IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

COMMERCIAL DIVISION

Reportable
Civil Suit No. 0689 of 2022

In the matter between

VAS GARAGE LIMITED **PLAINTIFF**

And

MTN UGANDA LIMITED **DEFENDANT**

Heard: 3rd April, 2024.
Delivered: 21st April, 2025.

Civil procedure - *Limitation - when any payment in respect of the claim is made, the cause of action is deemed to have accrued on and not before the date of the last payment - A claim in conversion is a continuing tort, lasting as long as the person entitled to the use and possession of property is deprived of it - Concurrent jurisdiction - a decision of the Uganda Communications Commission does not preclude the right of the complainant to take any other action against the operator, under the Act or any other law - where a right or liability is created by statute which gives a special remedy for enforcing the same, the remedy provided by statute must be availed of in the first instance - If the tribunal intended to handle a particular type of dispute is not yet operational, in such cases, the courts can step in and provide the relief that the tribunal would have otherwise provided - Pleadings - parties ought to plead in a succinct manner, only material facts, albeit in a chronological order, and desist from ordinary storytelling of a blow by blow narration or account of the events as they unfolded.*

Civil procedure - *Assessment of general damages - unfair competition - section 53 of The Uganda Communications Act, 2013 - Rules 5 and 6 of The Communications (Fair Competition) Regulations, 2005 - Damages for unfair competition should be adequate to deter anticompetitive conduct, without resulting in a windfall for an injured plaintiff - the totality principle - When multiple grounds for damages are established in the same case, the court* *must consider if any part of the award overlaps with other remedies or if certain aspects of the injury or loss are being compensated twice.*

Administrative law - *jurisdiction of administrative tribunals - an administrative tribunal cannot make orders that affect individuals' rights or obligations without authority from its enabling statute.*

Intellectual property rights - *copyright in electronic databases - Because copyright protection requires originality, raw data is not copyrightable but data compilations can meet such requirement through the coordination, selection, or arrangement of the compilation - Protection extends to original selections and arrangements of data in a database as a literary work, but does not extend to the underlying data itself - alternatively, a database may qualify as a "sui generis" property on account of significant investment in the form of capital, human labour, or technological resources, having been made in compiling it - "Sui generis" ownership of a database does not necessitate originality; industrious collection granting commercial value is enough.*

Advocates - *Rule 41 of The Advocates (Remuneration and Taxation of Costs) Rules - A certificate of costs for two counsel - There should be "something exceptional" which justifies a certificate of two counsel. The mere fact that the questions involved are of great general or public importance is not in itself sufficient. In the same vein, complexity on its own may not be enough - A case concerned with very important novel issues with far-reaching consequences, may be sufficiently exceptional to justify the award of such a certificate.*

JUDGMENT

STEPHEN MUBIRU, J.

The plaintiff's claim;

[1] The plaintiff is a private limited liability company engaged in the provision of "Value-Added Services" to the telecommunications industry. The defendant is a telecommunications service provider. As part of its core business, the plaintiff engages in the provision of "Mobile Content on-demand Distribution" to the Telecom Network Mobile subscribers through the Uganda Communications Commission (UCC) short codes 6666 and 0800206666. For that purpose, the plaintiff designed, developed, and implemented a content management platform

for the provision of its Value Added Services, in particular delivering content by SMS to Telecom customers.

[2] It is the plaintiff's case that during or around the year 2012, it approached the defendant with a proposal for entering into a "Content Provision Agreement" (CPA) to allow the plaintiff provide telecom Value Added Services (VAS) to the defendant's customers. At this point, the defendant made it clear to the plaintiff that the only condition that had to be met for a direct connection to the defendant's customer platform by way of the Content Provision Agreement, was the generation of a sum of shs. 82,000,000/= as the minimum Gross Revenue per month. Upon fulfilling the above conditions, during the year 2013 the defendant executed a Content Provision Agreement with the plaintiff under an arrangement referred to as content aggregation. The agreement was renewed during the years 2014, and thereafter remained in force for an indeterminate time, unless terminated in writing by either party. The plaintiff thus developed and deployed unique content services by investing in advertising through numerous radio and television stations, thereby profiling the defendant's customers to consume the unique content.

[3] Subsequently, by way of email, the defendant communicated to the plaintiff to the effect that the Uganda Communications Commission (UCC) had started a drive to ensure that the customers did not receive unsolicited SMS. If they did, they should be able to block such SMS from being delivered to them in the future. In order to meet that directive, the defendant was required to implement an SMS Do-Not-Disturb (ONO) solution, at their own expense, allowing customers to block unsolicited SMS by registering in the defendant's database via USSD, SMS, or customer care service. That way, the customers would be able to block all unsolicited messages from Content Providers or block sender IDs. In the course of implementation of that directive, the defendant by a letter dated 21st November, 2014 introduced its own billing platform. The plaintiff was compelled to operate through this new platform.

[4] Under the new arrangement, the plaintiff was required to hand over its profiled database of subscribers to the defendant, and in turn, the defendant would be responsible for the maintenance, management and updating of the plaintiff's subscription database. In this new setup, the plaintiff's platform was to send a billing request including the content sender ID and the mobile number to be billed, which the defendant was to validate; if the validations were successful, the defendant would charge the mobile number airtime, then deliver content to the customer's mobile number SMS inbox. The defendant then had to notify the plaintiff of successful or failed content delivery. The plaintiff was obliged to pay a monthly bearer charge fee of shs. 5,000,000/= in respect of the Bulk SMS Services, and shs.12/= per SMS effective 24th November, 2014.

[5] Between 14th and 15th December, 2014 the plaintiff noted that the defendant's billing platform was not returning any successful content deliveries/billing and contacted the defendant for billing support by way of an email. The plaintiff sent a second follow-up email about the same problem to the defendant on 18th December 2014. By an email transmitted the same day, the defendant replied indicating that some modifications had been made to the content management process to better align it with the DND solution. Therefore, instead of the preferred auto-renewal, now users were required to subscribe monthly to the content subscription services using toll free numbers. The defendant added that this affected all subscription services and that in doing so, the defendant was complying with a written directive from the Uganda Communications Commission.

[6] In response the plaintiff contended that it had just spent over shs. 300,000,000/= on a promotion that the defendant had just approved to run for three months in September 2014, which aired on NTV and thirty (30) radio stations across the country, such that it was unfair in the circumstances to retire/delete the plaintiff's profiled database. Moreover, the defendant was not contractually allowed under the December, 2014 Content Provision Agreement to delete the plaintiff's active profiled subscribers' Database. The defendant responded by restoring the

plaintiff's deleted profiled subscribers, whereupon the plaintiff performed user acceptance tests (UATs) which confirmed that everything was functioning well, except for a few missing Keywords that had not been uploaded, returning no successful content delivery in the plaintiff's reports.

[7] Subsequently on or about 12th July, 2015 the plaintiff issued an invoice in the sum of shs. 288,817,785.84/= reflecting the revenue it had generated for the month of May, 2015, from the successful content delivery based on the defendant's authenticated reports. However, in August, 2015 the plaintiff experienced billing problems when all billing requests returned failed, reporting zero successful content delivery by count in the authenticated reports received from the defendant's Billing Platform. On 17th August, 2015 the defendant's engineer from its Network Group Department, communicated to the plaintiff the defendant's decision to expire/delete all subscription Databases, as a business decision made by the defendant's marketing department pursuant to UCC Directive of the 14th November 2014 (Ref. T&B/463). On that account, the defendant asked the plaintiff to compromise a percentage of its revenue earned in exchange for a marketing budget support to help recruit new subscribers to the plaintiff's database account and a 10% revenue increment on new business. The plaintiff refused to reduce their claim, and no settlement agreement was ever signed between the parties. Nevertheless, the defendant went ahead to withhold the plaintiff's dues in the sum of shs. 529,008,565/=

[8] In due course, the plaintiff gained access to a copy of the UCC directive on basis of which the defendant expired/deleted the plaintiffs Databases in December, 2014 and August, 2015 respectively, only to discover that the directive did not support what the defendant had always communicated to the plaintiff. It is on that account that the plaintiff lodged a complaint with the UCC, against the defendant. The plaintiff contended that the defendant had selectively implemented the UCC directive to its advantage to kill off competing third parties so as to boost its internal revenue.

