers requesting that they call them back. The main aim of this product is to allow Vodago users who do not have balances on their accounts to keep in touch with their families and loved ones. The service is also available to contract customers.

HOW IT WORKS

You send what is called a USSD message to another person asking the person to call you back. The other person, to whom 'Call Me' is sent, must have a Vodacom cellular phone but can use any phone to return the call.

*The USSD command is *140*082 last seven digits # (Send or Call).*

A standard SMS will be sent to the other person asking that person to 'Call Me' with a contact number showing.

In a message to staff, Andrew Mthembu, Managing Director of Vodacom, said he was impressed with the product and the fact that the idea came from a member of staff. 'Most impressive to me was the fact that the idea of the product came from one of our staff members whose job is not related in any way to product development This led me to ask myself one question:

What would happen in this company if we were all to come up with workable solutions to our company's problems like Kenneth did? Surely as a young company that we are, there are many areas

that we have not managed to perfect yet, be it in Finance, IT, Operations and so forth', Andrew said.

'Call Me' has been a big success. On the first day in operation about 140000 customers made use of the service. It will be free until December 31 this year and thereafter cost users 15 cents per transaction."

[37]. Under cross-examination Mr Muchenje testified, *inter alia*, that he could not remember approving the plaintiff's appointment to the Finance Department. He testified that he reported to Mr Willem Swart, Finance Director of Vodacom (Pty) Ltd (i.e. the Group), at the time. In 2001 Mr Van der Watt was Head of Finance Management which was one of the sub-departments under Mr Swart. Mr Muchenje gave evidence relating to the structure and the directorships at Vodacom Group (Pty) Ltd and its relation to its subsidiary, Vodacom (Pty) Ltd (i.e. the company that operated the network). Cross-examination was quite lengthy. I will discuss aspects of it in the course of evaluating the evidence and in the discussion of the issues including the issue of authorisation. At this stage I will mention some salient aspects.

[38]. Mr Muchenje conceded that there was no mention or record of the defendant having made a promise or having given an undertaking to pay any remuneration to the plaintiff and that the "*high watermark*" of the emails was that Mr Geissler promised that once the product was launched and successful he would speak to Mr Knott-Craig about remuneration. Mr Muchenje was adamant that the plaintiff had raised the issue of remuneration with him at the outset, when he came to him with the memorandum and that the plaintiff also mentioned remuneration at the rate of 15% (in the Rand) of the revenue generated through use of the product that was to be developed from the idea. Mr Muchenje opined with reference to the emails, that, given the benefit of hindsight, Mr Geissler acted in bad faith. He also gave the opinion that although he would never know definitely that somebody was responding to a "*Please Call Me*" message, rules could be made establishing criteria that would enable one to treat a particular 'call back' as being in response to a 'Please Call Me' message. He did not concede that the analogy that was drawn between the plaintiff's position and revenue sharing with service providers, was not valid. He testified that if Mr Geissler had told him before that the defendant was going to take the plaintiff's idea, but not pay him for it he (i.e. Mr Muchenje) would have advised the plaintiff to take his idea elsewhere. According to Mr Muchenje, Mr Geissler had indeed told him that the defendant would pay the plaintiff for the use of his idea, although the amount still had to be agreed.

[39]. Mr Muchenje described Mr Geissler and his relationship with him in the following terms:

"... I could pick up the phone and call Philip Geissler Philip Geissler at that time was feared in Vodacom, he was the security guy, checking on cameras on people etc.,. So he was the guy that was checking to make sure everything is fine and so on, so people are afraid of him. I was one of the few

people that would speak to him. So I guess Mr Makate also was a little bit intimidated, but I spoke with Mr Geissler myself, yes."

[40]. According to Mr Muchenje, Mr Geissler promised to revert concerning the amount of the remuneration, but agreed to the use of the idea for payment. Mr Geissler promised that once the product was tested and proved to be commercially viable, he would come back and finalise with the plaintiff the issue of remuneration. According to Mr Muchenje, if Mr Geissler had not made the promise the plaintiff may have taken his idea elsewhere, or may have become a WASP (*'Wireless Application Service Provider'*³) himself, or may have gone into partnership with someone like Mr Attieh. Mr Muchenje testified that the plaintiff had been told that he should not discuss his idea with anyone else.

[41]. The witness testified that he advised the plaintiff not to go to the top executives first with the memorandum, but to go to those as reflected in the changes made to the original memorandum, in other words, to deal with the Products Department first. He said that he was not present when the plaintiff discussed the details with Mr Geissler, but he had spoken to Mr Geissler before and Mr Geissler had indicated that the product (i.e. using the idea) had to be developed and tested before the amount of the payment could be finalised. He said that he knew that it was a new product and that he got guidance from Mr Geissler who told him about the technical and commercial viability tests. The witness further testified that he conveyed what Mr Geissler had told him to the plaintiff. He could not remember whether he had one or two meetings with the plaintiff concerning the report back from Mr Geissler. Mr Muchenje further testified that after the initial meeting with the plaintiff he spoke to him numerous times about progress. He had related to the plaintiff what Mr Knott-Craig had allegedly said to Mr Geissler concerning the plaintiff's request to be paid 15% of the rand on a revenue sharing basis. The witness was, however, of the view that Mr Geissler had acted in bad faith in failing to negotiate in good faith with the plaintiff about remuneration for the use of the idea. He testified that he did not know what happened between Mr Geissler and Mr Knott-Craig, but it could not be negotiation in good faith to say that the plaintiff was getting nothing.

[42]. According to this witness, Mr Geissler was representing the defendant at all times. He was of the view that if someone came to the defendant with a new product he would have had to see the Product Development Director (someone in the position of Mr Geissler) who would have had to get the necessary approvals. The person who came with the product did not have to get those approvals himself. In the case of the plaintiff, it was not for the plaintiff to get the approvals for the acceptance of his idea by the defendant. But after Mr Geissler had approved it, it was for Mr Geissler, to take the matter further and get the necessary approvals.

[43]. Mr Muchenje was adamant that Mr Geissler was the correct person to approach with the idea. He is the

one that could say whether a product could be developed from the idea, and whether it was going to work or not and that there was no point in talking to Mr Knott-Craig about it first. According to the witness, Mr Geissler said that you only go for Board approval if the product is shown to be technically and commercially viable.

[44]. Mr Muchenje testified further that he knew that if Mr Geissler did not have authority to approve, he would get the necessary approval and permission and revert to the plaintiff. He also testified that he knew that Mr Geissler had no authority to make promises for remuneration and that he had to get approval. The witness denied misleading the plaintiff about that. According to the witness, it was quite normal at the defendant for certain individuals to be given delegated authority to do certain things. On each occasion they have to consider whether they have the authority and if they do not have the authority, to take the matter to those with the authority, to get the required approval. The witness testified further that he could not question Mr Geissler when he made the promise to him, because Mr Geissler was a Director of the defendant.

[45]. Still dealing with the issue of authority, the witness insisted on seeing the written delegation of authority. He testified concerning the procedure when a product enters Vodacom. According to him it does not first go to the CEO as the final signatory. There is a process with cumulative steps. The memorandum of the plaintiff was addressed, after discussion with the witness, to the relevant persons who then had to see to it that the necessary approvals were obtained and that the formalities, that were required, were complied with.

[46]. Mr Muchenje conceded in cross-examination that it was historically correct that Vodacom had never entered into revenue sharing agreements with employees, but stated that it does not mean that the defendant was entitled to say that it would not negotiate with the plaintiff after having exploited his idea and then, as justification for not negotiating with him, raise the fact that the plaintiff was its employee. The witness compared the situation with that of Mr Knott-Craig's son who owns a company, "*Cell-Find*" and co-owns the company "*Cointel*".

According to Mr Muchenje, the defendant's resources were utilised to assist in developing or bringing the products, offered by those companies, to the market. The witness pointed out that when the plaintiff made his proposal to Mr Geissler, it was not as an employee and that Mr Geissler's email of 6 February, which was addressed to the plaintiff, also reflects that understanding.

[47]. During his re-examination the witness asked after the written delegation authority of Vodacom (Pty) Ltd (Issue 5) and pointed out with reference to that document that the first person who needed to approve new products and services was the Group Director for new products and services, who, at the relevant time, was Mr Geissler. The witness testified that it was then Mr Geissler's responsibility "*fo walk it through right up to final approvaf*". He pointed out that the delegation of authority document dealt with in his

cross-examination did not bring out that aspect. The witness testified that, accordingly, he correctly advised Mr Makate to talk to Mr Geissler. With reference to the Issue 5 delegation document, he pointed out that when it came to commitments different people may have had to approve, depending on the estimation of the revenue, or impact that the contract would have. Thus, if Vodacom (Pty) Ltd wished to enter into a service provider agreement, the approval of the Group Director of Marketing, the Group Finance Director and the Managing Director would have been required. Mr Geissler, who was in charge of products for the whole group, would also have had to look at the product. With reference to the approval of the "*Please Call Me*" product, the witness testified that the launching of the product indicates that it was approved by the relevant persons, including the Chief Executive Officer at the time, Mr Knott-Craig.

[48]. According to the witness, a service whereby you identify an incoming call, is a value added service • , as would be an itemised billing service. An SMS service would also be a value added service.¹ The witness testified that the service provider did not provide a value added service, but that those services were provided by the network operator. By analogy, the plaintiff could be compared to a Value Added Service Provider and not to a traditional service provider. The plaintiff's work at Vodacom did not entail product development, in the course of further cross-examination on the Issue 5 delegation document, it was put to the witness that the plaintiff's claim was not within the approved budget and ought to have been dealt with as one falling outside the approved budget. The witness did not agree with this proposition and said that it had to be determined whether one was talking about revenue, or about expenses claimed, or about the claim that the plaintiff was making to be paid. The witness testified that the new product would not have been provided for in the budget and that the plaintiff's claim was not in the budget for the year 1 April 2001 to end March 2002.

[49]. The plaintiff testified, *inter alia*, that after completing his matric he managed, in 1995, to secure a position as a trainee accountant at Vodacom and was based at its head office in Sandton. In 2000 he was studying towards his Bachelor of Commerce (Honours) degree and was serving his articles with Vodacom. His permanent employment contract with Vodacom was concluded in 1998. In about the years 2000 and 2001 the plaintiff worked in the incentive section which was responsible for making payments, or giving incentives to service providers. This section was part of the Income Financial Control Department.

[50]. According to the plaintiff, his work included ensuring that a complete deal register was maintained. This involved co-ordinating with the Sales Department. Payments would be made as per instruction on the deal registers. Prior to that and as trainee accountant, he was assigned to the Community Services Department where his main job entailed debt collection from community service providers who bought airtime from Vodacom and then resold it. These service providers took 33% and Vodacom kept 67% of the revenue. The plaintiff testified that he assisted the service providers with their banking.

[51]. The plaintiff testified that he had met Mr Knott-Craig in their coffee cell in his early days at Vodacom. He testified that Mr Geissler was the Director of Product Development and that Mr Muchenje was the most senior person in the Financial Income Control Department.

[52]. According to the plaintiff, the basis on which Vodacom (Pty) Ltd (i.e. the network) did business with service providers, was on revenue sharing basis. The service providers got a percentage of the revenue generated, i.e. there was a revenue split between the service providers and Vodacom. The plaintiff mentioned companies such as "*Smart Calf*" and "*Diloran*" and the "*Sure Group*" and dealers that were involved with prepaid services, as examples of service providers that did business on such a revenue sharing basis. According to the plaintiff, Vodacom would invoice them for its portion of the revenue share and they service would pay that amount to Vodacom. Cointel was a service provider that developed the product "Auto Recharge". According to the plaintiff, this company also enjoyed payment in the form of a revenue share. The plaintiff also gave examples of so-called WASP's and the services they provided.

[53]. Regarding his idea, the plaintiff testified that he came up with the "*buzz*" idea late in November 2000. He ascribed its origin to a long distance love relationship that he had with the person who was now his wife. She was a student in Cape Town at the time; had limited finances and could not call him because she could not afford to buy airtime. He testified that as a result he ended up calling her most, if not all of the time. When he asked her why she was not calling him, she would say that she was not able to "*buzz*" him. He testified that the term "*buzz*" was used in the townships. You would call the person and allow the phone on the other side to ring twice and then cancel the call. The person who was being called would see that there was a missed call from a particular number, or person, and would then call back.

[54]. The plaintiff explained that the "*buzz*" then gave him the idea. He thought along the lines of, what if his girlfriend could "*buzz*" him even though she did not have airtime? He realised that it was not only his girlfriend, but friends, family, the unemployed and members of the community at large who could not get contracts with cellular phone companies such as the defendant, or who experienced "*soft-locking*", that were being affected. He said that he was suggesting with his idea a means (by "*buzzing*") of conveying a message to the other party who could then respond by calling back. He saw that this would enable the use of unused sim cards (i.e. for lack of airtime) and would generate revenue by the return call. According to the plaintiff, there was a rise in unused Vodago sim cards and sim cards in the market generally, and he saw this as an excellent opportunity. He realised that there was a potential of substantial interconnect fees being generated by the return calls or "*call backs*". The essential aspect of his idea was that the person with no airtime should nevertheless be able to send a message to the other person to "*call back*" and that the message should not be charged for. The plaintiff was of the view that any attempt to charge for the message sent would defeat the object of his idea.

