# Not out of the woods yet – a copyright lawyer take on the Concourt's judgement in the Please Call Me case

Whilst the case may boil down to truth about a promise made concerning an idea, neither "copyright", "patent", "trademark", "geographical indication", "trade secret" and "design" or "intellectual property" are mentioned in the judgement.

The type of case this has been over years is best summed up in the judgement

[115] On the basis of the facts and events summarised above Mr Makate sued Vodacom, basing his claim on a contract concluded between him and Vodacom represented by Mr Geissler. As often happens, his pleadings were more ambitious than the evidence led in support of this case. Over time they were amended. **At the close of the trial he claimed only that the contract between him and Vodacom was that in return for his providing the idea to Vodacom it would enter into bona fide negotiations with him in order to agree on a reasonable remuneration for his idea**. Should they be unable to agree on a reasonable remuneration the matter would be referred to Mr Knott-Craig for his adjudication. The trial Court held this to have been proved on a balance of probabilities

Whilst the judgement contains 85 mentions of the word 'idea', there is no connection made in the judgement to the fact that the idea was manifest as a "literary work" *per se*. Copyright law does not protect an idea, it only protects the manifestation if the idea in certain subject matter and in the judgement, this is acknowledged in

"[4] Meanwhile the applicant came up with an idea in terms of which the cellphone user who has no airtime would be able to send the request to the other cellphone user who has airtime to call the former. **The idea was reduced to writing** and the applicant consulted his superior and mentor at Vodacom for advice on how he could sell it to any of the cellphone service providers,

> including Vodacom. His mentor, Mr Lazarus Muchenje advised him to speak to the Director of Product Development and Management, Mr Philip Geissler"

The Copyright Act 98 of 1978 makes no mention of "idea" however for copyright to subsist in all but two types of works eligible for copyright, Ch 1 Sec 2 (2) of the Copyright Act 98 of 1978 as amended connects to the judgement in respect of the idea being reduced to a literary work… i.e. written down

> "A work, except a broadcast or programme-carrying signal, shall not be eligible for copyright unless the work **has been written down**, recorded, represented in digital data or signals or otherwise reduced to a material form"

The question that is raised by the curious is whether there exist grounds to sue Knott-Craig as regards claims in his biography?

There are 66 mentions of "Knott-Craig" in the judgement and 190 (26 in media and pre-amble; 169 in judgement) mentions of Vodacom.

If one is to take the Concourt's judgement at

"[11] Despite the product being a success, **Vodacom did not negotiate** compensation for the use of the applicant's idea. Instead, as the High Court later held, Messrs Knott-Craig, Vodacom's CEO, and Geissler created a false narrative pertaining to the origin of the idea on which the "Please Call Me" product was based. They dishonestly credited Mr Knott-Craig with the idea and this lie was perpetuated in the latter's autobiography"

"[105] In not compensating the applicant and persisting in advancing the legal defences even after the trial Court had emphatically found that an agreement was concluded, **Vodacom associated itself** with the dishonourable conduct of its former CEO, Mr Knott-Craig and his colleague, Mr Geissler. This leaves a sour taste in the mouth. It is not the kind of conduct to be expected from an ethical corporate entity"

[117] Lastly, it ignores one of the more disgraceful aspects of this case[82] namely that, after the institution of this action, Mr Knott-Craig published his autobiography and falsely claimed credit for the "Please Call Me" idea. To make matters worse, when challenged, he procured an email from Mr Geissler to bolster his untruthful version

…….one might conclude that there are further causes of action against both Vodacom and Mr Knott-Craig that Mr Makate might explore. It is difficult to see how the two can be separated, including in respect of the biography. It is probable that the draft was shared with Vodacom prior to publication. It may be opined that Vodacom has worn the "cloak" of its employees' "dishonourable conduct" at all material times.

Specifically it is Vodacom as the judgement says that "associated itself with the dishonourable conduct of its former CEO, Mr Knott-Craig and his colleague Mr Geissler". Whilst Mr Knott-Craig and Mr Geissler were according to the judgement, individuals of 'dishonourable conduct" at Vodacom, as Mr Makate and his legal likely know well, it is the Vodacom at all times who was the Defendant and it was the corporate culture at Vodacom that saw to the hell that they endured and that the fighting the truth was to be maintained.