[9] As the regulator, the UCC on 27th March, 2018 delivered its ruling where it observed that whereas its intention was to standardise the broadcasting of SMS and the implementation of the "Do-Not-Disturb" directive, it was not true that the Commission (through the directive) required the profiled databases of the subscribers to be deleted/expired. The defendant's way of implementing the "Do-Not-Disturb (ONO)" directive through the expiry of the profiled database was not in line with or envisaged by the directive as issued by the Commission. It was enough for the defendant to send the messages as instructed in the directive, as opposed to expiration/deletion of the said profiled database and further requiring the customers to engage in the monthly re-subscription. It therefore found that the defendant wrongfully expired/deleted the plaintiff's profiled subscription database as stated in the Complaint and directed that the defendant should remedy the injustice and losses occasioned to the plaintiff, and should undertake an unconditional reconciliation with the plaintiff towards a view of settling any outstanding amount and achieving the purpose of the Commission's decision within 30 (thirty) calendar days from the date of the decision, failure of which the Commission would consider imposing penalties and sanctions as stated under *The Uganda Communications Act, 2013*.

[10] It is the plaintiff's case that the defendant has deliberately ignored the UCC decision and refused to carry out a reconciliation with the plaintiff for the losses occasioned as a result of the defendant's breach, hence this suit to seek the Court's intervention to enforce the UCC decision. As a result of the defendant's adamant refusal to comply with the ruling of the Uganda Communications Commission, the plaintiff has suffered and continues to suffer insurmountable loss of business, investment capital, income generated revenue, subscriber profiled database, goodwill, future prospects, and SMS advertising/broadcasting revenue.

The defence to the claim.

[11] In its defence, the defendant contended that the court lacks jurisdiction *rationae materiae* and the plaintiffs claim is *res judicata*, an abuse of Court process on

account of forum shopping and it is frivolous and vexatious. The plaintiff by its own will made the choice of forum for resolution of the dispute. The UCC heard the complaint on the submissions of both parties and on 27th March, 2018 delivered a decision. Prior to the delivery of the said decision, the plaintiff had on 6th February 2018 purported to commence arbitration allegedly on account of breach of contract and non-payment of shs. 22,673,940,585/=. The High Court ordered that the arbitral proceedings be terminated on ground that the arbitral tribunal lacked jurisdiction. The defendant on its part challenged the decision of the UCC by way of judicial review, but was not successful.

[12] The High Court accordingly affirmed the UCC decision. On 17th March, 2022 the parties held a reconciliation meeting. The defendant accordingly informed UCC about the outcome of the meeting. All previously outstanding payments to the plaintiff were reconciled and paid in accordance with the terms of the CPA and the decision of UCC. Accordingly, the plaintiff is barred by estoppel from raising any further claims. Several years later, the plaintiff has now lodged a claim purportedly for enforcement of the decision of UCC and recovery of shs. 9,632,340,711/= The claims sought to be enforced in this claim have no foundation in the UCC ruling. It is a disguised appeal against the decision of UCC improperly brought as a claim for enforcement with fresh issues for trial before a different forum.

[13] During November, 2014 the UCC issued a directive to all telecommunications service providers to implement what is commonly referred to as the “Do Not Disturb Directive (DND)”; The purpose of the directive was to stop the receipt of unsolicited messages by telecom customers. Implementation of the DND directive required a revision of all Content Provision Agreements with content providers and clean-up of all existing content customer subscriptions to ensure compliance with the UCC regulatory requirements. The clean-up and amendment of contracts was done across board for all content providers and was not targeted to the plaintiff. The clean-up and changes in doing business to which the plaintiff agreed, involved monthly resubscription for VAS services provided customers accepted as opposed

to monthly resubscription irrespective of whether the customer agreed to re-subscribe or not.

[14] The defendant accordingly implemented the DND directive for all content providers in line with specific requirements of the UCC. Content providers including the plaintiff were informed and they signed the revised contracts which contained clear terms and conditions to govern the parties' relationship in the new era of DND. The plaintiff's database of subscribers was not deleted. The plaintiff just like other content providers simply shared their list of subscribers with the defendant but remained with their original list of subscribers. The List of subscribers was shared by way of CD and the defendant only blocked the plaintiff from sending unsolicited messages to the subscribers. The plaintiff does not own any customers on the defendant's network. The said customers belong to the defendant and the plaintiff was at the time only authorised to deliver content to those customers who had subscribed for the content with a clear command of subscription. The same authorisation (as described above) was given to several other content providers without exclusivity. Accordingly, there was no exclusive database capable of being deleted by the defendant. During August, 2015 with the consent of the plaintiff the parties undertook a clean-up exercise of the key words used by the plaintiff which were too long and had led to billing failures. The defendant denies that it is liable for any injury alleged to have been sustained by the plaintiff or damages, lost business, interest, costs or other relief claimed.

<u>The questions for determination;</u>

[15] At the scheduling conference conducted by Court on 5th July, 2023 the following issues were agreed upon by the parties for determination, namely;

1. Whether there was a breach of contract by the defendant.
2. Whether the plaintiff is entitled to the remedies sought.

[16] As part of their submissions, counsel for the defendant raised two additional preliminary points of law that need to be addressed before the substantive issues, i.e. whether the suit is barred by limitation and whether the suit is properly before court, the remedy sought having been granted by and administrative tribunal and confirmed by this Court in exercised of its powers of judicial review.

The submissions of counsel for the plaintiff;

[17] Counsel for the plaintiff submitted that the plaintiff's case is that the defendant breached its contractual obligations when it expired/deleted its database. It is not disputed that the parties entered into two Content Provision Agreements, one dated 16th July, 2013 and another dated 22nd December, 2014. Under Clause 4.1 of the Contract, the plaintiff undertook to supply the services provided for in Appendix "A," which included content provisioning, service provisioning, and bulk info services. Under clause 5.1 of the Contract, the defendant agreed to manage usage, monitor content, and retain control of the core information services. When the plaintiff availed the required documentation, the defendant agreed to configure premium short and long codes authorised by UCC on the MTN network. Under clause 6.2 of the contract, the defendant reserved the right to immediately cancel any services or content that does not adhere to the MTN information Services Provision Policy or any other standards or policies of MTN, at its discretion, on written notice to the plaintiff.

[18] The plaintiff developed content and operated short code 6666 and 0800206666 acquired from UCC, from which it delivered its services through service keywords. Some of the keywords are contained in emails and the attachments exchanged between the plaintiff and defendant dated 12th January 2015; 13th January, 2015; 8th January, 2015 and 14th January, 2015. The defendant admitted that the basic structure of the parties' relationship was that the plaintiff was connected to the defendant's network and allowed to supply information-based services to the defendant's subscribers. The services supplied by the plaintiff to the defendant's

subscribers included Short Message Service (SMS), Multimedia Service (MMS), Interactive Voice Services (IVR), Music on Demand, Out Bound Dialling, Wireless Application Protocol (WAP) and Unstructured Supplementary Service Data (USSD) based information services. The plaintiff continued to provide value-added services to the defendant's subscribers using the defendant's network platform in consideration of shared revenue as stipulated in Appendix B of the Content Provision Agreement. In the course of business, the plaintiff rendered invoices for services, and the defendant always paid upon reconciliation.

[19] Based on the terms of the contract, the only instances under which the defendant would cancel the plaintiff's services were for breach of the MTN information services policy or other policies and in case a subscribed customer is not successfully billed for a period that would be determined and agreed by both parties. In both cases, the defendant would be required to either issue a written notice in case of breach of policy. By the defendant's email correspondence dated 17th August 2015 three instances of breach of contract by the defendant occurred. First, the defendant expired the plaintiff's databases as a business decision, contrary to the terms of the Contract clause 6.2. Secondly, the defendant's failure to bill the subscribers for revenue sharing contrary to clause 5.1.5 which provides that the defendant would bear the responsibility of billing of legitimate services to MTN Customers and collecting revenue from MTN customers which would be shared between the parties. Thirdly, the introduction of the term "expiry" was outside the express terms of the contract, and contrary to clause 15 of the Content Provision Agreement.