[55]. The plaintiff testified that early one morning, on or about 21 November 2000, he composed a memorandum setting out his idea, its objectives, etc., and took it to work with him. In his mind he had no doubt that his idea would result in “*big money*”. He wanted to keep his options open, in case the defendant did not agree to accept his proposal. He was then going to go to a competitor, or raise capital to develop the idea himself. The plaintiff testified that this meant financial security for him. He said “*This was my ticket to long-term, i mean it was, I do not know, it was, I was thinking that I am now done, I do not have to work ever in my life and I will focus on this ... I have arrived, definitely.*”

[56]. The plaintiff explained that Mr Muchenje was like a mentor to him, giving him useful advice not only about accounting, but business as well. They discussed many things and he trusted Mr Muchenje and that is the reason why his memorandum was also addressed to Mr Muchenje. According to the plaintiff, on 21 November he walked into Mr Muchenje's office holding the memorandum close to his chest. He sat down and explained to Mr Muchenje the idea and his business proposal. He also told Mr Muchenje of his options. According to the plaintiff, he told Mr Muchenje that he needed “*to strike a deal, an ongoing revenue share deal*” and “*if that [was] not acceptable*” to then exercise his other options.

[57]. The plaintiff testified that they discussed the pros and cons of his idea. He thought it was the following day that Mr Muchenje informed him that he had spoken to Mr Geissler about the idea and the proposal; that Mr Geissler was keen and had also stressed that the memorandum must first be sent to the Product Development Department. This resulted in the amendment to the addressees on the original memorandum, including the crossing out of Mr Muchenje's name and the addition of the name of Mr Xolani Mthabela, who was then working in Product Development. The plaintiff explained that his original intention (as reflected in the memorandum before its amendment) was to send it to the persons whose names appear there.

[58]. Mr Knott-Craig testified on a range of topics. He testified, *inter alia*, about the structure of the company Vodacom Group Limited, and the holding company Vodacom (Pty) Ltd, the operating or “network company”, the position of the Directing Committee in the holding company and the positions of the persons in the hierarchy of authority at the holding company.

[59]. Briefly, he testified in regard to the structure, that Vodacom in South Africa, originally comprised of two companies, namely, the network operating company and the service provider company. The former operated the networks and the latter company did the selling. That was later changed so that there was a group company, which the two subsidiaries (i.e. the service provider and network companies) and others, became a part of. Each subsidiary had its own board and the Group Company also had its own Board, (“the Vodacom Group Board”). The powers of the Group Board were largely delegated to a Directing Committee which was made up of representatives of the shareholders, and that committee was, ultimately, the authority in the Company. The witness testified that he was the Group Chief Executive Officer at the time and also

Executive Chairman of the Operating Company. Mr Geissler reported to Mr Mthembu. Common functions such as legal, human resources, regulatory, group finance and treasury functions resided in the Group. Mr Mthembu reported to the witness.

[60]. Executive directors of the Vodacom Group, including the witness, attended meetings of the ultimate authority, i.e. the Directing Committee, by invitation. Mr Krause, was Group Financial Director. The holding company itself did not produce any products. But it concluded operational agreements with third parties, because the legal function resided with it and the delegation of authority required at least the witness' approval, if not the board's approval.

[61]. The divisions in the subsidiary companies, such as the financial division, fell under the control of the Group Financial Division headed by the Group Financial Director, even though they also reported to their own Managing Director. In the period 2000 to 2001, Mr Krause was the Financial Director and Mr Johann van der Watt was Financial Director of the network operating subsidiary, Vodacom (Pty) Ltd. Mr Muchenje would have reported to Mr van der Watt.

[62]. The witness testified that he may have met the plaintiff but could not recall doing so, because every year he would meet "every single staff member in the company". According to him, he would travel around the country and have "many, many, many sessions", giving staff members an opportunity to raise issues with him, and for him to keep the staff abreast of developments in the company. He testified that Mr Muchenje was possibly at those sessions.

[63]. The witness testified, *inter alia*, that budgeting was a "bottom-up" process. Subsidiaries would prepare budgets and submit them to the Group for approval. The witness would engage shareholders concerning the budgets of subsidiaries. Once a budget was fixed, the subsidiary was obliged to work within it. There was little room for exceeding budgets. However, they always, generally, managed to keep to their budgets. The remuneration budget was one that could not be tampered with. However, the witness testified that he had the limited authority to adjust the remuneration scales of junior employees who were being promoted.

[64]. There were three forms of remuneration, namely a salary, an annual short-term bonus incentive, and a long-term bonus incentive scheme, which comprised of the allocation of phantom shares. In addition to that a chief-executive-officer's-award was presented annually to at least 6 or 7 employees who had truly excelled. In 2000 the award comprised something in the nature of a trip for a family to an exotic location. Subsequently, the award was in the form of cash. Initially it was about R1000-00 (one thousand rands) and in 2008 it was about R50 000-00 (fifty thousand rands).

[65]. The witness testified that no one had authority to promise an employee any remuneration beyond what

was envisaged as stated above. In his evidence in chief the witness traversed a delegation of authority document that had been approved by the Group Board of Directors on 8 November 2000. During his cross examination it became clear that that document had been revised. I do not consider it necessary to deal in detail with that part of his evidence because the plaintiff, ultimately, did not rely on actual authority or delegated authority, but relied on ostensible authority.

[66]. The witness's further evidence, in essence, dealt mainly with three aspects, namely, whether Vodacom had ever entered into a revenue-sharing agreement with an employee; whether Vodacom would have entered into such an agreement; and an explanation of the version given in his book as to how the product "Please Call Me", came about.

[67]. Briefly, the witness denied that Vodacom ever entered into a revenue-sharing agreement with an employee. He testified, *inter alia*, that Mr Geissler had no authority to enter into such an agreement with the plaintiff, nor did he (i.e. the witness) have such authority. He further testified that neither he, nor Mr Geissler could have made promises to the plaintiff regarding any remuneration for the use of his idea. The witness could not recall if he had been informed that the plaintiff had requested to be paid a revenue-share. He testified that it is possible, but he could not recall it. He testified that, in any event, it would have been outside his power to agree to that. He said that it would not even have received consideration, because it was not something that they ever did. He testified that Mr Geissler would have been in trouble if he had made a promise of such remuneration to the plaintiff. The witness described such trouble as being either "dismissal or death".

[68]. Mr Knott-Craig testified that the delegation of authority document was like their 'bible' and they were required to adhere to it. In 2000 new products had to be approved by the Group Board; all contracts had to be in writing and had to be scrutinised by the Legal Department. Contracts falling outside the delegated authority had to be approved by the Directing Committee, or the shareholders. Vodacom would only have considered a joint venture with a third party if that party offered to provide an ongoing service and to do so more efficiently than Vodacom.

[69]. Mr Knott-Craig, *inter alia*, denied seeing the plaintiff's memorandum (in which he first described his idea) at any time before 2007. While he was prepared to concede that the plaintiff's idea was good, he gave a lengthy explanation why he did not consider it to be unique, implying that it was possibly not good enough to merit a chief-executive-officer's award.

[70]. The witness testified about his involvement in the development of the "Please Call Me" product, but a major part of his evidence under cross examination related to his knowledge of the plaintiff and his idea and the version given in his book about the origin of the product. I deal in more detail with this aspect below

under the heading “overview of the witnesses”. Other aspects of this witness’ evidence are dealt with, where necessary, in the course of discussing the issues in this matter.

[71]. Mr Masllo, also gave evidence, but his evidence, in essence, related only to the question of whether a certain letter of demand which he authored, and in which rescission of the agreement had been mentioned, had been delivered, or transmitted to the defendant. This was relevant to the defendant’s defence that the plaintiff could not approbate and reprobate. This defence was, however, apparently not proceeded with when the matter was argued. Mr Masilo’s evidence was that the letter in question had not been sent to the defendant

[72]. On behalf of the plaintiff, it was contended that the evidence given by the plaintiff, Mr Muchenje, Mr Zatkovich and Mr Masilo, should be accepted and that the evidence of Mr Knott-Craig, insofar as it was relevant to the issues, should be rejected. It was also contended that adverse inferences should be drawn, because of the plaintiff’s failure to call Messrs. Sotiriades, Geissler and Mthembu. On behalf of the defendant, it was contended that the plaintiff should not be believed and that the evidence of Mr Knott-Craig should be accepted. It was contended that the calling of Messrs Sotiriades and Mthembu was not necessary and that no inference should be drawn because of it not calling Mr Geissler. The argument was that the plaintiff ought to have called him.

OVERVIEW OF THE WITNESSES

[73]. I shall discuss the evidence given by the witnesses in more detail, where necessary, in considering the issues that have to be decided. At this point and as essential background, I deem it necessary to deal with my general impression and assessment of the witnesses. As for the plaintiff and his witnesses: Mr Zatkovich impressed me as an expert witness. He gave his evidence in a fair manner based on sound reason and without exaggeration. It is clear from the pleadings that his evidence was necessary. However, as the trial progressed and reached a conclusion, it became apparent that what he had to say was not going to be contradicted by the defendant. The thrust of his evidence, namely that the plaintiff’s idea (and more particularly the business part) was a novel and patentable idea, stood unchallenged, in argument counsel for the defendant did not criticise Mr Zatkovich’s evidence, save for submitting that his evidence was irrelevant for the purposes of determining the issues in this matter. Despite the fact that the defendant had given notice to call Mr Sotiriades as an expert, apparently to counter Mr Zatkovich’s evidence, Mr Sotiriades was not called. In the circumstances and insofar as Mr Zatkovich’s evidence may be of relevance for a decision on the issues, I have no difficulty in accepting it

[74]. Mr Muchenje similarly impressed me as an honest witness who came to relate what he personally knew about the matter. The defendant’s representatives had consulted with him before he was called by the

plaintiff. Notwithstanding a lengthy, searching and if I may say, gruelling cross-examination by highly skilled and very experienced counsel of the defendant, he remained calm and collected. He did not contradict himself and readily conceded to not knowing, or being unable to remember. The defendant's counsel submitted that there were differences in the detail of some aspects of his evidence and that of the plaintiff. I shall discuss those alleged differences in the course of deciding the issues. At this stage, it suffices to state that the differences, if any, in his evidence and that of the plaintiff are, in my view, not material and of a kind that would detract from his credibility. In my view his evidence is consistent with the general probabilities and those arising from the facts as I shall discuss in more detail.

[75]. The plaintiff gave evidence in a reasonable manner. He too was subjected to a lengthy, skilful cross-examination. Notwithstanding, he retained his composure and, in my view, gave fair answers to questions. I have already dealt with the criticism that there were (allegedly) differences between his evidence and that of Mr Muchenje. The defendant's counsel, however, also levelled strong criticism at his credibility, in particular, because of alleged differences between his version, in particular, regarding the terms of the agreement he alleged he concluded with Mr Geissler, and the letters (including letters of demand) that were written by him or on his behalf concerning the matter, before he instituted this action against the defendant. The plaintiff stuck to his version, including to what he had said in chief concerning the terms of the agreement that he concluded with Mr Geissler (whom he alleged represented the defendant). The plaintiff's version regarding his idea and his communication with Mr Geissler concerning that idea, is also corroborated in material respects by the an article in the defendant's newsletter, "*Talk Time*", dated March 2001. The novelty of the "*Please Call Me*" idea is acknowledged, in particular, the feature of the idea that Vodago prepaid users with no airtime are allowed to send a free message to someone else requesting them to call back. Mr Mr Mthembu, the Managing Director of the defendant at the time, is quoted in the said newsletter, as lauding the fact that the idea of the "*Please Call Me*" product came from the plaintiff.

[76]. in addition, the emails that came from Mr Geissler to others, including the plaintiff and Mr Muchenje, concerning the plaintiff's idea and the "*Please Call Me*" product, provides further vital corroboration of material aspects of the plaintiff's version. The plaintiff's version is also consistent with the general probabilities and the probabilities arising from the common cause facts. Areas of the plaintiff's evidence where he confronted difficulty related, in particular, to his version that Mr Geissler had agreed with him that he would be remunerated for the use of his idea if it proved to be feasible technically and from a business perspective; and that he had, concerning remuneration, proposed to Mr Geissler a 15% share of the revenue (profit) derived from the product developed from his idea and that Mr Geissler had agreed that in the event of them not being able to fix a figure between themselves, Mr Knott-Craig, in his capacity as Chief Executive Officer of the defendant, would determine the figure. However, the emails confirm the involvement of Mr Knott-Craig by the plaintiff and Mr Geissler in the issue of remuneration. Another area of difficulty for the

plaintiff, was the alleged inconsistency between his version in court regarding the terms of the agreement he concluded with Mr Geissler and the correspondence sent by him, or on his behalf, before this action was instituted against the defendant.

