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Principles of Contractual Certainty and Pacta De Contrahendo: Discussion of the case of Vodacom (Pty) Ltd v Makate and Another (Case no 401/2022) [2024] ZASCA 14 (06 FEBRUARY 2024)

MARVIN R. AWARAB¹

ABSTRACT

One of the topics in contractual relationships that has generated discussion is contractual certainty. Some have questioned whether it should be a stand-alone criterion or if it should be included in the list of requirements for a legally binding contract. According to one argument, consensus should incorporate certainty because the two concepts are comparable. The argument for certainty as a stand-alone need, however, is more persuasive since it goes beyond the bounds of agreement. The parties to the agreement must be aware of every obligation that the agreement aims to establish. Clarity is therefore a necessary condition for a contract to be enforceable. An agreement between the contracting parties to negotiate the terms of the contract is called a pacta de contrahendo, also referred to as a contract to contract. Pacta de contrahendo can have two forms: an option and a right of preemption. Despite their similarities, the two kinds differ in how they are operated. With an option, the parties have already agreed upon the parameters of the main contract; in contrast, with a pre-emptive contract, the grantor grants the other party the prerogative to finish the main contract first, should the parties want to move forward with it. There is however, also a misunderstanding as to the certainty and enforcement of pacta de contrahendo. In light of the above, this paper seeks to analyse the case of Vodacom (Pty) Ltd v Makate and Another (Case no 401/2022) [2024] ZASCA 14 (06 FEBRUARY 2024.

Keywords: *Contractual certainty, contract, pacta de contrahendo, option, right of pre-emption.*

I. INTRODUCTION

The case under review concerns an appeal against the judgment and order of Gauteng Division of the High Court, Pretoria (the high court). The case deals with various aspects of the law such

¹ Author is a Senior Lecturer at School of Law, University of Namibia, Namibia.

as prescription, contractual certainty and intellectual property rights. The case review is however limited to the discussion of contractual certainty, although other aspects could be mentioned in passing. Before, the matter come to the supreme court it was previously heard already in the supreme and the constitutional court. It is thus, important to revisit the 2016 constitutional court decision. The leave to appeal in the constitutional court involved the enforcement of a contract concluded by the applicant and the respondent's agent. The defendant has contested the claim using a variety of defenses, two of which the Gauteng Local Division of the Johannesburg High Court (trial Court) upheld. First, the applicant's claim had prescribed; second, the agent lacked the legal capacity to enter into the agreement. This application was made because the applicant was denied permission to appeal by both the trial court and the Supreme Court of Appeal.

The legal dispute arose from an oral agreement to use the concept underlying Vodacom's now-famous "Please Call Me" product. The agreement was reached between Mr. Makate and Mr. Geissler, who was Vodacom's Director of Product Development and Management at the time. After some discussion, the applicant and Mr. Geissler decided that Vodacom would employ the applicant's idea to create a new product that would be tested for feasibility on the market. Should the product prove to be successful, the applicant would receive a portion of the profits made from it. The parties postponed their discussions over the amount to be given to the applicant, even though the applicant had said that he wanted 15% of the revenue. They did, however, agree that Vodacom's Chief Executive Officer (CEO) would set the sum if they couldn't agree on it. As it was customary within Vodacom to make and implement business decisions before they received the approval of the board, the "Please Call Me" product was also launched before Vodacom's Board approved it on 15 March 2001. Vodacom did not bargain for payment for using the applicant's idea, even if the product was a success. Rather, as the High Court subsequently determined, Geissler and Vodacom CEO Messrs. Knott-Craig fabricated a story about where the concept for the "Please Call Me" product originated. They falsely claimed that Mr. Knott-Craig originated the concept, and his incorrect status quo was indicated in Mr. Knott-Craig autobiography. Approximately two years after launching of the 'Please call me' product, the applicant left the employment of Vodacom. Approximately four years following the release of the "Please Call Me" product, he filed a lawsuit in the High Court in 2008 to enforce his contract with Vodacom. In line with the parties' verbal agreement, he requested an order compelling Vodacom to fulfill its responsibilities. Alternatively, the applicant wanted the common law to be developed in accordance with section 39(2) of the Constitution and to be infused with the principles of good faith and Ubuntu. In response to the application brought by

the applicant, Vodacom disputed the existence of the agreement on which the applicant relied. Furthermore, Vodacom asserted that the parties who have been alleged to conclude the contract on behalf of Vodacom did not have actual or ostensible authority to enter into the agreement on its behalf.