[20] To camouflage the breach, the defendant wrongfully used the pretext of implementing the UCC directive to "implement a Universal Opt-Out Method on Short Code 196 and operation of the "Do-Not-Disturb" register for SMS and MMS, to cancel the plaintiff's digital assets in form of the subscription databases and service keywords without notice, and cause, contrary to Clause 6.2 of the Content Provision Agreement. The defendant's contractual obligation to cancel the

plaintiff's service was limited to only a breach of the defendant's "content provision and bulk info service provider guidelines" policy which was defined under Appendix B of the 2014 Content Provision Agreement. The defendant disguised the wrongful cancellation of the plaintiff's Databases and service keywords under the "expiry" term that was never part of the UCC Directive nor the 2014 Content Provision Agreement and the MTN information service provision policy that regulated the defendant and plaintiff's operations contrary to clause 15 of the 2014 CPA. The defendant without any contractual obligation or regulator-specific directive to expire the plaintiff's services, the defendant expired the plaintiff's Databases and service Keywords and failed in its obligation to bill legitimate services to MTN customers and collect revenue on behalf of the plaintiff from September, 2015 to March, 2017 contrary to Clause 5.15 of the 2014 Content Provision Agreement.

[21] The defendant failed to perform its obligations under Clause 5.1.7 of the 2014 Content Provision Agreement, which required the defendant to send regular SMS reminders to subscribed customers to remind them of what services they had subscribed to and the amount they were billed for the services. The defendant's unlawful expiry of the plaintiff's Databases and Service Keywords, prevented the plaintiff from providing services to their subscribed customers and earning revenue as provided for under the Contract. The defendant also provides Value-Added Services to its customers. These are the services that the plaintiff was providing to its customers therefore, the defendant viewed the plaintiff as a competitor to justify its unlawful actions. The defendant's actions of expiring/deleting the plaintiff's keywords and databases and its failure to bill the plaintiff's customers were not authorised by UCC. Instead, the defendant's unlawful actions were intended to unfairly prevent, restrict and distort competition in relation to the plaintiff's business. The defendant misused its dominant position as the custodian of the plaintiff's keywords and databases to unfairly drive the plaintiff out of business.

[22] Following a reconciliation, the amount payable by the defendant to the plaintiff was shs. 979,000,000/= The defendant paid the plaintiff shs. 450,000,000/= leaving a

balance of shs. 529,008,565/= which was a subject of the UCC complaint, among other issues. The defendant unlawfully withheld the sum of shs. 529,008,565/=, from 9th February, 2018 the date when the contract was terminated, to 14th June, 2022, the date of payment of the said sum following a directive by UCC. Interest in the sum of shs. 1,256,624,946/= computed at the rate of 25% per annum, should be allowed on this sum. The plaintiff incurred expenses of over shs. 300,000,000/= on a promotion that the defendant had just approved to run for three months in September, 2014 which aired on NTV and thirty (30) radio stations across the country, and it was unfair to retire/delete the plaintiff's profiled database.

[23] The defendant has deliberately ignored the UCC decision and refused to carry out a reconciliation with the plaintiff for the losses occasioned as a result of the defendant's breach. On the 12th July, 2015 the plaintiff issued an invoice for shs. 288,817,785.84/= reflecting the revenue it had achieved for the month of May, 2015 from the successful content delivery based on the defendant's authenticated reports. The defendant knew from day one that the plaintiff is a limited liability company established to provide Value Added Services for a profit with a computed and projected income that the plaintiff lost due to the defendant's breach in the sum of shs. 9,632,340,711.29. As a result of the defendant's breach, it has suffered and continues to suffer insurmountable loss of business, investment capital, income generated revenue, subscriber profiled database, goodwill, future prospects, and SMS advertising/broadcasting revenue.

[24] In a nutshell, the plaintiff prays for an award of shs. 1,256,624,946/= from the defendant, which is interest on delayed payment of the invoices raised and shs. 8,375,715,765/= as loss of income for the twenty – nine (29) months of the contract. The plaintiff prays for shs. 300,000,000/= as special damages, interest on special damages at the rate of 25% per annum and interest on general damages at the rate of 10% per annum plus costs certified for two Counsel.

The submissions of counsel for the defendant;

[25] Counsel for the defendant, submitted that from the year 2013 to 2015, the plaintiff provided value added services ("VAS") to the defendant's subscribed customers. The plaintiff's provision of VAS to the Defendant's customers was among other things regulated by the Content Provision Agreement and a Content and Bulk Information Services Provision Agreement ("CPA") executed by the parties in July, 2013 and December, 2014 respectively. The VAS supplied by the plaintiff to the defendant's subscribers included Short Message Service (SMS), Multimedia Service (MMS), Interactive Voice Services (IVR), Music on Demand, Out Bound Dialling, Wireless Application Protocol (WAP) and Unstructured Supplementary Service Data (USSD) based information services.

[26] In November, 2014 following outcry by telecommunications customers across the country, including the defendant's customers over receiving unsolicited messages and unexplained deductions of airtime, the Uganda Communications Commission (UCC) rolled out what came to be popularly known as the "Do Not Disturb" (DND) solution. This directive was communicated to the defendant by the UCC on 14th November, 2014. The DND directive affected the way the plaintiff and other Content and Bulk SMS Providers' business with the defendant would be conducted. In the ensuing period, the defendant duly notified the plaintiff and all Content and Bulk SMS Providers (including under their membership referred to as WASPA) by communicating the DND directive and the resultant changes in the way of delivering VAS to customers.

[27] The defendant implemented the DND solution across the board for all content providers and in line with the specific requirements of the UCC, the overall objective of the DND being to ensure that customers do not receive unsolicited messages and if they do, they are able to block such messages from being delivered to them in future. All content providers including the plaintiff were informed and they signed revised contracts with clear terms and conditions to

govern the relationship of the parties in the new era of DND. The process of implementing the DND directive in which the Plaintiff fully participated was transparent. It necessitated a clean-up of all existing customer subscriptions in order to allow customers to exercise the choice to opt out of subscription to VAS.

[28] It is undisputed that the plaintiff's claim for breach of contract is premised on what the plaintiff has severally referred to as the "expiry / deletion of its data base" in August, 2015. According to paragraphs 29 and 33 of P.W.I Robert Mugisha's witness statement, he testified that he found out that the plaintiff's data base was allegedly expired/ deleted following an email of 17th August, 2015. The plaintiff's verification report of alleged loss of revenue and business clearly indicates, at paragraph 1.2 page 2 thereof, that the plaintiff's data base of profiled customers was expired in August, 2015. The plaintiff's claim for alleged loss of revenue and business based on breach of contract is barred by limitation. The plaintiff did not plead that it was under any disability or that it is entitled to the benefit of any exceptions under *The Limitation Act*.

[29] The plaintiff's sole premise of the allegation of breach of contract for which it claims loss of income and business is that the defendant expired / deleted its database which resulted in loss of income and business. The defendant did not breach the contract because it did not fail to perform any of its contractual obligations, not at least in the terms alleged by the plaintiff. There is no clause in the contract stipulating that the plaintiff had ownership of customers to whom content and bulk SMS services would be provided. It cannot be true therefore that the plaintiff owned a database of subscribers who were not in the first place, subscribers of the plaintiff. As a matter of fact, it is undisputed that the customers to whom content was provided are subscribers of the defendant. It is undisputed that on 14th November, 2014, UCC wrote to the defendant directing it to implement the DND solution for all its customers. This, was in response to massive complaints from customers about receipt of unsolicited content from content providers using the

defendant's platform. Moreover, whenever there were unsolicited content messages to the customer, the customer would be charged airtime.

The decision;

[30] In all civil litigation, the burden of proof requires the plaintiff, who is the claimant, to prove to court on a balance of probability, the plaintiff's entitlement to the relief being sought. The plaintiff must prove each element of his or her claim, or cause of action, in order to recover. In other words, the initial burden of proof is on the plaintiff to show the court why the defendant is liable for the relief claimed. Generally, the plaintiff in his claims for breach of contract in the instant suit must show: (i) the existence of a contract and its essential terms; (ii) a breach of an obligation imposed by the contract; and (iii) resultant damages. For the claim of unfair competition, the plaintiff must prove; (i) an act of violation of fair competition; and (ii) resulting harm, meaning the injury is of a type the fair competition laws were intended to prevent and flows from the unlawful conduct. However, the defendant raised some two points of law in its final submissions that have to be addressed before delving in the merits of the claim. For the claim of conversion, the plaintiff must prove; (i) an intentional act of dominion or control by the defendant over the plaintiff's property, (ii) that this act is inconsistent with the plaintiff's right to possession; and (iii) demonstrable harm or loss due to the defendant's actions.