[77]. That the plaintiff wanted to make money out of the use of his idea is not only confirmed by Mr Muchenje, a clearly honest witness, but is probable. Mr Muchenje's evidence, albeit hearsay, that Mr Geissler informed him that Mr Knott-Craig had said that the plaintiff was greedy and would get nothing and an email sent by Mr Geissler to the plaintiff in which he informs the plaintiff that he would be discussing the issue of remuneration with Mr Knott-Craig, is also consistent with the plaintiff's version that he and Mr Geissler agreed on the Chief Executive Officer's involvement on the issue of remuneration. Notwithstanding rigorous cross-examination on that aspect of his version, the plaintiff consistently maintained his version.

[78]. No direct evidence was called to gainsay the plaintiff's version of the agreement that he says he concluded with Mr Geissler, including concerning its terms. Mr Knott-Craig, whose evidence I have difficulties with as I shall shortly explain, could not deny the plaintiff's version, although his evidence was seemingly led with the intention of undermining the probability of the plaintiff's version, or certain aspects of it.

[79]. In Mr Geissler's email of 9 February 2001, which he distributed throughout Vodacom, he clearly links the defendant's "*Please Call Me*" product to the plaintiff and ascribed the idea, underpinning the product, to the plaintiff. In the email he also thanks the plaintiff for bringing the idea to the attention of the defendant.

[80]. Notwithstanding the cross-examination of the plaintiff suggesting that no agreement as alleged by the plaintiff, or any agreement at all, was entered into with Mr Geissler concerning the use of the idea, Mr Geissler himself was not called to contradict the plaintiff's version. Mr Geissler was the most obvious person to call to counter the plaintiff's version. The defendant's counsel in argument suggested that Mr Geissler could have been called by the plaintiff. Given the circumstances one cannot fault the plaintiff for not calling Mr Geissler. Since the defendant was disputing the plaintiff's evidence, in particular, about the conclusion of the agreement and its terms, it was really for the defendant to call Mr. Geissler. It was established in evidence that Mr Geissler was within South Africa and nothing suggested that he was unavailable. In my view, the defendant's failure to call Mr Geissler in the circumstances justifies an inference that he was not able to deny the version of Mr Muchenje and the plaintiff and/or that his credibility was seriously compromised and in order to avoid weakening the case that the defendant endeavoured to put up, *inter alia*, by means of the evidence of a single witness, Mr Knott-Craig, he was not called by the defendant.

[81]. As regards Mr Knott-Craig, I have difficulty with key aspects of Mr Knott-Craig's evidence. The areas of his evidence that perturb me in particular were concerning his knowledge or lack of knowledge of the idea

behind the "*Please Call Me*" product, despite his position as Chief Executive Officer of the defendant and his reputation as someone who was 'hands- on'; the explanation given, in the part autobiography of his life, a book titled "*A Second is Nothing*", for the *Please Cali Me*" idea; and his evidence in court relating to it and then, his, what I consider, rather equivocal evidence regarding whether he had described the plaintiff as being greedy and had decided that the plaintiff should get nothing.

[82]. The difficulty I have, with the aforementioned aspects of Mr Knott-Craig's version, is intensified in the light of the fact that the evidence showed that there was a good, if not very close relationship between Mr Knott-Craig and Mr Geissler.

[83]. In the part autobiography that Mr Knott-Craig co-authored with one Eunice Afonso, at least one of the chapters (Chapter 1) is written in the first person. Mr Knott-Craig there writes about himself, while the other chapters appear to be in the third person, i.e. Mr Knott-Craig is written about, including Chapter 10 where the contentious passage, which I repeat here for convenience, appears. The passage reads:

"The Please Call Me idea happened by chance. Alan was leaning over the railing of the Vodacom building chatting to a colleague, Phil Geissler; when Phil pointed out one security guard trying to attract another's attention, and because his buddy didn't see him, the security guard called him on his cellphone. Alan immediately spoke to Leon about creating a Please Call Me service. Because the Please Call Me SMS sent was free, Vodacom made money by adding short advertisements just below the message, but the real money came from the return call. This concept generated hundreds of millions in revenue. By 2008, Vodacom generated 20 million Please Call Me requests daily"

[84]. In this book, which was published in about 2009, the authors do not say when this chance event occurred, but what is clear is that reference was being made to the very product, the idea of which the Managing Director Mr Mthembu, in the defendant's "*Talk Time*" newsletter of March 2001, and Mr Geissler, *inter alia*, in his email of 9 February 2001 for distribution throughout Vodacom, ascribed to the plaintiff. The product clearly did not occur by chance as Mr Knott-Craig's book asserts.

[85]. It is common cause that the media had confronted Mr Knott-Craig about the book's explanation for the idea. Mr Knott-Craig found it necessary then to seek corroboration for the book's account from Mr Geissler. Mr Knott-Craig testified that there were media queries about the "*P/ease Call Me*" product and that he then wrote to Mr Geissler and asked him whether he had the same recollection of the event. Mr Geissler responded by email on Christmas Day, the 25th December 2009, from Mauritius, where he was on holiday. In his response Mr Geissler, *inter alia*, states:

"As discussed, I read your latest book and agree in principle with the way Please Call Me was

created on the 4th floor outside your office with two of Vodacom 痴 security guards playing a role of two 堯repaid盃sers without any credit on their phones - communicating with each other. The concept of 舛alf Me • was refined inside your office minutes later and launched officially in late January 2001. I hope this helps with media queries ...”

[86]. This “*explanation*” of Mr Geissler is contrary to his earlier assertions. Mr Knott-Craig gave a very strange answer when he was asked why he felt it necessary to get corroboration from Mr Geissler concerning the idea and whether it was because he was not sure of it. He answered:

“I was very sure about it but you know, when I wrote this I think this is dated 2009, so it was ten years ago and I thought that I would ask for it if he had a different version to what I put here. I could not imagine him having a different version, but I wrote to him”

[87]. The answer is not only circuitous, but also nonsensical. Mr Knott-Craig says that he wrote because he thought that Mr Geissler had a different version, but at the same time he could not “*imagine*” Mr Geissler having a different version. Clearly, Mr Knott-Craig had difficulties answering the question put to him. Mr Geissler did in fact have another version of how the “*Please Call Me*” product came about, which is linked to the plaintiff, but which he chose not disclose in his response to Mr Knott-Craig. On the probabilities Mr Knott-Craig must have known the true version of how the product came about.

[88]. The version Mr Geissler gives in his Christmas email is clearly nonsensical. How did two persons with “*no credit on their phones*” speak to each other on the phones? That is clearly a notion completely different from the “*Please Call Me*” concept. The person who sends the Please Call Me message may have no airtime. But the one calling back on his cellphone must have airtime. And how was it possible for Mr Geissler and/or Mr Knott-Craig to see or establish, from the point where they were, that the security guards did not have airtime on their phones? When this anomaly was pointed out to Mr Knott-Craig in the course of his cross-examination, he responded by saying: “*they could not have had no credit on their phones*”. When he was asked where Mr Geissler could have gotten this notion from, Mr Knott-Craig’s response was that Mr Geissler should be asked to explain. However, it appears that at the time when Mr Knott-Craig got Mr Geissler’s written response on Christmas Day, he, Mr Knott-Craig, was clearly happy with it; and, apparently satisfied that it accorded with his version of the matter.

[89]. Trying to stick to the book’s version of how “*the Please Call Me*” idea came about, and in response to questions about Mr Geissler’s involvement in the refinement, and the time it took to refine the idea, Mr Knott-Craig expressed doubts. He was cross-examined at length about his book’s version about the genesis of the “*Please Call Me*” idea. The book’s version, on closer analysis, is, similarly, nonsensical. Mr

Knott-Craig in answering rather pointed questions about the version used Mr Geissler as a reference point. According to him, it was Mr Geissler who drew his attention to the two security guards who were “*trying to attract each other’s attention, or at least the one was trying to attract the other’s attention*”. The way in which the one tried to attract the other’s attention was not by shouting or waving at him, but, according to Mr Knott-Craig, “*by calling on his mobile the other security guard which was, they were both in my vision*”. Mr Knott-Craig’s attempt to explain how it was possible for him to see from a distance and know that the one was calling the other one, stated that he could see the one dialling and Mr Geissler was explaining to him what that one was doing. Mr Knott-Craig testified that he could see the other one receiving the call when Mr Geissler told him to look at the man at the bottom of the building and Mr Geissler was explaining to Mr Knott-Craig how “*the guy at the bottom was trying to attract the attention of the other guy*”. According to Mr Knott-Craig, the one person was on the ground floor and the other was on the third or fourth floor, within an enclosed atrium, of the Vodacom building. He estimated that they were approximately ten metres apart. When he was asked why the one security guard could not have attracted the attention of the other by shouting out across the atrium, Mr Mr Knott-Craig’s reply was that the security guards do not shout at each other across an atrium. Mr Knott-Craig tried to rationalise the flawed version, by adding that the one did not answer his phone. But this just made matters worse. How did Mr Knott-Craig or Mr Geissler know, in those circumstances, that the one security guard was calling the other one who did not answer his phone? How did Mr Knott-Craig or Mr Geissler know that these security guards, or at least one of them, did not have airtime, and how was it possible in the days before “*Please Call Me*” to call someone else if you did not have airtime?

[90]. Mr Knott-Craig testified that he was completely ignorant of the concept until then (i.e. until it was pointed out to him by Mr Geissler as described in the autobiography). The version in the book is completely implausible and Mr Knott-Craig, an intelligent person and qualified engineer, had great difficulty explaining it rationally. Mr Geissler’s “*corroboration*” in his Christmas message was yet another implausible version that complicated matters further for Mr Knott-Craig. But, unlike a frank witness, he tried to rationalise it and where he could not at all, he attributed ‘the observations’ to Mr Geissler and said that he should explain.

[91]. Mr Knott-Craig testified that until about 2009 or 2010 he never saw Mr Geissler’s email of 9 February 2001 that was sent to the entire Vodacom announcing the launch of the “*Please Call Me?*” product and in which Mr Geissler acknowledges that it was developed from the plaintiff’s idea.

[92]. Mr Knott-Craig conceded that Mr Geissler’s version in his email of 25 December 2009 and email of 9 February 2001 “*did not accord with each other*”¹, but, nevertheless, tried to show that they were not mutually destructive. This was clearly unconvincing. Mr Knott-Craig, in essence, testified that he did not know about the plaintiff’s idea and was not aware of the article in the *Talk Time* newsletter and said that no one told him about the plaintiff’s contribution to the product.

However, no reason was suggested why Mr Geissler would not have informed Mr Knott-Craig about the plaintiff and his idea. In the early stages, that is, between November 2001 and March 2001, Mr Geissler widely publicised the fact that the plaintiff's idea was behind the product. It is apparent from the newsletter that even the Managing Director knew about the plaintiff and his idea and was quite excited about it. It is instructive that Mr Knott-Craig also contributed an article to that very newsletter. The article is headed "*From the CEO's desk*". It is difficult to fathom why the Group Chief Executive Officer and Chairman of the service provider subsidiary, would be so ill-informed. It is not disputed that Mr Geissler had a close relationship with Mr Knott-Craig and that the "*Please Call Me*" idea was a first for the defendant; a significant product that had the potential of generating huge revenue. Why Would the Mr Knott-Craig, who is otherwise said to have been "hands-on", be in the dark about the plaintiff and his idea? Why would Mr Geissler want to hide those facts from Mr Knott-Craig and then pretend that the idea, presented itself by chance as they were watching two security guards? How did Mr Geissler know that Mr Knott-Craig did otherwise not know about the plaintiff and his idea, did not read or become aware of the article in the newsletter, or in the email of the 9th of February? It is only if Mr Geissler knew that Mr Knott-Craig did not know about the plaintiff and his idea that he could have confidently misrepresented facts to Mr Knott-Craig, or else Mr Knott-Craig was not truthful about what he knew and that he and Mr Geissler conspired to exclude the plaintiff and his contribution to the 'Please Call Me' product. How does the fact, that Mr Knott-Craig did not know of the plaintiff and his idea, fit in with his (equivocal) testimony that he may have rejected the plaintiff's request to be remunerated?

[93]. On the probabilities I find it hard to believe that Mr Knott-Craig had no knowledge. The probabilities rather point to an effort on the part of *inter alios* Mr Geissler and Mr Knott-Craig to, as it were, write the plaintiff out of the "*Please Call Me*" script for financial and other reasons, which, at least, the two of them could have come to explain. In my view, Mr Knott-Craig was not frank and honest about his knowledge of the plaintiff and his idea and its (ink to the 'Please Call Me' product.