The court stated that the applicant's requested remedy stems from the parties' agreement. Stated differently, his goal is to get that agreement enforced. It will be recalled that the relevant term he is attempting to enforce is the one that mandated that the parties discuss and agree on fair pay in good faith prior to using his concept. The unique facts of this case made this open-ended phrase necessary. The parties were uncertain if the applicant's innovative idea could be turned into a commercially successful product. As a result, they decided to later bargain over the salary after the product was built and tested for viability and profitability in the marketplace.

In dealing with the issue of negotiating in good faith the court said that A type of *pacta de contrahendo*, or agreements to agree, is understood to include commitments to negotiate in good faith. They are typically thought of as a type of contract whose objective is to produce more contracts in the future. However, as was the case in this instance, contracting parties occasionally find themselves in a position where they are unable to come to an agreement on certain aspects of the contract. They may decide to schedule a future negotiation and agreement on the outstanding issues in order to address the issue. The agreement that was reached may include the arrangement. If one of the contractual parties, as was the case in this instance, declines to discuss the outstanding term so that the parties' agreement may be carried out, a dispute may result. The court reaffirmed the position in the South African common law that an agreement to negotiate in good faith is enforceable if it provides for a deadlock-breaking mechanism in the event of the negotiating parties not reaching consensus.

The Constitutional Court thus affirmed that the agreement in question was a legitimate and enforceable contract. The court reasoned that Mr. Makate and Mr. Geissler had apparent authority to enter into a legal contract. The principles of good faith and the conduct of the parties could have led the court to reach such a conclusion. This reasoning is based on the court's statement in par 4 of the constitutional court judgment where the court said:

“The obligation of Vodacom to negotiate with Mr Makate concerning the remuneration to which he is entitled for coming up with the idea underlying “Please Call Me” can only be fulfilled by undertaking such negotiations. That will not involve the payment of money, the delivery of goods or the rendering of services. All those presuppose that the debtor can discharge the debt by what are in essence unilateral actions on its part. The obligation cannot therefore be

extinguished by conduct by Vodacom on its own. The negotiations will involve the active participation of Mr Makate. On both sides they will require conduct that is bona fide and reasonable. None of that is consistent with the simple concept of a debt and its discharge.”

II. RATIONALE CONTRACTUAL CERTAINTY

Contractual certainty has been one of the areas that raised a debate in contractual relationships. One of the questions that have been raised is whether it should be a stand-alone requirement or whether it should form part of other requirements of a valid contract. One contention is that because of the similarities between consensus and certainty, certainty should be infused into consensus. However, the more convincing view is that certainty is broader than the principles of consensus and should be treated as a stand-alone requirement. The parties to the contract must be certain of all the contractual obligations that the contract seeks to create. Hence, certainty is a crucial requirement of a valid contract.

Certainty, especially in commercial undertakings is very crucial, as commercial undertaking involves large sums of money and other business objectives. Parties need to be fully aware of what they are committing themselves to what will be the consequences of their actions or inaction. These consequences are not ordinary consequences, but legal consequences. In extreme situations, parties conduct could lead to breach of contract and invite remedies. Hence, it is of utmost importance that the parties are certain about the terms of the contract and in the case where clearly certainty is not possible at the time of conclusion of the contract, mechanism should be put in place to ascertain the obligations created and the performance of such obligations. One of the ways in which one can guarantee certainty of contractual obligations is to have the terms written down. Though writing itself is a formality, it can assist with ensuring that the certainty requirement is met, in that the parties become fully aware of what it is that they are expected to do and the time and the manner in which it must be done.