The preliminary points of law;

[31] Points of law which have been pleaded, or which arise by clear implication out of pleadings, which if argued may dispose of the suit, ought to be considered before the Court deals with the real questions in controversy between the parties. Although the defendant did not plead them, there are two points of law raised in the defendant's final submissions.

i. <u>Whether the suit is properly before this Court, the remedy sought having been granted by an administrative tribunal and confirmed by this Court in exercise of its powers of judicial review</u>;

[32] According to paragraph 3 of the plaint, this suit was filed in order “to enforce a decision by the Uganda Communications Commission dated the 27th day of March, 2018 for an order for the recovery of shs. 9,632,340,711/=.” The claim arose when, considering that the defendant’s conduct was in contravention of or a breach of fair competition, the plaintiff on or about 7th January, 2018 filed a complaint with the Uganda Communications Commission in relation to that contravention or breach, in terms of section 55 (6) of *The Uganda Communications Act, 2013.* The plaintiff complained that the defendant’s activities when implementing the “Do Not Disturb” directive of the UCC had kept the plaintiff out of business for the last two years without allowing the plaintiff access to deliver services to its profiled customers hence depriving the plaintiff of the right to do business and benefit from its resources.

[33] The plaintiff asserted that while MTN Uganda expired the plaintiff’s profiled subscription databases, MTN did not expire its own parallel MTN Play services managed by its international VAS Partner IMI Mobile as communicated on 18th December, 2014 that the expiry of all subscription had taken effect on the same day. MTN under its MTN Play service continued broadcasting its messages without including the opt-out instructions of (“Dial *196# or send “STOP” to 196 to opt-out”) at the beginning of the message as UCC had Directed.

[34] The defendant responded on 24th October, 2017 denying the accusation of unfair business practices. It contended that when the contract was renewed on 22nd December 2014 it contained new terms including implementation of the Do Not Disturb (“DND”) directives as required by the Commission, according to which the plaintiff was only authorised to deliver content to MTN Uganda customers who had subscribed for the services with a clear command of subscription. The process of

implementing the DND directive necessitated a clean-up of all existing content customer subscriptions, which was done in August, 2015 to ensure compliance with the new rules and this was done for all Content Providers and not targeted at the plaintiff as alleged. The plaintiff does not own any customers on the MTN Uganda network. The customers belong to MTN Uganda and the plaintiff is only given a right to deliver content to those who have subscribed for the content.

[35] All previously outstanding payments were reconciled and paid in accordance with the terms of the Contract. By that date the plaintiff had not invoiced a total of shs. 2,911,955/= for both MT SMS & MO SMS for the period January, 2016 to August 2017. The defendant awaited the plaintiff's delivery of a valid invoice in accordance with the payment process under the Content Provision Agreement for that amount to be paid. In its decision of 27th March 2018 the Commission directed as follows;

> Whereas the Commission's intention was to save mobile phone users from unsolicited SMSs through the implementation of the directive above, it is not true that the Commission (through the directive) required profiled databases of subscribers to be deleted/expired. In result therefore, MTN's way of implementing the do-not-disturb (DND) directive (through the expiry of databases) was not in line with or as envisaged by the Directive as issued by the Commission. It was enough for MTN to send the messages as directed in the Directive, as opposed to expiring the said databases and requiring subscribers to engage in a mandatory monthly re-subscription.
>
> ……. the Commission finds clear evidence of the existence of "Profiled data bases of subscribers" as asserted by the complainant……... (a) The customers using the MTN network belong to MTN Uganda Limited. (b) Since MTN allowed (under a commercial agreement) Vas Garage to advertise its various forms of content to MTN's customers, provide content to those subscribed, and profile them in line with the kind of content they required, by default, a database belonging to Vas Garage Limited, of profiled subscribers had to arise both for content delivery purposes and billing. MTN's argument that "the same authorisation is given to several other content providers without exclusivity. Therefore, there is no exclusive database capable

of being deleted by MTN Uganda;" has been rejected by the Commission because; (1) The profiled data base of subscribers to which each content provider provided content had to be in place to enable billing and sharing of the revenues therefrom (between MTN and each of the content providers), and (2) MTN's letter dated 21st November, 2014 to all Content and Bulk SMS Providers (already referred to above) also clearly defeats MTN's current argument on this issue. In the said letter, MTN required of each content provider to handover their "current subscription data bases" to be maintained and managed by MTN Uganda Limited. In result therefore, the Commission, having carefully considered submissions of the parties, and the evidence available, has found that MTN Uganda Limited wrongfully 'expired' Vas Garage's subscription data bases as stated by the complainant.

……. the Commission hereby finds MTN's decision to pay Vas Garage only half of the reconciled revenue to have been in breach of the CPA, and unfair……… he Commission has noted that MTN misused its dominant position to frustrate and curtail Vas Garage's ability to receive the due amounts owed to it for fear of losing the relationship between the two. In result therefore, the Commission hereby finds that the failure by MTN Uganda Limited to make payment to Vas Garage Limited of the balance in the sum of shs. 529,008,565 (five hundred and twenty-nine million, eight thousand five hundred and sixty-five shillings)-inclusive of VAT as indicated in the attachment to Vas Garage's final demand notice to MTN dated 8th December, 2015 was a wrongful act, which MTN should immediately remedy.

[36] The Commission directed the defendant to undertake an unconditional reconciliation with the plaintiff with a view of settling any outstanding amounts and achieving the purpose of the decision. The parties were directed to comply with the ruling of the Commission within 30 (thirty) calendar days from the date of the decision and thereafter formally inform the Commission immediately on the steps they have taken in adherence to the ruling. Should the parties fail or refuse to adhere to this ruling, the Commission indicated it would not hesitate to consider imposing penalties and sanctions as enumerated under the Act and Regulations. The Commission concluded by stating that in the event that any of the parties to

the complaint was not satisfied with the directed reconciliation, they had the option, in accordance with section 55 (8) of *The Uganda Communications Act, 2013* to refer the matter to any other appropriate forum.

[37] Section 55 (8) of *The Uganda Communications Act, 2013* in essence provides that the decision of the Commission with regard to a complaint regarding contravention of or a breach of fair competition does not affect in any way the right of the complainant to take any other action against the operator, under the Act or any other law. On the other hand, section 55 (9) of the Act provides that any person aggrieved by the decision of the Commission under that section may appeal to the tribunal. The Uganda Communications Tribunal provided for under section 60 of *The Uganda Communications Act, 2013* has jurisdiction to hear and determine all matters relating to communications services arising from decisions made by the Commission or the Minister under the Act. Judgments and orders of the tribunal are executed and enforced in the same manner as judgments and orders of the High Court (see section 65 (3) of the Act). Any person aggrieved by a decision of the tribunal may within thirty days from the date of the decision or order appeal to the Court of Appeal (see section 65 (4) of the Act). As recently as March, 2023 the Ministry of Information, Communications, Technology and National Guidance was in the process of process of establishing the tribunal until cabinet halted the creation of new institutions or agencies under the Ministries, Departments, Agencies (MDAs) rationalisation policy intended to scrap some agencies and merge others. The Uganda Communications Tribunal has never been established.

[38] As a creature of statute, an administrative tribunal cannot make orders that affect individuals' rights or obligations without authority from its enabling statute. An administrative tribunal does not have the general jurisdiction that a Court does. The power to impose a particular remedy must be provided for in the tribunal's enabling statute. Many enabling statutes set out express lists of the remedies a tribunal may order. For example, tribunals often have the power to make declaratory orders, to order a party to repair a problem or to mitigate damage, or

to order a party to comply with the tribunal's enabling statute. Orders for the payment of money, such as compensation or damages, fines, fees and levies, and costs, can generally only be ordered by tribunals that have the express statutory authority to do so.

[39] The powers conferred by statute are taken to include, by implication, a right to take any steps which are reasonably necessary to achieve the statutory purpose: "whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorised, ought not (unless expressly prohibited) to be held, by judicial construction, to be *ultra vires*" (see A*ttorney General and Another v. Great Eastern Railway Company (1880) 5 AC 473; (1880) 5 App Cas 473; Colman v. Eastern Counties Ry Co (1847) 16 LJ Ch 73* and *Ashbury Railway Carriage and Iron Co v. Riche (1875) LR 7 HL*).