[94]. It is clear that Mr Geissler changed his attitude toward the plaintiff, for reasons which have not been explained. What is glaringly lacking is an explanation for the drastic change in attitude, from a situation where Mr Geissler's earlier email and the article in the newsletter acknowledged and praised the plaintiff for his idea and his contribution to the product, to a situation where Mr Geissler, suddenly, turned to questioning the true origin of the plaintiff's idea and eventually ascribed the product to an idea which, allegedly, occurred to him and/or Mr Knott-Craig, by chance, when they, allegedly, viewed two security guards communicating with each other by means of cellular phones. Did Mr Geissler attempt to extricate himself, with the help of Mr Knott-Craig, from the "trouble" Mr Knott-Craig referred to in his evidence concerning the authority to agree to or to make promises regarding remuneration?

[95]. Mr Masiio was called after the close of the defendant's case to prove that the letter dated the 12th of March 2008 was merely a draft and was never communicated to the defendant. The letter, inter alia, contained a threat or suggestion that the agreement would be cancelled by the plaintiff. Mr Masiio made a good impression and there is no reason to doubt the veracity of his version. The letter in which the cancellation was raised was not communicated to the defendant. In any event, as I have pointed out earlier, the issue of alleged cancellation by the plaintiff by means of this letter, was clearly abandoned by the defendant and was not persisted with.

[96]. I shall deal with other aspects of the evidence, in particular with that relating to the question of authority, in considering that point. I should however point out here that I have not considered the evidence of the witnesses in isolation or piece-meal in respect of different issues, but I have considered all their evidence in respect of all the issues in the light of that came to my conclusions regarding their credibility. I am merely dealing with the aspects separately for the purposes of convenience.

PROOF OF THE ISSUES

[97]. I shall now briefly consider whether the plaintiff succeeded in proving on a balance of probabilities that he entered into an agreement with Mr Geissler on the terms which he alleges.

[98]. The plaintiff (supported in material respects by Mr Muchenje's evidence) gave evidence about the terms of the agreement concluded with Mr Geissler. Mr Geissler was not called as a witness and the defendant did not directly contradict the plaintiff's, or Mr Muchenje's evidence. It was submitted on behalf of the defendant, that the mere fact that evidence is not directly contradicted by other evidence does not make it credible and it should not for that reason be accepted as probable, because it may in itself be so improbable as to justify its rejection. In that regard reliance was placed on what was said on the matter in *Pezutto v Dreyer*² and *Cooper and Others NNO v Seyfretts Trust Ltd*³.

[99]. On behalf of the defendant it was also argued, in essence, that the plaintiff's evidence lacked credibility, in particular, if one compared his oral evidence in court with documents that were contemporaneous with the alleged agreement. Here the defendant was referring, specifically, to the emails that passed between Mr Geissler, the plaintiff and Mr Muchenje; the plaintiff's "silence" when he could have been expected to record and pursue his version of the alleged agreement; the various letters of demand sent by the plaintiff, or on his behalf, to the defendant; the different versions contained in the plaintiff's successive pleadings; the plaintiff's counsel's opening address as well as (the alleged) difference between the plaintiff's and Mr Muchenje's versions and the differences between the version of the plaintiff and that of Mr Knott-Craig; and, according to counsel for the defendant, "the overwhelming improbabilities against the plaintiff's version". In argument

counsel for the defendant expanded on each of these points.

I shall now consider the detail of the points as well as the argument raised on behalf of the plaintiff in response thereto.

THE CONTEMPORANEOUS DOCUMENTS

[100]. The defendant was referring in this regard to the various emails that passed between Mr Geissler, the plaintiff and Mr Muchenje at the time the agreement is alleged to have been concluded. According to the defendant's counsel, not one of the emails record any of the five terms alleged by the plaintiff in his oral evidence, namely, "*the payment promise*"; "*the disclosure condition*"; "*the revenue share term*"; "*the undertaking to negotiate*"; or "*the Mr Knott-Craig determination term*". According to this argument, the high watermark of the emails is what contained in the emails exchanged by the plaintiff and Mr Geissler on the 30 January 2001 and 6 February 2001, respectively. The plaintiff in his email of 30 January, inter alia, says to Mr Geissler: *I think we should start talking about 'rewards'* And Mr Geissler in his email in reply on 6 February 2001 says to the plaintiff: *"As for rewards. All staff are expected to assist the company to achieve its goals. That is part of normal business. As for you and your assistance, once the product is launched (and assuming it is successful) I will speak to Alan, you have my word"*

[101]. Defendant submitted further, that none of the series of emails contain a recordal of the terms allegedly agreed to and that the plaintiff did not give a satisfactory explanation for the absence of such a record. It was also argued that plaintiff did not give a satisfactory explanation for not recording the terms after he was told that Mr Knott-Craig had said that he was greedy and would get nothing. According to defendant/ relying on what was held in *McWilliams v First Consolidated Holdings (Pty) Ltd*⁴, the plaintiff's failure to respond and record his version of the alleged agreement supports the inference that his version is not true.

[102]. On this same point, it was submitted by counsel for the plaintiff that a closer analysis of the emails demonstrates that they in fact support the plaintiff's version.

[103]. The first difficulty I have with the approach of the defendant is in the isolation of this one aspect without relating it to all the other evidence and the probabilities, both, general, and those arising from the evidence. What is clear from the emails, is that Mr Geissler recognises plaintiff as the one who contributed the idea and even asked the plaintiff for suggestions regarding the naming of the product to be developed from the idea. This, in particular, appears from an email of Mr Geissler to the plaintiff which is dated 30 January 2001. The plaintiff's email of 30 January to Mr Geissler, makes clear that the plaintiff wanted to be rewarded for his idea. Read together with Mr Geissler's response of 6 February 2001, it is supportive of the plaintiff's evidence that the plaintiff's reward was dependent on whether the product (to be developed from

the idea), was launched and was successful. The emails are also broadly supportive of the plaintiffs evidence that if he and Mr Geissler could not agree on the reward, then Mr Knott-Craig would determine it. The contents of those emails have to be contrasted to Mr Geissler's subsequent version (in his email to Mr Knott-Craig of 25 December 2009, in which attempts to corroborate Mr Mr Knott-Craig's version of how the product came about), as to the origin of the idea for the product and Mr Mr Knott-Craig's version of that origin, both of which are false.

[104]. The plaintiff conceded that the emails did not reflect everything that he discussed orally with Mr Geissler. The plaintiff is a layperson and was a young, inexperienced and junior employee at the time. Not recording the terms of the agreement at that stage, cannot, in my view, be regarded as unusual or abnormal. Viewed in the light of all of the evidence and the probabilities, I do not consider this point to have any merit. Mr Geissler could have been called to contradict the plaintiffs evidence concerning the terms that were, or were not, agreed to, but he was not called. In my view no reasonable explanation was given for not calling Mr Geissler despite evidence showing that he was readily available and could have been called. All of the defendant's arguments regarding the plaintiff's credibility, concerning the agreement and its terms, are compromised by the failure to call Mr Geissler.

THE ALLEGED "SILENCE"

[105]. The defendant argued that the fact that the plaintiff did not utilise the grievance procedure available to employees and the fact that documents, such as Mr Geissler's email of 9 February 2001 to all Vodacom staff, as well as Mr Muchenje's email and the article in the newsletter, "*Talk Time*", were silent about monetary compensation, supports the inference, or contention, that no promise of monetary compensation for his idea was made to the plaintiff.

[106]. On the plaintiff's behalf it was argued that the first point under this subheading was simply a 'red-herring' and that the second point was a mere 'make-weight'. There was no reason for Mr Geissler, or for the newsletter, or for Mr Muchenje's email, to have published any promise of payment, or concerning any agreement between Mr Geissler and the plaintiff.

[107]. The plaintiff's case was that he did conclude the agreement with Mr Geissler, acting on behalf of the defendant, while he was an employee of the defendant, but that he did not conclude it as, or in his capacity as an employee; it was a business agreement outside of his employment relationship with the defendant. There was, accordingly, no reason for him to utilise the company grievance procedure when Mr Geissler (and the defendant) had appeared to be reneging on the agreement.

[108]. In my view, there was no reason for details of any agreement that was made with the plaintiff to have

been publicised by Mr Geissler in his email to virtually the whole of Vodacom, Similarly, there was no need to publish such details in the “Talk Time” newsletter, a publication that was, presumably, available to all employees of the defendant or the Vodacom group.

[109]. It is common cause that for a period of about six years, after being rebuffed by Mr Geissler and, almost, four years after his resignation from the defendant, the plaintiff did not enforce the agreement. The defendant submits that the plaintiff did not furnish an acceptable explanation for his “inaction” over that period.

[110]. The plaintiffs explanation was that he enjoyed working for the defendant. Mr Geissler’s email to him, which is dated the 8 March 2002, in which Mr Geissler questioned the plaintiffs integrity regarding the origin of the idea, made him very unhappy and his unhappiness persisted until he left the defendant. The plaintiff testified that he was intent on completing his articles and did not want to prejudge himself before then. He was bidding his time and wanted to complete his articles and then enforce his rights. The first time there is a written record of him pursuing his complaint, is his letter which was sent to the defendant in 2007 in order to secure a meeting between him and the defendant. That was almost four years after he left the defendant. However, he testified that from the time he left the defendant he consulted various lawyers and did research. It was a period during which he was *“trying to explore”* how he could *“address the matter”*³¹. The plaintiff gave details of the lawyers he consulted. His first attorney took him to consult with two, well known, senior advocates/ who told him that he had a case. However, nothing really happened after he had been to see them. At some point they got tired and he (i.e. the plaintiff) ran out of money. He, subsequently, consulted other attorneys, Moledi Attorneys in Pretoria, Dawn Norton in Johannesburg and then Masilo Attorneys in Germiston.

[111]. The plaintiff testified that it was *“an emotional exercise”* for him. He had to pay the lawyers out of his salary and that it was quite hard for him. As far as the plaintiff was concerned, he was not supine, but was doing something about the matter, albeit within his means. He had consulted lawyers and was relying on them. He explained that sometimes he became depressed and could not pursue the matter, or, otherwise, ran out of funds.

[112]. pitted against a large and still growing commercial giant and the issues The defendant did not refute the plaintiff’s explanation. The plaintiff’s counsel submitted that the explanation was reasonable. One cannot reject the explanation out of hand as unreasonable. The plaintiff was may well have been regarded by lawyers, not familiar with the topics covered, as complex, although the issues now appear relatively simple since they have been reduced, distilled and refined by the pleadings and the trial processes. Furthermore, it is not unlikely that the plaintiff and his advisers anticipated a tough legal battle that would have required good,

specialist skills and substantial resources, including funds. The plaintiff was not financially well off and his precarious financial situation and the immense legal challenge facing him, might well have retarded, or, at times, halted the progress with his claim, altogether. In my view, there is nothing improbable, unreasonable, or unusual about that.

THE LETTERS OF DEMAND, PARTICULARS OF CLAIM AND OPENING STATEMENT

[113]. The defendant referred to the various letters of demand of the plaintiff, including to the letter of demand of 16 May 2007, written by the plaintiff personally, addressed to the defendant and copied to, *inter alios*, Mr Knott-Craig. The letter states, *inter alia*, that long before the launch of the product the plaintiff had demanded to discuss business that would ensure that there was a financial benefit that accrued to him for his idea and that Mr Geissler had promised to speak to Mr Knott-Craig, because he thought that the plaintiff's case was different; but that compensation was subject to the product being a commercial success. On behalf of the defendant, it was submitted that this letter did not refer to any of the material terms alleged by the plaintiff.

[114]. Counsel for the defendant also referred to the plaintiff's second letter of demand dated 11 July 2007, also written by the plaintiff personally and addressed to the defendant, where the plaintiff relates the history of how he came to impart the idea to Mr Geissler and in which he states, *inter alia*, :

"4. On the basis of the commercial success of the concept since 2000, I have lost revenue that I should have been legally entitled to. I therefore demand payment of R500 000 000 (Five Hundred Million Rand) as compensation for the innovative idea/concept of 'The Buzz option', now known as 'Please Call Me'.

5. I seek an alternative remedy in royalties equivalent to 15% per call induced by, plus 15 cent per ad placed on, the Please Call Me ' concept since 2000 to date."

[115]. It was submitted on behalf of the defendant, that the plaintiff raised the payment promise and the 15 cent proposal for the first time in the second letter, but that the letter did not refer to the disclosure condition, the revenue share term, or the term relating to the undertaking to negotiate, or to the term that Mr Knott-Craig would determine the reward.