As to the specific grounds Mr Makate and his legal team may choose, that is a matter for them to consider on the facts of the case, however it may be opined that there are certainly grounds to address the dishonesty of both Mr Knott-Craig and Vodacom.

Does the Concourt judgement assist Mr Makate and his legal team, given the judgements criticisms of Mr Nott Craig, with grounds to sue is another question that that the curious raise.

The *plain language* of the judgement disambiguates the matter of the dishonesty of Knott-Craig, and provides evidence to any case that the plaintiff seeks to pursue as

regards the dishonesty afoot. it would be nigh impossible to separate the dishonesty that continued by Vodacom *post* Knott-Craig's departure as an employee from Vodacom from that of Knott-Craig during his employment and during the rest of the case

So does the Concourt Judgement set a precedent of any kind?

Yes indeed, in more ways than one – this judgement adds to the body of jurisprudence in South Africa.

Mr Makate and his legal team are highly commended for their perseverance, patience, courage and belief in the truth that a promise has meaning and matters

It adds to case law the notion of "reduced to writing" and certainly adds to case law on the matters, as per the Concourt Judgement of:

> "Contract — breach — oral agreement to negotiate in good faith Pleadings — Ostensible authority — Distinct from estoppel — Not necessary to plead ostensible authority in replication
> Prescription Act 68 of 1969 — Sections 10(1), 11(d), 129(d) — interpretation of "debt"
> Constitution — Section 39(2) — Narrow interpretation of "debt" — claim not prescribed"

More than that though, one does not need to be defeated by the High Court or the SCA, the Concourt rules.

Lastly it should be noted that there should be no celebrations yet…….it is said there "is many a slip between cup and lip" – they are not out of the woods yet.

The order – see below – is not watertight

1. It relies on "**good faith**" of a party, Vodacom, who has in this matter shown the opposite.

2. It once again relies on the route of the matter, if agreement is not reached it "must be submitted to Vodacom's Chief Executive Officer for determination of the amount" when the history of the Vodacom's CEO's "**determination**" is tainted. The case's presence at the Concourt is further evidence of the recent Vodacom's CEO's "determination"

3. It relies on "**reasonable**" **for both time and compensation**….when just reaching this point is *prima facie* evidence of Vodacom's unreasonableness to date

4. It prescribes the commencement date for negotiations but not the finish date…..leaving it open to the interpretation of "**reasonable**"….i.e. further conflict.

> "3. The order of the Gauteng Local Division of the High Court, Johannesburg, is set aside and replaced with the following order:
>
> "(a) It is declared that Vodacom (Pty) Limited is bound by the agreement concluded by Mr Kenneth Nkosana Makate and Mr Philip Geissler.
>
> (b) Vodacom is ordered to commence negotiations **in good faith** with Mr Kenneth Nkosana 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 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."

4. The negotiations mentioned in 3(b) **must commence within 30 calendar days** from the date of this order.

5. Vodacom is ordered to pay the applicant's costs in this Court and in the Supreme Court of Appeal, which include costs of two counsel, where applicable"

There is much water still to flow under this bridge before resolution is reached – the legal prayer can only be that sense prevails on the part of Vodacom and comes to agreement within 30 days.

If the matter does not resolve in 30 days, it may well come to be that the reliance and prescription detailed above and arising from the order may haunt this judgement as being neither assertive or definitive enough.

In concluding the query as to whether this Concourt Judgement and indeed the case itself have much to do with intellectual property in general and copyright specifically, the answer is no, peripherally only as regard the idea being "reduced to writing". Anyone hoping for what would have been a landmark case on whether "Please call me" was original and eligible for protection by copyright will be disappointed. This is and has been a case of contract law, the meaning of debt and of prescription is this is what the judgement speaks to.

Note:

- This opinion was written in response to questions posed by Ms Dudu Dube a journalist at the New Age.
- Quotations have been taken from the Concourt Judgement and from the Copyright Act 98 of 1978.
- All **bolding** and underlining is added by the writer.