[40] Implied authority refers to the jurisdiction to perform acts that are reasonably necessary to accomplish the purpose of the statute. Implied authority is not express or written into the statute, but it is authority the statutory body is assumed to have in order to achieve the statutory purpose. Implied authority is incidental to express authority since not every single detail of the statutory body's authority can be spelled out in the statute. Anything not authorised, expressly or implicitly, is *ultra vires* the corporate body and void, and cannot be ratified or made effective.

[41] Nowhere in *The Uganda Communications Act, 2013* is the Uganda Communications Commission vested with power to grant monetary relief. Under section 6 (1) (d) the Commission has power to impose a fine on a person who unlawfully possesses, installs, connects or operates any communications equipment or apparatus, or unlawfully provides or performs any communications services. The award of monetary relief cannot fairly be regarded as incidental to, or consequential upon, those powers which the Legislature has authorised.

[42] Upon satisfaction that an operator is competing unfairly, the Commission's powers are limited to; (a) ordering the operator to stop the unfair competition; (b) requiring the operator to pay a fine not exceeding ten percent of the annual turnover of the operator; or (c) declaring any anticompetitive agreements or contracts null and void (see section 55 (7) (c) of the Act). There is no general power or broad discretionary power conferred upon the Commission to direct a party to do anything that, in its opinion, the party ought to do to achieve compliance with the Act, both in respect of the complaint and in respect of future practices. Unlike Courts, the Uganda Communications Commission, which can be characterised as regulatory in character, lacks constitutional distinction from the executive, as it was created precisely for the purpose of implementing government policy in the regulation and management of telecommunications services.

[43] Regulatory tribunals will often have a mixture of functions, some purely regulatory and some inquisitorial or adjudicative. Being a regulatory tribunal, the Commission sometimes exercises a function that is investigative, prosecutorial and adjudicative as it is only bodies equipped with these three powers that can be expected to regulate adequately complex or monopolistic industries that supply essential services, such as telecommunications. Because of this primary policy-making and enforcement function, its capacity to grant private law relief is looser at the executive end of the spectrum where the primary purpose is to develop, or supervise the implementation of, particular government policies, but tighter at the judicial end of the spectrum where the primary purpose is to adjudicate disputes through some form of hearing. Any enforcement powers a tribunal has must be granted to the tribunal in its enabling statute.

[44] There is no enforcement mechanism for decisions of the Commission. It is only the judgments and orders of the Uganda Communications Tribunal that can be executed and enforced in the same manner as judgments and orders of the High Court (see section 65 (3) of the Act). On 24th October, 2024. Unfortunately, the Tribunal is yet to be set up. Parliament rejected at its second reading, *The National*

Tribunal Bill, 2024, which contained a proposal to introduce a single tribunal by repealing all provisions in enactments establishing Tribunals, on grounds that it contravenes Article 152 (3) of the Constitution. Efforts made in the *Centre for Constitutional Governance (CCG) and two others v. Uganda Communications Commission and two others, H.C. Misc. Cause No.152 of 2019* came to naught on 22nd January, 2024 when Court dismissed an application intended to order the Government to constitute it. The status quo currently therefore is that the Uganda Communications Tribunal is yet to be constituted.

[45] It is a well-established proposition that where a right or liability is created by statute which gives a special remedy for enforcing the same, the remedy provided by statute must be availed of in the first instance (see *Wolverhampton New Water Works Co. v. Hawkesford (1859) 6 CB (NS) 336 at p. 356* and *Dr. Charles Barugahare v. Makerere University and three others, H. C. Misc. Cause No.147 of 2020*). If a statute provides a specific remedy, that remedy is often considered exclusive, meaning that it is the only way to address the issue created by the statute. If a statute outlines a process for appealing an administrative decision (e.g., in this case section 55 (9) of the Act provides that any person aggrieved by the decision of the Commission under that section may appeal to the tribunal), the person affected must first exhaust that appeal process before they can challenge the decision in court. The remedy provided in the Act will impliedly exclude the jurisdiction of the civil court to that extent. Where rights and liabilities are the creatures of a statute and a remedy is provided for the enforcement of the same, then that remedy alone can be availed of and no suit will lie before the ordinary civil court for their enforcement. This principle reflects the legislative intent that the specific remedy provided by the statute is the preferred or intended way to address the issue.

[46] One of the exceptions is where the tribunal intended to give statutory relief is yet to be set up, individuals who would normally seek relief through that tribunal are left without a specific statutory mechanism to address their issue. If the tribunal

intended to handle a particular type of dispute is not yet operational, the legal system must provide a mechanism for individuals to seek redress. The legal system has a responsibility to provide alternative mechanisms for individuals to seek redress when a specialised tribunal is unavailable. In such cases, the courts can step in and provide the relief that the tribunal would have otherwise provided. Resort then may be had to the Courts. The other exception is where an internal remedy within an organisation or agency is deemed ineffective or would lead to a futile result, the court may then permit a litigant to directly approach the court.

[47] The intended function of providing statutory relief through the Uganda Communications Tribunal is currently unavailable because the tribunal itself does not exist. Individuals seeking relief may need to explore alternative avenues, such as judicial review or other legal mechanisms. Judicial review is but only one method challenging administrative action. In some instances, individuals may be able to pursue common law remedies, such as those for breach of contract or tort, if the relevant facts support such a claim. A party to an administrative action may also bring a suit against another party in court, to enforce the tribunal's order. This may depend on whether the tribunal order is of a type that a court would enforce, and whether the court believes it should enforce the tribunal order in the absence of any statutory procedure for obtaining court assistance (see Sara Blake, *Administrative Law in Canada*, 4^{th} ed. (Markham: LexisNexis Butterworths, 2006) at 226).

[48] For breach of contract the common law has always awarded to the injured party damages, and "damages" means a monetary award that compensates that injured party. In this suit, the plaintiff seeks recovery of shs. 1,256,624,946/= being interest on the outstanding payment of the invoices raised; shs. 8,375,715,765/= being loss of income for the 29 months of contract; c) general damages; d) interest at the rate of 25% per annum on special damages from the date of filing the suit until payment in full; e) interest at the rate of 10% per annum on general damages from the date of filing the suit until payment in full; and f) the costs for two Counsel. None of those

remedies were considered nor granted by the Uganda Communications Commission in its decision of 27th March 2018. Indeed, its powers being regulatory in nature, it had no jurisdiction to grant that relief. It is therefore incorrect to submit that by this suit, the plaintiff seeks remedies that have previously been granted by that administrative tribunal and confirmed by this Court in exercise of its powers of judicial review.

[49] In any event, the Commission concluded its decision by stating that in the event that any of the parties to the complaint was not satisfied with the directed reconciliation, they had the option, in accordance with section 55 (8) of *The Uganda Communications Act, 2013* to refer the matter to any other appropriate forum. Similarly, in clause 5.1.5 of the *Uganda Communications Commission Complaints Handling Guidelines, 2021* it is stated that where the complainant or service provider is not satisfied with the resolution or decision of the Commission, they have the right to seek redress from an appropriate Court(s) of law. The defendant's contention that this Court lacks jurisdiction *rationae materiae* and that the plaintiff's claim is *res judicata*, an abuse of Court process on account of forum shopping, and that it is frivolous and vexatious, is accordingly rejected. The reliefs sought in the claims now before Court have not been determined previously by any Court or tribunal of competent jurisdiction. The objection is misconceived.

ii. Whether the suit is barred by limitation;

[50] It is noteworthy that the question of limitation was never pleaded nor argued during the trial. However, being a point of law, it can be raised at any stage of the proceedings, even when not pleaded (see *Uganda Railways Corporation v. Ewan and five [2000] HCB 61*; *Makula International Ltd. v. His Eminence Cardinal Nsubuga and another [1982] HCB 11* and *Broadways Construction Co. v. Musa Kasule and others [1971) E.A. 16*). Once an illegality is brought to the attention of court, it overrides all questions of pleadings, including any admissions thereto.