[116]. Defendant's counsel also referred to the third letter of demand, which was written by Masilo Attorneys on behalf of the plaintiff. It is dated 19 January 2008 and it referred to the payment promise, the disclosure condition, and to the undertaking to negotiate, but not to the revenue share term, or Mr Knott-Craig's determination, or to the 15% proposal. It was, furthermore, pointed by the defendant's counsel, that the letter

alleged that the defendant and the plaintiff *"were to negotiate and/or determine the reasonable payment and/or reward"*.

[117]. The defendant's counsel referred to the further letter of demand, dated 12 March 2008 and drafted by Masilo Attorneys. It was submitted that in this letter no reference was made to the disclosure condition, the undertaking to negotiate, or to the term that Mr Knott-Craig would determine the amount. Reference was also made to the *"open letter"* drafted by the plaintiff personally and sent to various persons at the defendant on 8 July 2008. Counsel for the defendant submitted that the letter referred to none of the material terms of the alleged agreement and pointed out that the plaintiff stated in the *"open"* letter, *"I was emphatically promised that once my concept has proven to be commercially viable, you would consider my simple and straightforward request, i.e. to be allowed to share in the success of my innovation"*.

[118]. With reference to the five letters referred to above, it was submitted on behalf of the defendant, that the alleged five material terms *"were so belatedly and so inconsistently mentioned that the allegations in the letters of demand ... have no credibility"*; secondly, that none of the letters ever made mention of the term that Mr Knott-Craig would determine the amount; thirdly, that the plaintiff could not give a satisfactory explanation why the version regarding the terms of the agreement as set out in his letters of demand, differed from his version in court.

[119]. On behalf of the plaintiff it was submitted that the letters which the plaintiff wrote himself, *"are broadly in line with his evidence"* and that they were written *"in a manner to try and resolve the dispute, by a layman and not a lawyer"*.

[120]. Counsel for the defendant also referred to the plaintiff's pleadings and pointed out that in the original particulars of claim it was alleged that the defendant's obligation was to take measures that would ensure that the plaintiff receives a reasonable reward or remuneration, which was continuous and in proportion to the use of the product. It was pointed out that according to the plaintiff's original pleadings, the appropriate amount of the remuneration payable to the plaintiff would properly be determined after the defendant had ascertained if the product would be of benefit to it and would continue to be of benefit for a sustainable period and further that it was alleged that it was agreed that *"the defendant is allowed by the plaintiff to use the commercial idea and/or product for [an] indefinite period but on condition that the plaintiff would be paid a proportionate amount in the sum of 15% of the money that accrued to the defendant from or through induced calls"*. But that the original particulars of claim contain no reference to the disclosure condition, the undertaking to negotiate or to the 'Mr Knott-Craig determination' term. Developing this argument further, counsel for the defendant contended that the plaintiff's particulars of claim, after it was amended on the 14th of March 2012, now alleged that the defendant was obliged to enter into *bona fide* negotiations with the

plaintiff in order to agree on a reasonable remuneration to be paid to the plaintiff, as well as the “*Mr Knott-Craig determination term*”, with an alternative allegation that the plaintiff would be paid a reasonable remuneration for the “*type of idea, the product and ongoing services*” which the plaintiff was to provide to the defendant - and that such remuneration would not be “*less than 15% of all monies accrued to the defendant from or through the induced calls*”.

[121]. The defendant further pointed out that the amended particulars of claim still did not contain the disclosure condition, or the term relating to the obligation to negotiate a reasonable remuneration, and that there was no mention made that the plaintiff’s remuneration would be a share of the revenue generated by the calls induced by the plaintiff’s idea. It was submitted that the “*Mr Knott-Craig determination*” term was alleged for the first time, four years after the issue of summons in the matter. Regarding the alleged differences in the original and amended particulars of claim, the defendant submitted that they undermine the credibility of the plaintiff’s evidence concerning “*what terms, if any, had been agreed upon and consequently on whether the alleged agreement had been concluded at all*”. The defendant further submitted that the plaintiff’s explanation for the discrepancies in the pleadings, where he blames the pleaders (i.e. the lawyers), was “*implausible*”

[122]. The plaintiff’s counsel submitted, in response to the argument regarding the pleadings, that the defendant’s contention regarding the differences in the original pleading and the amended pleading, “*loses sight of the fact that the very purpose of an amendment is to vary pleadings*”. It was pointed out that the “*Mr Knott-Craig determination*” term was not a recent invention, because the emails that passed between the plaintiff and Mr Geissler on the 30th of January and the 6th of January, read with the email of the 18th of January clearly points to this having been a term. In the email of the 18th of January the plaintiff enquired from Mr Geissler “*how are we doing on this ... Any developments so far (we still have to meet)*”. In the email of the 30th of January the plaintiff, having suggested a name for the product, states: “*Lastly as per our verbal conversation, I think we should start talking about ‘REWARDS’, can you please notify me when can this be feasible.*”

In his email in response dated the 6th of February, Mr Geissler, after indicating that he would pass the suggested name to their “*advertising people*”, says to the plaintiff the following:

“*As for rewards. AH staff are expected to assist the company to achieve its goals. That is part of normal business. As for you and your assistance. Once the product is launched (and assuming its successful) I will speak to Alan. You have my word.*”

(It is common cause that the ‘Alan’ being referred to, is Mr Knott-Craig).

[123]. Counsel for the plaintiff further submitted that in the amended particulars of claim the “*Mr Knott-Craig determination*” term was alleged and that the plaintiff adequately explained in his evidence how the term came about.

[124]. It is now trite that the importance of pleadings should not be unduly heightened.⁵ It is common for parties to make mistakes in pleadings, or to not plead what had to be pleaded, or to not state their versions adequately, or correctly in every material respect, in the pleadings. The mere fact that the pleading does not contain an allegation, that is then later added by means of an amendment, does not justify, as an only inference, that it is an afterthought. All other facts and circumstances, including evidence fed of and concerning that allegation must be considered and it is only in light of all of that material, that an inference may be drawn.

[125] In this case it is apparent that the amendment introduced new or different allegations about the terms of the alleged agreement. That fact, on its own, does not undermine the credibility of the plaintiff. Generally, pleadings are not drafted by clients, where the client has engaged a professional to do so. There is nothing to suggest that the plaintiff had any knowledge or skill in the drafting of pleadings. On the contrary, his evidence, to the effect that he was functionally illiterate when it came to such matters, was not countenanced. The plaintiff did not merely rely on his pleadings, but gave evidence on oath as to what the terms, of the agreement that he concluded with Mr Geissler, were. The defendant could have called Mr Geissler to refute the plaintiff’s version. The plaintiff’s explanations for the discrepancies in the pleadings are not of such a nature that they could be rejected out of hand. They are reasonable. In the absence of any evidence from the defendant to counter the plaintiff’s version as to the terms, (despite Mr Geissler’s availability to be called as a witness), the only plausible inference to be drawn is that the version of the plaintiff could not be countenanced other than by way of technical points. Mr Knott-Craig could not take the matter in respect of the agreement and its terms any further. On his version, he had no knowledge of such agreement or its terms. He could not deny there was such an agreement on the terms alleged by the plaintiff. The same, in essence, could be said concerning the letters of demand that were written before summons in the matter was issued.

[126], The defendant also relied on what the plaintiff’s counsel said and may not have said in his opening address, as ammunition for undermining the plaintiff’s version regarding the conclusion of the agreement with Mr Geissler and the terms of the agreement. The defendant selected certain passages from the address. The plaintiff’s counsel submitted that this was a “*nit-picking exercise*” and that the defendant was ignoring irrefutable, common cause facts. I need not deal with much of the detail. This address was not a statement under oath and cannot serve as a replacement for what the plaintiff said under oath about the agreement and its terms. Notwithstanding the technicalities, the defendant elected not to call evidence to refute the plaintiff’s version, which was given under oath. Mr Knott-Craig, on his own version, had no knowledge of the matter.

He could not deny the conclusion of the agreement, but could only comment on Mr Geissler's authority to conclude such an agreement and the consequences for him if he acted outside the scope of his authority or powers.

[127]. Considering all of the evidence, including the emails and the defendant's election not to call Mr Geissler, the plaintiff, in my view, has proven, on a balance of probabilities, that he entered into an agreement with Mr Geissler on the terms he testified to under oath.

IS THE DEFENDANT BOUND BY THE AGREEMENT?

[128]. A second and more difficult issue for determination is whether the plaintiff has proven on a balance of probabilities that the defendant is bound by the agreement.

[129]. Counsel for the plaintiff submitted that it has been proven that the defendant was bound on the basis of Mr Geissler's ostensible authority. The plaintiff sought to amend its replication by pleading "an estoppel in conjunction with the ostensible authority of Mr Geissler". I will revert to that issue later. Counsel for the defendant has disputed this and has argued, in essence, that the plaintiff cannot by virtue of the pleadings, as they stand, rely on ostensible authority. The defendant opposed the plaintiff's application to amend his replication, but submitted, in the alternative, that even if the plaintiff were to be allowed to amend, the plaintiff did not make out a case of ostensible authority.

[130]. In his particulars of claim, as they stood at the time of trial, the plaintiff did not rely on actual authority, but alleged, *inter alia*, in paragraph 2.4 of the particulars of claim, that he (i.e. the plaintiff) acted in person in entering into the agreement and that "[t]he defendant was represented by Mr Muchenje and Mr P Mr Geissler (hereinafter referred to as the representatives) who were then occupying the positions of the Head of Finance Division and the Director of Product Development, respectively, in the employ of the defendant. The representatives were acting within the course and scope of employ with the defendant. The representatives had ostensible authority to negotiate and to contract for and/or on behalf of the defendant (emphasis added).

[131]. In paragraph 3 of the particulars of claim the plaintiff alleged, that after the conclusion of the agreement the defendant ratified it and "used and/or utilised [the] product (Please Call Me) to generate income". In argument the plaintiff did not rely on this point, but relied on the ostensible authority point. I shall, nonetheless, discuss this basis later.

[132]. In response to the plaintiff's allegations of ostensible authority, the defendant, in its main plea, denied all the allegations in paragraph 2.4 of the particulars of claim "as if specifically traversed" and pleaded in amplification of that denial, that it denied that "the representatives" referred to in paragraph 2.4.2, i.e. Mr

Muchenje and Mr Geissler, had either express, or implied, authority to conclude the agreement on its behalf; also denied that it represented to the plaintiff that they had authority to conclude the alleged agreement on its behalf and denied that any agreement, either on the terms alleged, “*or any other terms whatsoever*, was concluded between the parties.

[133]. The plaintiff delivered a replication, but did not deal at all with the issue of authority or ostensible authority in that pleading. The replication was very brief and only replicated to the defendants allegation that the plaintiff had cancelled or rescinded the agreement by a letter dated the 12-of March 2008.

[134]. In argument the plaintiff’s counsel disavowed reliance on actual authority, or ratification and relying squarely and solely on ostensible authority, submitted that the plaintiff had proved that Mr Geissler had ostensible authority to bind and did bind the defendant in entering into the agreement with the plaintiff.

[135]. A great deal of the time in argument on this issue was expended on whether the plaintiff could rely on ostensible authority, because of the manner in which it was pleaded. The defendant’s submissions in this regard were premised on the authority of *Waller v. Waller*, *Precedents of Pleadings* •, and particularly, the cases cited in that work under the topic of *Agency* •, where the author discusses ostensible authority and estoppel.⁶

[136]. The defendant submitted that if reliance is placed on ostensible authority, the elements of estoppel must be alleged, including a representation by the alleged principal, as well as the necessary causation. It was furthermore submitted on behalf of the defendant, that since the plaintiff did not plead the elements of estoppel, the plaintiff could not rely on ostensible authority. According to this argument, the plaintiff was obliged to rely in his particulars of claim on the actual authority of the defendant’s representative and once the defendant denied it, to then plead an estoppel in the replication.

[137]. On behalf of the plaintiff, it was submitted that actual authority could not be pleaded in the particulars of claim if there was no actual authority and if the case that was to be made out was that there was ostensible authority. It was furthermore argued, that in this instance, ostensible authority had been fully pleaded in the particulars of claim, albeit, with less particularity.

[138]. The plaintiff’s counsel submitted further that by alleging “*ostensible authority* in his particulars of claim, the plaintiff had “*axiomatically pleaded an estoppel*”] that the defendant’s remedy was to serve a notice upon the plaintiff to remove the cause of complaint, but, instead, the defendant pleaded to the allegation of “*ostensible authority*” and even requested further particulars concerning the issue. According to the plaintiff’s counsel, “*that meant that there was a triable issue on the pleadings as they stood*’. It was further submitted on behalf of the plaintiff, on this point, that the plaintiff in his particulars of claim, did

allege that Mr Geissler, in entering into the agreement with the plaintiff, was “*acting in his capacity as Director of Product Development and Management, in the employ of the defendant*’.