III. CONTRACTUAL CERTAINTY AND THE AGREEMENT TO AGREE

Pacta de contrahendo, commonly known as the contract to contract is an undertaking between the contracting parties to negotiate the terms of the contract. There are two forms of pacta de contrahendo, namely an option and a right of pre-emption. Though the two forms are similar in nature, the difference lies in the operation. With an option, the parties already define the terms of the main contract, whereas in the case of the pre-emptive contract, the grantor gives the pre-emptive right to the other party to conclude the main contract, if the parties decide to proceed with the main contract. Thus, in the case of an option there is a substantive offer and an agreement to keep the offer option for stipulated period of time. On the other hand, the right

of pre-emption does not create a substantive offer, but simply a preferential right.

When dealing with an option contract, it is essential that all the requirements of a valid contract is met. This is because an option contract is a contract on its own and thus, the absence of any of the requirements of a valid contract will affect the validity of an option. In the same way as certainty is required for a normal contract, an option contract also needs to comply with the requirement of certain. If the parties are uncertain regarding the terms of the contract, an option contract will most likely be said to lack contractual validity and thus affect the enforcement of the main contract.

(A) Facts of the case

Mr. Makate was a trainee accountant at Vodacom. He had a wonderful concept in 2000: a cellphone user without airtime may request to call another user who had airtime by sending a message. Vodacom developed the PCM product based on this concept. It proved to be an overwhelming success. Vodacom, however, declined to compensate Mr. Makate for his suggestion. He filed a high court lawsuit against Vodacom in 2008, claiming among other things that the parties had an informal agreement for Vodacom to utilize PCM and receive a portion of the profits from it. When the matter got to trial, Coppin J. of the top court rejected his claim. Permission to appeal was denied by the trial judge. The identical outcome befell Mr. Makate's request for permission to appeal the trial court's ruling to this court. Still, he was successful in his request for permission to appeal to the Constitutional Court. The appeal was upheld with costs on April 26, 2016, after Mr. Makate was given permission to file an appeal. The Supreme Court of the Constitution of 2016 ordered that Vodacom be bound by the agreement reached by Mr. Makate and Mr. Philip Geissler, the company's Director of Product Development. The order also required the parties to negotiate in good faith to determine the amount of reasonable compensation that would be due to Mr. Makate, and if they couldn't, Vodacom's CEO would have to figure it out in a reasonable amount of time.

In order to ascertain the central question of the appeal, it is imperative to reiterate the ruling that the Constitutional Court issued on April 26, 2016 (the operative order), which served as the basis for the mandate of the second respondent, Mr. Shameel Joosub, the CEO of Vodacom. The order of the constitutional court read:

‘(a) It is declared that Vodacom (Pty) Ltd is bound by the agreement concluded with Mr Kenneth Nkosana Makate and Mr Phillip Geissler.

(b) Vodacom is ordered to commence negotiations in good faith with Mr Makate for determining a reasonable compensation payable to him in terms of the agreement.

(c) In the event of the parties failing to agree on the reasonable compensation, the matter must be submitted to Vodacom's Chief Executive Officer ('CEO') for determination of the amount within a reasonable time.

(d) Vodacom is ordered to pay the costs of the action, including the costs of two counsel, if applicable, and the costs of the expert, Mr Zatkovich.'

It was the court's intention through its order to resolve Mr Makate's woes, it appears not to have achieved that purpose and has the matter found its way back to the supreme court. The parties commenced with negotiations. When consensus on the amount of compensation to Mr Makate could not be reached, para (c) of the operative order was triggered.

As a result, the CEO gave Mr. Makate R47 million in compensation for his PCM product. Mr. Makate, dissatisfied, filed a review process in the high court, challenging the amount of money Vodacom was supposed to pay him, according to the CEO. The CEO will now decide how much compensation should be given to Mr. Makate after the high court ruled in favor of Mr. Makate. Alongside this injunction were some guidelines that the CEO had to adhere to while making his decision again. With the permission of the high court, Vodacom files an appeal against the ruling and directive of that body.

The issues for determination are the interpretation of the Constitutional Court order, in relation to the CEO's mandate and determination. Arising from that, this Court must determine whether the high court was correct in granting the order it did and, in particular, whether it was correct to impose directives on the CEO on, inter alia, the exercise of his mandate and the duration of the contract period.