[51] Matters of limitation are inextricably intertwined with the concept of a cause of cation. A cause of action was defined as a bundle of facts which if taken together with the law applicable to them give the plaintiff a right to a relief against the defendant (see *Attorney General v. Major General Tinyefuza, Constitutional Petition No.1 of 1997*). It is alternatively defined as every fact which is material to be proved to enable the plaintiff succeed or every fact which if denied, the plaintiff must prove in order to obtain judgment (see *Cooke v. Gull, LR 8 E. P. 116* and *Read v. Brown 22 QBD 31*). The pleadings must disclose that; the plaintiff enjoyed a right known to the law, the right has been violated, and the defendant is liable (see *Auto Garage and others v. Motokov (No.3) [1971] E.A 514*). Whether or not a plaint discloses a caution of action must be determined upon perusal of the plaint alone together with anything attached so as to form part of it (see *Kebirungi v. Road Trainers Ltd and two others [2008] HCB 72*). The implication is that whether or not a suit is time barred is determined by examining the contents of the plaint.

[52] It is trite that a cause of action does not run from discovery, but rather it arises when a right of the plaintiff is affected by the defendant's act or omissions (see *Elly B. Mugabi v. Nyanza Textile Industries Ltd [1992-93] HCB 227*). Limitation begins to run from the date of the cause of action to the date of filing the suit (see *Miramago F. X. S. v. Attorney General [1979] HCB 24*). The limitation period starts from the date the cause of action accrues, whether or not the claimant knows of the potential claim. According to Order 7 rule 11 (d) of *The Civil Procedure Rules*, a plaint should be rejected where the suit appears from the statement in the plaint to be barred by any law. A litigant puts himself or herself within the limitation period by showing the grounds upon which he or she could claim exemption, failure of which the suit is time-barred, the court cannot grant the remedy or relief sought and must reject the claim (see *Iga v. Makerere University [1972] EA 65).* This disability must be pleaded as required by Order 18 rule 13 of *The Civil Procedure Rules*, which was not done in the instant case. It is trite law that a plaint that does not plead such disability where the cause of action is barred by limitation, is bad in law.

[53] Two major purposes underlie statutes of limitations; protecting defendants from having to defend stale claims by providing notice in time to prepare a fair defence on the merits, and requiring plaintiffs to diligently pursue their claims. As time passes witnesses to an event become unavailable and memories fade. For practical reasons the law does not permit the filing of a case after a certain specified time, since it is thought to be incapable of proof. On this reasoning, those causes dependent upon oral testimony such as most torts, are barred sooner than a cause founded upon some writing, such as contract. Statutes of limitation are designed to protect defendants from plaintiffs who fail to diligently pursue their claims. Once the time period limited by *The Limitation Act* expires, the plaintiff's right of action will be extinguished and becomes unenforceable against a defendant. It will be referred to as having become statute barred.

[54] Unfortunately, the plaint was drafted more in a manner of storytelling than the expected pleading of succinct material facts, albeit in a chronological order. A pleading is not and should not be presented as a story or a blow by blow narration or account of the events as they unfolded. A party should plead only enough details to give the legal essentials which he or she needs, and to enable the opponent to identify the transaction or event in question and plead to it. Claims should be set out with sufficient facts, but not the kind of detail contained within a witness statement. Focus is placed on the material facts only, which are those facts which are necessary to establish the elements essential to formulate a claim or a defence. The skilful advocate demonstrates the ability to reduce a commercial dispute to its key elements, in a clear and concise manner. Detail is provided only where the rules of pleading so require or for the avoidance of surprise. A narrative form of pleading makes the case inherently more difficult for the judge to understand and it calls for strenuous expert deconstruction and distillation. A failure to reduce the particulars to their elements is thus likely to obscure the issues.

[55] Storytelling has its place, but the rules of pleadings require the skill of reducing a complicated scenario to the material facts, outside of the narrative. Although the plaint in the instant case was loosely drawn with diffuseness and a conspicuous lack of precision, almost in entirely narrative form, thus containing a large volume of prolix, irrelevant details, three causes of action can be discerned from it, namely; - breach of contract, conversion and unfair competition. The plaintiff seeks to recover the following relief, namely; - a) an order of recovery of shs. 1,256,624,946/= being interest on the outstanding payment of the invoices raised; b) an order of recovery of shs. 8,375,715,765/= being loss of income for the 29 months of contract; c) general damages; d) interest at the rate of 25% per annum on special damages from the date of filing the suit until payment in full; e) Interest at the rate of 10% per annum on general damages from the date of filing the suit until payment in full; and f) costs for two Counsel.

[56] Section 3 (1) (a) of *The Limitation Act*, provides that actions founded on contract may not be brought after the expiration of six years from the date on which the cause of action arose. As regards the claim for recovery of shs. 1,256,624,946/= being interest at the rate of 25% per annum, on the outstanding payment of the invoices raised, it is explained in paragraphs 6, 12, 22 and 24 of the plaint that on 12th July, 2015 the plaintiff issued an invoice in the sum of shs. 288,817,785.84 reflecting the revenue it had achieved for the month of May 2015, from the successful content delivery based on the defendant's authenticated reports. The plaintiff asserts that the defendant on the pretext of the UCC Directive of 14th November, 2014 (Ref. T&B/463) withheld the plaintiff's money in the sum of shs. 529,008,565/= after payment of the principal sum on 14th June, 2022.

[57] Although the Communications Commission on 27th March, 2018 directed the defendant to undertake an unconditional reconciliation with the plaintiff and settling any outstanding amounts, and although the defendant invited the plaintiff for a meeting on 17th March 2022, the defendant deliberately ignored the UCC decision and refused to carry out a reconciliation. According to item (j) of Appendix "C" to

the agreement dated 22nd December, 2014 entitled "*Fees, Payment and Revenue Share for Content Provisioning and Service Provisioning*," it was agreed that "MTN shall effect payment thirty (30) days after receipt of an accurate invoice from the Service Provider." The implication is that the defendant failed in its obligation to pay not later than 12th August, 2015. The plaintiff raised its final demand notice/invoice of 8th December, 2015. *Prima facie*, the claim would become stale after 12th August, 2021.

[58] However, according to section 22 (4) of *The Limitation Act*, except for payment of a part of the rent or interest due, where any right of action has accrued to recover any debt and the person liable or accountable therefor acknowledges the claim or makes any payment in respect of the claim, the right is deemed to have accrued on and not before the date of the acknowledgment or the last payment (see also *Tabitha Lalango Lutara v. Attorney General, C. A. Civil Appeal No. 26 of 2011* and *Finance Bank Zambia Limited v. African VSAT Systems Limited, CAZ Appeal No. 062/2022) [2023] ZMCA 389*).

[59] Therefore, if a debtor makes a payment toward the debt, then the cause of action accrues as at that date, essentially restarting the six (6) year countdown. In *Busch v. Stevens [1963] 1 QB 1*, the Court described this as "a notional birthday and on that day, like the phoenix of fable, it rises again in renewed youth, and also like the phoenix, it is still itself." Like the phoenix, the limitation period can be re-started at any time, even if the original limitation period has already expired. In the instant case, the defendant's part payment of 14th June, 2022, following a directive by the Uganda Communications Commission restarted the six-year period such that the suit filed on 19th August, 2022 was not time barred.

[60] On the other hand, shs. 8,375,715,765/= is sought to be recovered as loss of income for the 29 months of contract, covering the period from August, 2015 when the Content Provision Agreement was first breached, and then later on 9th November, 2017 when it was breached again by expiry/deletion of its database.

This culminated in termination that occurred on 9th February, 2018. Unfortunately, the plaint does not succinctly specify the date from which the 29 months is to be reckoned. Having filed the suit on 19th August, 2022 what is clear though is that the plaintiff cannot have any breach that occurred before 19th August, 2015 as the basis of his claim. Since it is the plaintiff's claim is that the contract was wrongfully terminated on 9th February, 2018 the implication is that the period of limitation elapsed on 9th February, 2024. The suit was filed on 19th August, 2022 hence it was not filed outside the period of limitation. The 29 months are understood to date back from that claimed wrongful termination, hence to August, 2015.

[61] As regards the claim of unfair competition, although at common law it is ordinarily an umbrella category for all statutory and non-statutory causes of action arising out of business conduct which is contrary to honest practices in industrial or commercial matters such as passing off and misappropriation of trade secrets, in Uganda's telecommunications industry it is created by statute under section 55 of *The Uganda Communications Act, 2013* as a remedial statute. The tort of unfair competition typically arises from one's interference with another's business, existing customer accounts, good will, theft of trade secrets, or proprietary information. As a remedial statute, the Act is designed to provide the means for individuals or entities active in the telecommunications industry, to seek redress for wrongs or to have their rights protected. Its main purpose is to address and improve on how rights are protected and address problems, among others, of unfair competition.