[139]. Notwithstanding the submission that the plaintiff had made out a case of ostensible authority on the pleadings as they stood, the plaintiff, nevertheless, after the close of the defendant’s case, after he had led evidence in rebuttal on the issue of cancellation and after the matter had been adjourned for final argument, sought an amendment of his replication, to, in effect, plead an estoppel and the facts supporting it. It was argued in support of the amendment, that it was in order to allege in what respects Mr Geissler had the “*trappings of authority*’. It was submitted further, that the plaintiff had raised ostensible authority from the outset and that the defendant could not contend that it was taken by surprise on the issue. It was further contended that the defendant’s denial in its plea that Mr Geissler had ostensible authority to conclude

[142]. It was further submitted on behalf of the plaintiff, that he reasonably relied on the defendant’s representation that Mr Geissler had authority to enter into the agreement. The plaintiff could not be blamed for placing full reliance on the aura of authority that ‘*engulfed*’ Mr Geissler; that the plaintiff had been advised by his superior, Mr Muchenje, that Mr Geissler was the appropriate person to deal with and even Mr Knott-Craig had testified that he could not blame the plaintiff for believing that Mr Geissler had the necessary authority.

[143]. The plaintiff’s counsel submitted further, that the plaintiff was clearly prejudiced by the representations made by the defendant. The plaintiff would not have imparted his idea to the defendant through Mr Geissler, but for Mr Geissler’s promises that if the product proved to be technically and commercially viable, further negotiations in respect of remuneration would follow.

[144]. It was submitted further on this point, that the test for establishing whether the representations were sufficient to establish ostensible authority, was whether Mr Geissler had ~~the~~ *the trappings of authority, set in context* as laid down in *NBS Bank Ltd v Cape Produce Co (Pty) Ltd and Others*⁸ Mr Geissler, it was submitted, ~~his~~ *in his conduct and his environment fulfils all the requirements* ~~laid down in Northern Metropolitan and passes the test~~ • laid down in *NBS Bank*. It was submitted further that it was not contested that Mr Geissler had the authority to agree to test the product (or idea) and there was no evidence to suggest that he could not have negotiated with the plaintiff about the payment of compensation for the use of the plaintiff’s idea. It was pointed out, that according to Mr Muchenje, he thought that the promise which was made to the plaintiff (i.e. by Mr Geissler) was that if the product works he (Mr Geissler) was going to further engage with the plaintiff and obtain whatever other approvals that were required; and that Mr Geissler never said to the plaintiff that the plaintiff was not going to be compensated. In this regard it was submitted that there was no suggestion that Mr Geissler did not have the authority to enter into negotiations and then

obtaining any other approvals that were required

[145]. With reference, specifically, to its late amendment, it was submitted on behalf of the plaintiff, that his counsel had made it clear that the plaintiff would seek an amendment dealing with the issue of authority in due course. Further, that this was not a new case of authority, because the plaintiff had already pleaded *ostensible authority* • from the outset. Further, that the requirements of estoppel had been fully canvassed with the witnesses, including by the defendant's counsel in his cross-examination of Mr Muchenje. Further, that the defendant, despite its opposition to the amendment, did not indicate that it would seek leave to re-open its case, or that it would suffer prejudice. Further, that it was permissible in terms of law for a party, during the course of a trial, to bring the pleadings in line with the evidence. The plaintiff's counsel likened the defendant's opposition to the amendment to hypocrisy, in that it had also, during the course of the trial, amended its plea in order to bring it in line with the evidence⁹.

[146]. On behalf of the defendant, relying on *Northern Metropolitan*, it was submitted that *ostensible authority*, is just another name for an estoppel which is raised against a denial of actual authority; that it had to be pleaded comprehensively, i.e. not just as a 'label', but by averring all the factual elements in satisfaction of the requirements of an estoppel, which are conveniently summarised in *Northern Metropolitan*¹⁰; that the plaintiff's cryptic reference to the label *ostensible authority* • in his particulars of claim, was inadequate and did not entitle him to rely on the estoppel.

[147]. The defendant opposed the plaintiff's application to amend his replication so as to plead estoppel, on the following grounds: that the absence of a pleading of estoppel in the plaintiff's replication was raised by the defendant in the course of its argument on absolution from the instance; that, notwithstanding, the plaintiff's counsel, realising that an amendment was required, did not apply for an amendment there and then to introduce estoppel but, instead, moved a notice of intention to amend in the form of a draft replication dealing with the issue of cancellation; that by introducing an amendment to deal with estoppel, the plaintiff was attempting to introduce a new case that had not been pleaded before and in respect of which the plaintiff was not cross-examined and which was not in issue when the plaintiff and his witnesses testified. It was further submitted on behalf of the defendant, that the potential prejudice to the defendant was obvious. The amendment should have been moved at the earliest opportunity and holding it over until completion of the evidence and then *inequivocally withdrawing it, only to reintroduce it at a much later stage, when the matter was argued, was impermissible*". It was submitted that the plaintiff should not at this late stage be allowed to introduce a new case on ostensible authority, and particularly in circumstances where the plaintiff's witnesses were not cross-examined concerning the allegations now intended to be introduced by way of the amendment. It was also not the basis upon which the defendant presented its evidence. Referring to *CIBA*

- *Geigy (Pty) Ltd v Leishof Farms (Pty) Ltd*¹¹ and *Randa v Radapile Projects CC*¹², it was submitted that the amendment should not be allowed in the circumstances.

[148]. It was further submitted on behalf of the defendant that the intended amendment did not, in any event, make out a case of ostensible authority, was excipiable, and should, for that reason, also be refused. In the alternative, it was submitted that even if the amendment was to be granted, the plaintiff has not proved the ostensible authority of Mr the agreement on its behalf and its denial that it made any representation to the plaintiff that Mr Geissler had such authority, entitled the plaintiff to replicate on those issues.

[140]. It was further submitted on behalf of the plaintiff that the requirements for relying on ostensible authority, as explained, *inter alia*, in *Northern Metropolitan Local Council v Company Unique Finance (Pty) Ltd and Others*⁷, had been met. Elaborating on this point, it was submitted that the defendant made representations that Mr Geissler had authority to bind it contractually. The defendant appointed Mr Geissler to its board and he was a full director, carrying the title of *Director*. His designation was *Director of Product Development and Management* (i.e. he was an Executive Director); the management of New Products was an important duty within the defendant; Mr Geissler was feared at the defendant and he was also charged with the security role; the plaintiff was intimidated by Mr Geissler and it was the defendant who permitted Mr Geissler to portray himself as someone who was to be feared in the organisation; Mr Geissler did not give the impression that he did not have the authority to enter into the agreement with the plaintiff; deals were concluded at the defendant, in general, without authority and were then later ratified; both the plaintiff and Mr Muchenje were aware of this; the *Todacom way* was a culture at the defendant in terms of which deals worth millions of rands were concluded merely on a handshake and the defendant encouraged this culture; Mr Geissler is the one that announced the launch of the *Please Call Me* product and even though that occurred after the conclusion of the contract, it shows that he had authority concerning the implementation of the deal and it also confirmed *"his aura of authority"*. It was further submitted that the defendant, through its internal newsletter, *Talk Time*, informed its employees of the plaintiff's idea and that it also appears from the newsletter that the Managing Director of the defendant at the time, Mr Mtembu, praised the plaintiff for his contribution to the development of the *"Please Call Me"* product. Even though this occurred after the conclusion of the contract, according to the plaintiff's counsel, it demonstrated that Mr Mtembu must have assumed that whoever negotiated the transfer of the innovation from the plaintiff to the defendant had concluded some kind of agreement with the plaintiff and that Mr Mtembu must have known that the person was Mr Geissler. That, according to the plaintiff's counsel, *"gives credence to the trappings of authority of Mr Geissler"*.

[141]. It was further submitted on behalf of the plaintiff that the defendant's representations of Mr Geissler's

authority was, firstly, in written form by means of Mr Geissler's name appearing on letterheads of the defendant with his designation as 'Director of Product Development and Management', as well as his designation on emails directed at staff and, secondly, the representations were in other forms, creating an aura of authority around Mr Geissler, particularly, concerning new product development and management.

Geissler and that the evidence does not support the estoppel, which was intended to be pleaded.

[149]. With reference to the requirements of estoppel and particularly in relation to the plaintiff's proposed amendment, it was further submitted as follows: with regard to a representation by words or conduct, that the allegations in paragraph 1.1.1 of the proposed amendment were factually incorrect, because Mr Muchenje never testified that he had told the plaintiff that Mr Geissler was the correct person, with the capacity to negotiate with the plaintiff in order to conclude a contract. On the contrary, so it was submitted, Mr Muchenje knew that Mr Geissler had no such authority and did not mislead the plaintiff concerning that. It was submitted further, that the plaintiff could not rely on the representation of someone who had no authority to make such representation on behalf of the defendant, particularly, in relation to the kind of unique agreement that the plaintiff sought to conclude. Furthermore, that any representation by Mr Geissler concerning his authority, could not bind the defendant, therefore, the allegation that Mr Geissler had said that he had such authority, was irrelevant. Even as a director, Mr Geissler had no more authority than anyone else to act on behalf of the company.

[150]. With reference to paragraphs 1.1.1, 1.1.2, 1.1.3, 1.1.5, 1.1.6, 1.1.7 and 1.1.9 of the proposed amendment, it was submitted that the appointment by the defendant of Mr Geissler and Mr Muchenje to their respective positions, did not constitute a representation that they could contractually bind the defendant and that the plaintiff, as an employee, ought to have known this. Mr Geissler's job was to attend to new products of the defendant, which was something different from having authority to bind the defendant contractually. The conduct referred to in paragraph 1.1.3, namely that Mr Muchenje expressly dissuaded the plaintiff from presenting his idea to Mr Knott-Craig, and persuading him to present it to Mr Geissler Van der Watt and Mtabela, instead, did not constitute a representation that Mr Geissler had authority to enter into contracts on behalf of the defendant, but, on the contrary, conveyed that *"practical tests at a level below the level of contracting had to be passed before dealing with persons authorised to bind the defendant"*.

[151]. It was further submitted on behalf of the defendant, that the conduct referred to in paragraphs 1.1.5 and 1.1.6, namely, that the defendant, represented by Mr Geissler and Mr Sotiriades, gave effect to the agreement (at least partially) by commencing with the development of the product (i.e. based on the plaintiff's idea) and that Mr Geissler informed the plaintiff that the agreement was being implemented, *"constitute ratification arguments"* and have nothing to do with Mr Geissler's ostensible authority to contract on behalf of the defendant. In any event, this conduct followed upon the alleged conclusion of the agreement

with the plaintiff and was not relied upon by the plaintiff to enter into the contract with Mr Geissler.

[152]. It was also submitted that the conduct alleged in paragraph 1.1.7, namely that the defendant had previously concluded and conducted business with third parties on a revenue share basis, was factually incorrect. With reference to the evidence of Mr Knott-Craig, it was submitted that the defendant paid third parties for services rendered to it on an ongoing basis and that third parties paid the defendant for the ongoing use of the defendant's network, but the defendant never entered into "revenue share?" agreements with anyone. In any event, so it was submitted, the defendant never concluded such agreements with employees and the agreements that were concluded for the defendant with third parties, were concluded by those with the authority to do so, in accordance with the defendant's written delegation of authority. On this point it was also submitted, *inter alia*, that there was no evidence of any precedent that could have conveyed the impression that Mr Geissler had the authority to enter into a contract such as the one contended for by the plaintiff.

[153]. It was argued concerning the allegation in paragraph 1.1.9 of the proposed amendment, namely, that Mr Knott-Craig entered into oral agreements with third parties and only had them ratified later, that in this case there was no ratification. With reference to the evidence of Mr Knott-Craig on the issue, it was submitted that the board of the defendant had no knowledge of the agreement between the plaintiff and Mr Geissler when it decided to launch the product. In any event, the allegation did not support the foundation for the alleged ostensible authority, because it related to ratification. In any event, so it was argued, agreements with third parties were different from agreements with employees and the plaintiff did not allege that he had contracted with Mr Knott-Craig.

[154]. The defendant's counsel argued further that there was no evidence, or sufficient proof, that the representations alleged by the plaintiff, were representations of the defendant. For estoppel to succeed the representation must be by the defendant. It was submitted in this regard, that neither the board, nor Mr Knott-Craig, were aware of the negotiations between Mr Geissler and the plaintiff, and that no representation of Mr Geissler's authority can be attributed to the defendant. A failure to prove that a representation was made by the defendant would be fatal to the plaintiffs purported reliance on estoppel, as was illustrated by the facts in *Northern Metropolitan*.