(B) Legal Counsels Arguments

Vodacom claims that a lump sum was what the parties intended as appropriate compensation. Mr. Makate would receive "a share in the revenue generated by" the PCM product, they agreed. Whether that portion should be a percentage or a single sum was not made clear. They postponed discussing "the amount to be paid," saying that the CEO of Vodacom would decide what to do if they couldn't come to an agreement. All of this points to the parties' intention to receive a lump sum award. Furthermore, Vodacom argues that the CEO had discretion in deciding on the compensation package. His mandate did not stipulate that Mr. Makate was entitled to a portion of the revenue from the PCM product, either in full or in part, continuously or indefinitely, or for a specific amount of time.

On the other hand, Mr. Makate argues that he is entitled to a portion of the profits made by the PCM concept under a contract, and he accepts 5% as a reasonable amount. The idea of a "share

in the revenue" itself implies a certain amount of proportionality between the "share" and the "whole." It's not just a make-believe "amount." Mr. Makate argues that Vodacom's interpretation of the Constitutional Court's ruling regarding the CEO's duty is incorrect, and that the CEO properly concluded that it was part of his mandate to ascertain Mr. Makate's right to a portion of the revenue.

(C) Court's Findings

The court found that the parties entered into *pacta de contrahendo*, i.e. the agreement to agree. This is clear from the court's statement in paragraph 94 of the judgment, wherein the court stated that "likewise, the Court found that the parties had agreed to negotiate the 'amount of compensation' once the product was developed and tried for its commercial viability." The court went on to clarify that in the event that the parties disagree on the 'amount to be paid to the applicant, Vodacom's CEO would determine that 'amount'. This indicates that the option between the parties, as initially found by the constitutional court is valid and enforceable. The court, relying on the minor judgment of the constitutional court, reiterated the fact that though the option agreement was valid, there was no agreement reached on the precise form or amount of such remuneration. This was to be established or decided on at a later stage. The court reaffirmed the constitutional court's stance that the principles of the law of contract required the CEO to make a forward-looking determination. The court also observed that the constitutional court upheld Mr. Makate's claim for specific performance. One of the requirements of the claim for specific performance is that the plaintiff must prove the existence of a valid contract. The mere fact that the constitutional court upheld the claim for specific performance shows that a valid contract was entered into. According to the court, the parties' agreement did not prescribe how the CEO should determine that amount, what form it should take, or that it should be a percentage of the revenue earned from the PCM idea. The Court categorically made it clear that the Constitutional Court's judgment is clear and unambiguous on the terms of the CEO's mandate. Hence, Mr. Makate is not entitled to compensation on the basis of a percentage of the revenue earned. The parties agreed on a revenue share percentage before the CEO. However, this does not change the fact that there was no agreement on a revenue share basis.

IV. CONCLUDING REMARKS

Option contracts are valid and enforceable in the South African law of contract. The parties bound by a valid option contract are required to render the performance as required by such a contract. It is furthermore, important to note that oral agreements are valid and enforceable.

Hence, an oral agreement does not void the contract of its legal consequences.

Option contracts ideally contain a substantive contract and an agreement to keep the option open. Hence leaving the amount to be paid or the precise form left undecided pending later decision, could defeat the operationality and nature of an option contract. This case gives an impression that at the time of concluding the option contract, the precise terms of the main contract such as the precise amount and form of performance need not be agreed upon expressly. Although this view may be well-founded allowing the principles of freedom of contract, it leaves room for disputes as in this case. In order to avoid any room for disagreements regarding the creation of contractual obligations and the performance thereof, it is crucial for parties to reach contractual certainty regarding all the material terms of the main substantive contract during the option contract. Conversely, it could be argued that though the obligation and the performance of the obligation is not established with certainty, it can be ascertained. If this approach is correct, the certainty requirement is complied with.

This case is a clear example that an option contract though generally valid and enforceable must be dealt with on its own merits. It is essential to look at what the parties have agreed upon to determine the claim and or performance of contractual obligations.