[62] A cause of action under a remedial statute arises when a statutory provision grants a legal remedy for a violation of a duty or right, and that violation is the factual basis for a claim. In essence, it is the specific statutory based factual situation that triggers the right to seek a remedy under the law. As an action is a proceeding for the redress or prevention of a wrong, the cause of action must necessarily be the wrong which is committed or threatened. Section 55 (8) of the Act creates the right for any person to seek relief against an operator who is in breach of fair

competition, under the Act or any other law. The plaintiff is one of the class of persons for whose special benefit the statute was enacted, and thus by that section it created a right of action in favour of the plaintiff. There is both an explicit and implicit legislative intent to create a private remedy, and it is thus consistent with the underlying purposes of the legislative scheme to imply such a cause of action for the plaintiff.

[63] According to section 3 (1) (d) of *The Limitation Act*, actions to recover any sum recoverable by virtue of any enactment should not be brought after the expiration of six years from the date on which the cause of action arose. A cause of action for unfair competition generally arises when a business is harmed by a competitor's unlawful, unfair, fraudulent, deceptive, misleading, or unethical business practices. This can include actions like misappropriation of trade secrets, false or untrue advertising, or imitating a competitor's goods or services. Specifically, the harm must be a direct result of the competitor's actions, and the injured business must be a competitor. A cause of action "ripens" or accrues when all the essential elements necessary for a suit to proceed are present. This means the plaintiff has a legal right, the defendant has a legal duty, and the defendant has breached that duty, causing harm to the plaintiff. It is pleaded in paragraph of the plaintiff that the plaintiff's business. A cause of action for unfair competition ripens when a competitor suffers actual harm. This harm includes direct economic losses and potential losses of business opportunities or reputation, which will disrupt the normal order of market competition. The actual harm can take various forms, including loss of sales, market share, goodwill, or reputation.

[64] The underlying actions giving rise to this cause of action typically involve some level of fraud, deception, or bad faith. Section 25 of The Limitation Act provides for postponement of limitation period in case of fraud or mistake**.** Fraud must not only be specifically pleaded but also the particulars of the fraud alleged must be stated on the face of the pleading (see *BEA Timber Co. v. Inder Sigh Gill [1979] EA 463*). Under this section, the limitation period does not begin to run until such a time

when the plaintiff is invariably aware, or could have with reasonable diligence been aware of the fraud, but this must be pleaded (see *Sunday Edward Mukooli v. Nabbale Teopista and three others, H.C. Civil Suit No. 282 of 2013*).

[65] What section 25 of *The Limitation Act* does is to postpone the starting point of the period of limitation. The period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake, or could with reasonable diligence have discovered it. Being an exception, Order 7 Rule 6 and Order 18 rule 13 of *The Civil Procedure Rules* it is mandatory to plead the exception when a suit is filed outside the period of limitation and failure to do so renders the plaint fatally defective (see *E. Otabona v. Attorney General (1991) ULSLR 150*; *Iga v. Makerere University [1972] EA 65*). A plaint that does not plead an exception where the cause of action is barred by limitation, is bad in law. The intentional concealment of material information can constitute fraud, especially when accompanied by other elements like intent to deceive.

[66] In paragraph 13 of the plaint, the plaintiff pleaded that it is "upon inquiry from the Uganda Communications Commission, [that it] managed to access a copy of the UCC directive that was used to expire/delete the plaintiff's databases in December, 2014 and August, 2015 respectively." In paragraph 5.6 of the plaintiff's complaint to UCC dated 7th January, 2018 it is specifically stated that "in June 2017, we made a breakthrough when we received the exact copies of the UCC Directive of 14th November, 2014 with MTN received stamp; to our shock and disbelieve (sic). The UCC Directive had nothing to do with holding our payment and the expiry of the subscription Databases." Although the act causing the harm may have occurred during August, 2015 by reason of the defendant's concealment, it was not discovered until June, 2017 in which case the period of limitation would run out in June, 2023. Consequently, a suit filed on 19th August, 2022 would not have been filed outside the period of limitation.

[67] The plaintiff's case however is not entirely premised on fraud. Instead in paragraphs 17, 19 and 25 of the plaint, the plaintiff claims to have suffered insurmountable loss of business, investment capital, income generated revenue, subscriber profiled database, goodwill, future prospects, and SMS advertising/broadcasting revenue, as a result of the defendant's adamant refusal to comply with the 27th March 2018 ruling of the Uganda Communications Commission. The damage having occurred after that date of refusal to comply, the six years would elapse around 27th March 2024 in which case a suit filed on 19th August, 2022 was not filed outside the period of limitation.

[68] With regard to the claim of conversion, the general damages sought to be recovered, as pleaded in paragraph 13 of the plaint, are primarily based on what the plaintiff considers to be the defendant's wrongful expiry/deletion the plaintiff's databases in December, 2014 and August, 2015 respectively. Conversion is a tort that involves the wrongful exercise of control over someone else's property, and this includes situations where the property is destroyed. It is the plaintiff's case that expiring its profiled subscription databases and being prevented from offering services to its customers is illegal and an act of unfair business practice. The plaintiff claims to have suffered insurmountable loss of revenue, current and prospective subscribers, goodwill and advertising revenue from the date of commencement of the December, 2014 Agreement. When a person intentionally destroys another's property, they are essentially exercising control over it in a way that is inconsistent with the owner's rights.

[69] A claim in conversion is a continuing tort, lasting as long as the person entitled to the use and possession of property is deprived of it. This theory extends the statute of limitations for a tort when the wrongful act or conduct continues over time. It essentially implies that *The Limitation Act* does not begin to run until the continuing tort stops. This means a party can sue for a continuing tort even if the initial act occurred outside the normal limitation period, as long as the tort continues into the

limitations period. All in all, none of the plaintiff's three causes of action is time barred. The objection is misconceived.

First issue; <u>whether there was a breach of contract by the defendant</u>.

[70] The plaintiff engages in the business of mobile content on-demand distribution to telecom network mobile subscribers, of Value Added Services (VAS) beyond basic voice, messaging and data, through the Uganda Communications Commission (UCC) short codes 6666 and 0800206666. The mobile content on-demand distributed by the plaintiff is developed through a process of content aggregation involving the collection different types of information, including blogs, news and social media posts, which is packaged to suit the tastes of different mobile subscribers, along subjects such as.

[71] The Content Provision Agreement executed between the plaintiff and the defendant had as its object, the enabling of the plaintiff to provide telecom VAS to the defendant's customers, though a content management platform designed, developed, and implemented by the plaintiff, for the provision of VAS; in particular delivering content by SMS to telecom customers. The plaintiff was to provide services in three categories, namely; - (1) Content Provisioning; (2) Service Previsioning (the two categories including information on local, world, business and breaking news; verses of the Bible and Quran; seasonal messages for Easter, Christmas and New Year; local and internationals sports; ringtones, etc.); and (3) Bulk Info Services (for content delivery and notifications). Content in the first two categories was to be provided on a revenue share basis, while that in the latter was to be provided on a non-revenue share basis.

[72] It was the defendant's contractual obligation to collect revenue by billing the VAS customers. The defendant configured the plaintiff's UCC short code message on their system and a tariff of shs. 250/= would be charged to the customer. The defendant was to provide the plaintiff with reports of customers that have

subscribed and unsubscribed to the plaintiff's subscription services for reconciliation purposes when required. The plaintiff was entitled to 40% of the revenue and the defendant 60%. For purpose of the agreement, the defendant was to provide the plaintiff with a leased line from the MTN switch to its business premises upon payment, at full commercial rates where required. The defendant was required to send out regular reminders to all customers subscribed to the services. The reminders were to include, among others, the service subscribed to and amount charged. The customer was expected to explicitly indicate that they are still interested in the service by sending a confirmation message to the plaintiff's toll free number.

[73] It is the plaintiff's case that the defendant breached these obligations when it expired/deleted the plaintiff's keywords and databases as a business decision, when the defendant failed to bill the subscribers for revenue sharing, and when the defendant failed to send regular SMS reminders to subscribed customers to remind them of what services they had subscribed to and the amount they were billed for the services.

i. <u>Deletion/ expiry of the customer database</u>;

[74] The plaintiff asserted that on or about 21st November, 2014 the defendant migrated the plaintiff's services from the old platform where the plaintiff maintained its profiled subscription databases to a new subscription billing platform where the defendant would take over management of the subscription databases. On 17th August, 2015 the defendant's Engineer Bob Lutaya from the MTN Network Group Department, communicated to the plaintiff that the decision to expire/delete all subscription databases was a business decision made by the Marketing Department. The plaintiff successfully protested the defendant's decision to expire its subscribers and proved that its subscribers were active. The databases were restored.