[155]. Counsel for the defendant submitted, in the alternative, that even if a representation by the defendant of Mr Geissler's authority could be assumed to have been proved, it could not have been a representation of which it could be said, that the defendant should reasonably have expected insiders or even outsiders to act upon it. Further, that it could never have been reasonably relied upon by the plaintiff, because, firstly, mere absence of knowledge (or proof of knowledge) on the part of the defendant, of the negotiations between the

plaintiff and Mr Geissler, was fatal to a finding that the defendant should reasonably have anticipated that its conduct (i.e. representation) would mislead the plaintiff and, secondly, it could not have been reasonable for the plaintiff to have relied on Mr Geissler having authority to enter into the agreement, which was unique and unprecedented at the defendant. In support of this latter point, reference was made to *Glofinco v Absa Bank*¹³. Finally, it was argued on behalf of the defendant concerning the proposed amendment, that there was, in any event, no evidence of reliance by the plaintiff on any alleged representation. In elaboration of this point, it was argued that there was evidence that the plaintiff did not question Mr Geissler's authority, but there was no evidence that he relied on any representation of the defendant that Mr Geissler had authority to negotiate and conclude the agreement with him. At best for the plaintiff, he relied on Mr Geissler's own representations of his authority, but that was not a basis to found an estoppel (i.e. ostensible authority).

[156]. In my view, it is indeed so, that the plaintiff ought to have made the necessary allegations to found his reliance on ostensible authority. The requirements for the estoppels, to found a reliance on ostensible authority, have been conveniently summarised in *Northern Metropolitan*¹⁴, where Mpati P, stated:

"In order to hold the appellant liable on the basis of ostensible authority the respondents had to prove the following -

a representation by words or conduct;

made by the appellant and not merely by Du Plessis and/or Van Wyk that they had authority to act as they did;

a representation in a form such that the appellant should reasonably have expected that outsiders would act on the strength of it;

reliance by the respondents on the representation;

the reasonableness of such reliance; and

consequent prejudice to the respondents."

[157], These requirements had also been stated informatively and succinctly in an earlier decision in *NBS Bank*¹⁵ where Schutz JA, having referred to the simple explanation of the distinction between the concepts

"actual authority" and "ostensible authority" by Denning MR in *Hely-Hutchinson v Brayhead Ltd and Another*¹⁶, stated:

“As Denning MR points out ostensible authority flows from the appearances of authority created by the principal Actual authority may be important, as it is in this case, in sketching the framework of the image presented, but the overall impression received by the viewer from the principlé may be much more detailed. Our law has borrowed an expression, estoppel, to describe a situation where a representor may be held accountable when he has created an impression in another's mind, even though he may not have intended to do so and even though the impression is in fact wrong. Where a principal is held liable because of ostensible authority of an agent, agency by estoppel is set to arise. But the law stresses that the appearance, the representation, must have been created by the principal himself. The fact that another holds himself out as is agent cannot, of itself; impose liability on him. Thus, to take this case, the fact that Assante held himself out is authorised to act as he did is by the way what Cape Produce must establish is that NBS created the impression that he was entitled to do so on its behalf. This was much stressed in argument, and rightly so. And it is not enough that an impression was in fact created as a result of the representation. It is also necessary that the representee should have acted reasonably in forming that impression: Connock's (SA) Motor Co Ltd v Sentraal-Westelike Ko-operatiewe Maatskappy Bpk 1964 (2) SA 47 (T) at 50A-D, Although an intention to mislead is not a requirement of estoppel, where such an intention is

lacking and the course of conduct is relied on as constituting the representation, the conduct must be of such a kind as could reasonably have been expected by the person responsible for it, to mislead. Regard is had to the position in which he is placed and the knowledge he possesses. A court will not hold a person bound by consequences which he could not reasonably expect and are therefore not the natural result of his conduct: Monzali v Smith 1929 AD 382 at 386, Poort Sugar Planters (Pty) Ltd v Minister of Lands 1963 (3) SA 352 (A) at 364A B:

[26] What Cape Produce therefore has to prove in order to establish Assante's ostensible authority is:

A representation by words or conduct

Made by the NBS and not merely by Assante, that he had the authority to act as it did.

A representation in a form such that the NBS should reasonably have expected that outsiders would act on the strength of it.

Reliance by Cape Produce on the representation.

The reasonableness of such reliance.

Consequent prejudice to Cape Produce.

[157] The mere allegation in the particulars of claim, that Mr Geissler had “*ostensible authority*’, was not enough. The plaintiff had to plead an estoppel in the replication. If the plaintiff was aware at the outset of the true facts, namely, that there was no actual authority and that he was relying on ostensible authority, he should have pleaded the facts, as represented to him, to found such authority, in his particulars of claim. If he was not aware that Mr Geissler had no actual authority and had pleaded actual authority and the defendant had, in turn, pleaded the true facts (i.e. a denial of actual authority), the plaintiff may then have relied on estoppel in his replication¹⁷. But it was essential for the plaintiff to have pleaded the facts as represented to him, if he was aware of those facts. The estoppel, which is not a cause of action, should then have been pleaded in a replication, in response to the defendant’s plea.

[158]. An amendment of the plaintiff’s particulars of claim, alternatively an amendment introducing, or amending, his replication, was necessary to include the facts as represented to him. The plaintiff’s legal representatives were clearly aware of the need for an amendment at an early stage of the proceedings, if not before the actual trial, nevertheless, they deliberately held back the amendment and only sought it at a late stage after both parties had closed their respective cases and final submissions were to be made on the main issues

[159]. The plaintiff relied heavily on Rule 28(10) of the Uniform Rules which provides that the court may grant a party leave to amend a pleading at any stage before judgment and submitted that pleadings may even be amended on appeal. No reason of any substance was furnished for the obvious delay and for only seeking the amendment at a very late stage. It was submitted on behalf of the plaintiff that the purpose of the amendment was to bring the pleadings in line with the evidence and to plead the issue of estoppel and ostensible authority in the replication.

It was submitted that this Court, in considering the application, was to exercise a discretion, but has to lean in favour of the grant of the amendment in order *to ensure that justice was done between the parties by deciding the real issues between them*¹⁸,

[160]. While it might be so that courts will quite readily grant amendments to ensure and facilitate a proper ventilation of the real issues between the parties, courts are also sceptical of late amendments, particularly those that are withheld deliberately until all the necessary evidence had been led and witnesses have been cross-examined. In the well-known case of *Florence Soap and Chemical Works (Pty) Ltd v Ozen Wholesalers (Pty) Ltd*¹⁹ the court refused an amendment which was deliberately withheld and only moved when the trial was almost concluded. What was stated in that case is still valid now. There Naser J stated:

“I do not consider it necessary to enquire whether the delay was *mala fide*, as, in my opinion, it is not competent for a party to an action to refrain from raising in its pleadings an issue of which it is well aware

because it is of the opinion that the witnesses of the other party to the action might testify falsely if apprised of the allegations prior to giving evidence. The object of pleadings is to define the issues in the action and the failure by a party to plead causes of action or defendants of which it is aware cannot be condoned if the only reason for the failure is a desire to cross-examine witnesses before the issues are pleaded. The fact that some order in regard to costs could be made which would compensate the other party is not the only consideration. In the present case the trial had proceeded for 5 days and was nearing its end before notice of the amendment was given. Defendant is, in my opinion, entitled to claim that the trial should proceed on the issues raised in the pleadings and that it should not at this late stage be called upon to decide whether it would have to proceed to trial had the issues sought to be raised in the amendment been timeously pleaded.”

[161]. As reasons for the delay it was submitted by the plaintiff’s counsel, that the issue of ostensible authority was raised in the particulars of claim and was “*fully ventilated*” in the evidence; that the amendment was just to correct a technical defect; that the documents relating to delegated authority were only discovered on 19 July 2013; that the defendant’s board’s resolution to implement the plaintiff’s idea was never discovered, but handed to Mr Knott-Craig during his evidence; and further, that it would not have been prudent to launch the application for amendment before the record of the hearing was available, in this regard, the attorney of the plaintiff, Ms Wilna Lubbe, who deposed to the affidavit in support of the application to amend, states, *inter alia*, that parts of the record and especially, the crucial cross-examination of Mr Knott-Craig, was not transcribed and only became available on 13 September 2013. Lastly, it was contended, as part of the reasons, that the defendant was granted an amendment to include its, so-called, “*repudiation defence*” and that this had led to the re-opening of its case and protracted cross-examination.

[162]. I do not regard the reasons furnished as cogent. It is reasonable to assume that the plaintiff would have known at the outset what had been represented to him by the company and what he had relied on to conclude that Mr Geissler had authority to enter into the agreement with him. I cannot see how the alleged delays in respect of the document on delegated authority, or the board’s resolution and the transcript pertaining to Mr Knott-Craig’s evidence, could have, reasonably, prevented the bringing of the amendment, unless the amendment was dependent on the information gleaned from those documents. As for the defendant’s amendment, the circumstances involved there were not the same as in the case of the amendment sought by the plaintiff.

[163]. In the absence of cogent reasons for withholding the amendment until a very late stage it might be inferred that, either the facts to be introduced by way of the amendment were not known to the plaintiff until after all the evidence was in, or that the amendment was withheld for the same kind of reason that it was withheld in *Florence Soap*. That courts may grant amendments at any stage up to judgment, is without question, but that rule is subject to a rider that the application must be brought within a reasonable time.

There is no reason given why the amendment was not sought at the outset (or at least, at the stage when absolution was sought by the defendant). If the amendment had been brought earlier the defendant may have proceeded differently. This is not a case where costs could reasonably or adequately make up for the prejudice that would result if the amendment is granted. Its grant may, technically, necessitate a re-calling of the relevant witnesses. In my view, the deliberate withholding of the amendment until a very late stage cannot be condoned. In the exercise of my discretion I would not be justified in allowing the plaintiff to amend, by introducing, for the first time, the estoppel and the facts on which it is based, at a very late stage in the proceedings, having consciously and deliberately refrained from amending earlier

[164]. The result of the refusal of the amendment is that the plaintiff cannot rely on the facts, he sought to introduce by way of the amendment and consequently, on the estoppel, because it was imperative for the plaintiff to have alleged estoppel and the facts in support of it in full in his pleadings. In the circumstances, the plaintiff has not made out a case of ostensible authority and accordingly the defendant has not been proved to be bound by the agreement that the plaintiff concluded with Mr Geissler.

[165]. However, if I am found to be wrong in refusing the amendment, or if the plaintiff may, notwithstanding the absence amendment, still be able to rely on “*ostensible authority*”, which I do not find, I am of the view that the plaintiff failed to prove a representation, or representations, that were made by the defendant knowingly, or at all that Mr Geissler had the authority to enter into the agreement with the plaintiff, and has failed to prove the requirements for an estoppel. This is dealt with fully below.

[166]. The high watermark of the plaintiff's case, regarding the representations, was that the defendant appointed Mr Geissler to its board and that he was a full director with that title and his designation was *Director of Product Development and Management*. The mere fact that the defendant appointed Mr Geissler to that designated position cannot, in the circumstances, be said to have been a representation by the defendant that Mr Geissler had the authority to enter into the agreement on its behalf. The fact that Mr Geissler was a Director did not mean that he had the authority. The directors of a company only have such authority as is conferred on them expressly, or implicitly, by the company's constitution²⁰ and, invariably, the powers to bind the company, in any transaction, are bestowed on the directors as a collective (i.e. are bestowed on the board) and not on individual directors. Individual directors only have such authority as the board, or someone authorised to delegate, delegates to them²¹. The fact that it was Mr Geissler's job to attend to new products did not translate into him having authority to enter into agreements pertaining to the same.

[167]. The fact that Mr Muchenje dissuaded the plaintiff from submitting his memorandum (i.e. containing his idea) to the list of persons, as originally envisaged by the plaintiff in his memorandum (including Mr Knott-Craig), and to, instead, submit it to Messrs Geissler, Van der Watt and Mthabela first, was not a

representation by the defendant or conduct ascribable to the defendant. At best, it was Mr Muchenje's representation to the plaintiff that Mr Geissler had authority which, in turn, was based on Mr Geissler's representation of his own authority. Mr Muchenje never testified to the effect that he relied upon a representation or conduct of the defendant that Mr Geissler had authority to contract, on behalf of the defendant, with the plaintiff in respect of the plaintiff's idea. Mr Muchenje was clearly merely suggesting a more practical approach to the plaintiff, namely to start with Messrs Geissler, Van der Watt and Mthabela, instead of starting at the top, namely with the Chief Executive Officer, Mr Knott-Craig, the Managing Director and the like.

[168]. The fact that Mr Geissler was feared at the defendant, or that he was in charge of security, or that the plaintiff was "*intimidated*" by him, does not assist the plaintiff in proving the estoppel. Even if this was some "*aura*" which the defendant allowed to be created around Mr Geissler, this did not amount to a representation, or conduct, that was reasonably foreseeable to indicate and which could be reasonably be taken to indicate, that Mr Geissler had the authority to conclude contracts on behalf of the defendant (including with third parties in the position of the plaintiff).

[169]. What Mr Geissler told the plaintiff about his authority is not sufficient, and neither was the fact that, neither Mr Geissler, nor Mr Muchenje informed the plaintiff that Mr Geissler did not have authority to contract on behalf of the plaintiff. Furthermore, the fact that Mr Geissler and Mr Sotiriades subsequently developed a product utilising the plaintiff's idea, or that such a product was subsequently launched and marketed by the defendant would be relevant to an argument of ratification (which the plaintiff did not rely upon), but is not relevant to whether Mr Geissler had ostensible authority to contract on behalf of the defendant with the plaintiff. Since such production and marketing followed after the agreement, it could not have been relied upon by the plaintiff in entering into the agreement with Mr Geissler

[170]. The allegation by the plaintiff that the defendant had previously conducted business with third parties on a revenue share basis was disputed. But assuming that this was so, (although I make no finding in that regard), that too does not assist the plaintiff, who is required to show that there was a representation by the defendant or conduct on the part of the defendant, which reasonably represented to him, that Mr Geissler had authority to conclude such agreements with third parties, and, more particularly, with someone in the plaintiff's position.

[171]. The fact that Mr Knott-Craig may have entered into oral agreements with third parties which were only ratified subsequently by the board, in my view, does also not assist the plaintiff. Mr Knott-Craig was the CEO of the defendant and Mr Geissler was not the CEO and was a mere director. It does not mean that if Mr Knott-Craig could do it, Mr Geissler also had the authority to do likewise. It would clearly not be reasonable to assume so. In any event, there is no evidence that either the plaintiff, or Mr Muchenje, took into account

such facts before deciding to deal with Mr Geissler and that the plaintiff relied on such facts in concluding the agreement with Mr Geissler. Even if there was such evidence, it would not have been sufficient to meet the legal requirements for the estoppel.

[172]. The fact that the defendant's internal newsletter carried the story of the plaintiff's idea and that almost everybody at the defendant knew and was supposed to know of the plaintiff's contribution to the "Please Call Me" product, was not a representation, or conduct, of the defendant which was relied upon by the plaintiff to conclude the agreement with Mr Geissler. The fact that the Managing Director of the defendant at the time, Mr Mthembu, knew of the plaintiff's contribution to the product, as appears from the article in the newsletter, and the fact that Mr Mthembu may have assumed that some agreement was concluded with the plaintiff by someone from the defendant, also does not assist the plaintiff in establishing the ostensible authority of Mr Geissler. Furthermore, the fact that the plaintiff believed that Mr Geissler had the necessary 'pre-eminence' in the organisation to negotiate with him on this concept, also does not assist the plaintiff.

[173]. The plaintiff did not establish on the evidence, on a balance of probabilities, that words, or conduct, of the defendant in relation to the authority of Mr Geissler, caused him to conclude that Mr Geissler had the authority to contract with him. On that basis alone the estoppel should fail.²²

[174]. Furthermore, the plaintiff did not establish that the defendant, by its representation of Mr Geissler's authority, assuming such finding could be made, should reasonably have expected that such representation or conduct would mislead the plaintiff into believing that Mr Geissler had the authority to conclude the agreement with the plaintiff²³. On the evidence, the plaintiff and Mr Muchenje relied on Mr Geissler's representation of his authority. There is no evidence that the plaintiff (or Mr Muchenje) relied on the defendant's representation of Mr Geissler's authority to conclude a contract on its behalf²⁴.

[175]. The plaintiff has neither pleaded, nor relied on, ratification of an unauthorised agreement. It was emphasised that the plaintiff relied on ostensible authority. However, insofar as it may be contended that there was reliance on ratification, it has not been proved that the defendant had full knowledge of the facts, including the detail of the negotiations and the agreement between the plaintiff and Mr Geissler and that, with such knowledge, it adopted Mr Geissler's unauthorised act (the conclusion of the contract with the plaintiff). Even though it was common cause that the Board of the defendant authorised the launch of the product, there was no proof that it was aware of the detail of the negotiations between the plaintiff and Mr Geissler, including Mr Geissler's agreement in respect of payment for the idea and the promise to negotiate concerning the amount of the payment. The fact that Mr Knott-Craig, on the evidence, was in all probability aware that the idea for the product emanated from the plaintiff and that the plaintiff wanted to be remunerated for its use, does not assist the plaintiff.

PRESCRIPTION

[176]. In response to the plaintiff's claim the defendant, *inter alia*, raised a special plea of prescription and asked that any claims of the plaintiff which had arisen between November 2000 and 14 July 2005 be dismissed with costs.

[177]. In its special plea on prescription, to which the plaintiff did not replicate, the defendant alleged:

"1. The plaintiffs claim against the defendant, as pleaded by the plaintiff; are based on 'an oral commercial contract' ('the agreement'), which the plaintiff alleges was concluded in and during November 2000.

The plaintiff's claim and debt according to his allegations became due, as envisaged in terms of section 12(1) of the Prescription Act, No. 68 of 1969 ('the Act') at the latest from 12 March 2001, alternatively within a reasonable period of time from such date which would not have been later than 13 July 2005.

The launch of the product occurred on 12 March 2001, from which date the alleged generation of income and/or revenue from the use of the product on the part of the defendant would have commenced.

The plaintiff's summons was served on the defendant on 14 July 2008.

insofar as the claims by the plaintiff in his prayers relate to any period between 12 March 2001 and 14 July 2005, such claims have prescribed in terms of the provisions of section 11 (d) of the Act, in that the summons was served on the defendant more than three years after the date upon which the said claims arose.

WHEREFORE the defendant prays that any claims of the plaintiff which have arisen between November 2000 and 14 July 2005 be dismissed with costs."

[178]. It was not disputed that the plaintiff's combined summons was issued on the 8th of July 2008; was served on the defendant on the 14th of July 2005 and that claims of the plaintiff (in relation to the contract that had arisen between November 2000 and 14 July 2005), which were "*debts*" in terms of the Prescription Act No. 68 of 1969 ("*the Act*"), would have prescribed within a period of three years from the date the claims arose, but, definitely, by the time the summons was issued.

[179]. Instead, the plaintiff's counsel argued that the prescription plea did not relate to the relief that the

plaintiff was seeking, namely a declarator and an order that the defendant negotiate within him concerning remuneration. The plaintiff's counsel, with reference to the defendant's plea of prescription, submitted the following in written heads of argument: *"It is trite that prescription has to be pleaded and the onus rests upon the defendant averring prescription. The defendant has failed to plead any prescription other than income and revenue up until the 14th of July 2005. The defendant is attempting to smuggle In a prescription argument which is not being pleaded "*

[180]. In my view there is merit in the defendant's plea and no merit in the argument of the plaintiff in response to it. It is apparent from the plea that it is couched in broad terms to cover any and all claims, or "debts", which arose between November 2000 and 14 July 2005. The plea is not confined to claims for *"income and revenue"*, whatever that might mean. The language of the plea certainly covered all claims that arose and were due between the said dates.

[181] In terms of the Act, what prescribes is a *debt*. The word *'debt'* in section 10(1), read with sections 11(d), 12(1) and 12(3) of the Act has a wide meaning²⁵ and would not only include a claim to pay a plaintiff a share of revenue, but also a claim that the defendant complies with its obligations in terms of the contract, including its obligation to negotiate with the plaintiff concerning reasonable remuneration for the use of his idea.

[182]. According to the plaintiff, the obligation of the defendant to negotiate was a term of the contract which he concluded the defendant, represented by Mr Geissler and arose at the time of contracting, that is, within the period November 2004 and July 2005. On the plaintiff's own version, the contract was concluded during about November 2000. According to the emails exchanged between the plaintiff and Mr Geissler, on 30 January 2001, the plaintiff referred to "*the verbal conversation that he had with Mr Geissler and said to Mr Geissler I think we should start talking about internal "rewards". Can you please notify me when can this be feasible*". Mr Geissler's response is dated 6 February 2001 in which he, *inter alia*, promises to speak to Mr Knott-Craig about a reward once the product has been launched and was successful. The product was launched in February or March 2001 and proved a success upon its launch. The debt to negotiate arose and was due at any time after conclusion of the contract, or the launch of the product, but, most certainly, on the plaintiff's own version, it arose and was due before the end of 2001.

[183]. As I mentioned, the plaintiff did not plead in response to the plea of prescription. On his version, he was clearly aware of the debt and the identity of the debtor (that is, the defendant) as well as the facts from which the debt arose, long before the end of 2001. The debts that he is claiming in terms of prayers 1 and 4 (including the alternative prayer 4) have clearly been extinguished by prescription. The relief claimed in prayer 1 is a declaratory order that the oral contract, referred to in paragraph 2.1 of his particulars of claim, was entered into between the parties, as alleged, and this prayer was combined with an order directing the defendant to "*comply with the obligations in terms of the agreement*". This, in my view, would also constitute a "*debt*", which had prescribed. A declaratory order in respect of a debt which has prescribed would be of academic value only and serve no practical purpose²⁶

[184]. In the result the claims of the plaintiff stand to be dismissed for having prescribed.

COMPETENCE OF THE RELIEF SOUGHT

[185]. The defendant's counsel also argued extensively that the relief sought by the plaintiff in prayers 1, 2, 3 and 4 of his particulars of claim was not competent. The plaintiff's counsel also presented a counterargument in that regard. However, in light of the conclusion I reached in respect of the authority of Mr Geissler and on prescription, it is not necessary for me to deal with this issue.

COSTS

[186]. For the defendant it was submitted that costs should follow the outcome and should include the costs reserved during the course of the trial and in respect of two counsel. Plaintiff's counsel did not submit the contrary. The plaintiff employed two and the defendant employed three counsel. Given the nature of the matter I am of the view that the employment of two counsel was justified. The costs that were reserved are to be treated as costs in the cause.

[187]. In the result I make the following order:

1. The plaintiff's claims are dismissed with costs.
2. The costs are to include all costs reserved during the course of the trial and argument, as well as the costs of the amendment which the plaintiff sought, but exclude the costs of the amendment which the defendant sought and was granted.
3. The costs shall be in respect of two counsel.

P COPPIN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEARANCES:

FOR THE PLAINTIFF: C PUCKRIN SC

WITH HIM R MICHAU SC

INSTRUCTED BY: STEMELA AND LUBBE INC

FOR THE DEFENDANT: S A CILLIERS SC

WITH HIM R A SOLOMON SC AND A MCMANUS

INSTRUCTED BY: LESLIE COHEN AND ASSOCIATES

1 According to the witness Mr Zatkovich a Value Added Service' is a popular telecommunication industry term for non-call services, or, in short, all services beyond standard voice calls and fax transmissions.

2 *Pezutto v Dreyer* 1992 (3 SA 379 (AD) at 391E-F.

3 *Cooper and Others NNO v Seyfretts Trust Ltd* 2001 (1) SA 122 (SCA) paras 5 and 16-18.

4 *McWilliams v First Consolidated Holdings (Pty) Ltd* 1982 (2) SA1 (AD) at 10E-H

5 *Shill v Milner* 1937 AD 101 at 105. And see also *Myers v Abramson* 1951 (3) SA 438 (C) and *Middeldorf v Zipper NO* 1947 (1) SA 545 (SR).

6 See 鄭mler痴 *Precedents of Pleadings*" (Sixth Edition) by L T C Harms pages 166-167, particularly page 166.

8 2002 (1) SA 396 (SCA)

9 Reference was made here to the amendment brought by the defendant in relation to the issue of the cancellation letter written by Mr Masiio a former attorney of the plaintiff.

10 *Northern Metropolitan, (supra)* at para 28.

11 2002 (2) SA 447 (SCA) paras 30-46.

12 2012 (6) SA 128 (GSJ) paras 4-17.

7 2012 (5) SA 323 (SCA).

13 2002 (6) SA 470 (SCA) para 27

14 *Northern Metropolitan*, (*Supra*) at para 28.

15 (*Supra*) at para 2.

16 [1968] 1 QB 549 (CA) at 583A-G ([1967] 3 All ER 98 at 102 A~E).

17 See ‘*Amier’s Precedents of Pleadings*’ (6th edition) by L T C Harms at page 166.

18 Relying on ‘*Amler’s Precedents of Pleadings*’ (2003 Edition) by L T C Harms.

19 1954 (3) SA 945 (T).

20 *Ex Parte Russlyn Construction (Pty) Ltd* 1987 (1) SA 33 (D).

21 See generally on the powers of directors M S Blackman et al “Commentary on the Company's Act” (Volume 1) pp 4-28 up to and including 4-31

22 **See the facts in *Northern Metropolitan* (*supra*).**

23 **See the *Northern Metroplitan* case (*supra*) paras 45-46.**

24 **See *Glofinco v Absa Bank* (*supra*) para 13; *Northern Metropolitan* (*supra*) para 29.**

25 **See *Desai NO v Desai* 1996 (1) SA 141 (A) at 146H-147A; *LTA Construction Ltd v Minister of Public Works and Land Affairs* 1992 (1) SA 837 (C) at 849H-J and the cases cited there.**