[75] On 21st August, 2015 the defendant successively expired all CPs profiled subscription databases. At a meeting in February, 2016 the defendant explained that the UCC directive had badly affected its revenue and with the directive in place, there was no way the plaintiff would make any money. Further that it is the implementation of the directive which led to the expiration of all subscription services as the regulator had initiated the process. The defendant contended further that the DND directive was intended to ensure that customers do not receive unsolicited SMS and if they did, that they were able to block such SMSs from being delivered to them in the future. Customers would be able to block all messages from all CPs or block particular sender IDs by registering in the DND database via SMS or USSD. On 19th July 2017, the plaintiff registered its complaint with the Commission. On 9th November, 2017 the defendant responded by serving the plaintiff with a notice of termination of the Content Provision Agreement. The contract was eventually terminated on 9th February, 2018.

[76] The dispute between the parties to this suit rotates around the ownership and management of a digital database comprising a common pool of customers to whom different sets of services were provided by the two. While the defendant primarily offered basic voice services (like landline and mobile calls), messaging services (like SMS and email), and data services (like internet access), those of the defendant included short message service (SMS), multimedia service (MMS), interactive voice services (IVR), music on demand, out bound dialling, wireless application protocol (WAP) and unstructured supplementary service data (USSD) based information services, using the defendant's network. While the plaintiff claims to own the database of subscribers to its services, the defendant refutes that and contends instead that they are all subscribers to its network and therefore its customers whose database belongs to the plaintiff.

a. Copyright in the plaintiff's VAS customer database.

[77] The protection of data has long been problematic for commerce and industry. Deciding what data needs to be included in a database, how to organise the data, and how to relate different data elements are all creative decisions that may receive copyright protection. Intellectual property rights though provide very limited protection for machine-generated data. The parties nevertheless provided for these rights in their agreement. Clause 7.2 and 7.3 of the Content Provision Agreement dated 16th July, 2013 (identical to clauses 7.3 and 7.4 respectively in the one dated 22nd December, 2014) provides as follows;

> 7.2 The parties agree that all intellectual property rights, including but not limited to, copyrights, patents, trademarks, designs, technical information and confidential information which form part of, constitute or attach to the Network equipment and/or Network Services vest in MTN and nothing herein contained shall be construed as vesting any right in respect thereof to the Content Provider.
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> 7.3 Any intellectual property provided by the Content Provider to MTN shall remain the property of the Content Provider and shall not be shared, or passed on to competing Content Providers without the written consent of the Content Provider.

[78] Intellectual Property refers to intangible creations of the mind, such as inventions; literary and artistic works; designs; and symbols, names, and images used in commerce. Copyright is a set of exclusive rights granted by law to authors of original works of authorship. It applies automatically as soon as an original work is created and fixed in a tangible medium of expression, such as when it is stored on a hard disk. A work is "fixed" when its embodiment is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. In the case of a computer, data is not

stabilised for more than a transitory duration unless it is stored in or on a material object (see *Bellsouth Advertising & Publishing Corp. v. Donnelley Info. Publishing, Inc., 933 F.2d 952 (11th Cir. 1991*). Originality requires independent creation by the author and a modicum of creativity. Copyright covers only an author's original expression. Facts and ideas are not copyrightable. Copyright usually applies only partially to databases.

[79] Copyrightable expression usually is found in database structures, such as the selection and arrangement of field names, unless these do not reflect any creativity or are standard within an area of research. Copyright will also apply to creative data, such as photographs or expressive and sufficiently long text entries. By and large, the rule on facts and ideas means that most numerical data, scientific results, other factual data, and short text entries are not copyrightable. Digital Intellectual Property (IP) rights encompasses digital patents, copyrights, trademarks, trade secrets and digital assets such as software, algorithms, and databases. "Digital IP" refers to IP in a digital context, for example where IP rights protect digital assets, including content created, stored, amended, shared and/or otherwise dealt with using technological means such as digital music files, artistic works, computer programs, films, images etc.

[80] Although data does not typically fall into a category of intellectual property rights protected by intellectual property laws, today's economy is data-driven, so it is crucial to safeguard any innovation which may provide a competitive advantage. Digital IP protection allows businesses to both protect and maximise economic potential from their ideas. Effective Digital IP protection provides an incentive to invest in research and development in technological innovation. Recognising rights in data, by enabling businesses to protect the investment made by them in accumulating the valuable data they hold, plays a significant role in driving innovation and economic growth by offering legal protection and financial incentives to creators and inventors, as well as those who provide funding for their work. Digital IP not only drives innovation, protects the creator's investments, and

spurs healthy competition; it also fosters collaboration, allowing different players to leverage each other's experience, knowledge, and resources to develop the best solutions for the relevant market.

[81] IP rights are rights which essentially grant creators legal protection over their creations for a designated period. Copyright is the intellectual property right that protects the expression of ideas or information. Copyright protection arises automatically as soon as the created object has some material form. A person does not need to register or publish the work. Copyright owners have various exclusive rights over their copyright works, such as the right to copy, distribute copies (including electronically) and adapt the work. During this period, the owner of the IP has the exclusive right to exploit the IP, meaning they can prevent others from selling, distributing, or otherwise using the IP. IP rights allow owners to monetise their IP (through licensing for example), with such monetisation theoretically providing an incentive for continued innovation that benefits the public. IP rights can protect both physical and digital assets. Copyright describes the rights that creators have over their literary and artistic works. Works covered by copyright range from books, music, paintings, sculpture, and films, to computer programs, databases, advertisements, maps, and technical drawings.

[82] Section 5 (1) (e) of *The Copyright and Neighbouring Rights Act, 2006* specifies works eligible for copyright as including computer programmes and electronic data banks and other accompanying materials. By this definition, a computer program and a literary work are both eligible for copyright protection and therefore a database is too. By virtue of this provision, digital collections of literary or artistic works which, by reason of the selection and arrangement of their contents, constitute intellectual creations are protected as such, without prejudice to the copyright in each of the works forming part of such collections.

[83] Because copyright protection requires originality, raw data is not copyrightable but data compilations can meet such requirement through the coordination, selection,

or arrangement of the compilation. Database structures are literary works and not computer programs (see *Haupt t/a Soft Copy v. Brewers Marketing Intelligence (Pty) Ltd and others [2004] 4 All SA 67 (C*). Raw data may not be protected as an IP right as such because it lacks originality and creativity (see *Feist Publications, Inc., v. Rural Telephone Service Co., 499 U.S. 340*). The accumulation and collection of such data is not "original" in the copyright sense, in that it is not creative, it is not an intellectual creation that reflects the author's personality, but databases and compilations of data may be protected when they pass the originality test. Copyright can apply only to the creative aspects of collection: the creative choice of what data to include or exclude, the order and style in which the information is presented, etc., not to the information itself.

[84] Work is considered to be original if it has not been copied from an existing source and if its production required a substantial (or not trivial) degree of skill, judgment or labour. A database may meet this requirement because of the labour and skill involved in selecting and arranging the material. Protection extends to original selections and arrangements of data in a database as a literary work, but does not extend to the underlying data itself. For example, in *Payen Components SA Ltd v. Bovic CC and others 1995 (4) SA 441 (A)* protection was given to a catalogue and price list. In *Exchange Telegraph Co Ltd v. Gregory & Co (1896) 1 QB 147* protection was given to a list of stock-exchange prices. Copyright protects the structure and arrangement of a database as a literary work, but does not cover the data itself absent original selection or coordination. Copyright might also exist independently in the contents of the database (e.g., a database of images where each of the images would attract its own copyright protection as an artistic work).

[85] Raw data collected with no human original input will not be protected, and in the same vein processed data or other outputs which are compiled by automated processes will generally not be protected. Copyright protection will only arise if the database satisfies the requirements for a compilation, including that some (human) intellectual effort was directed towards the selection, arrangement and

presentation of information, which was not dictated by the nature of the data. Databases may be protected by copyright if they are original by reason of the selection or arrangement of their content. The protection does not extend to the content itself and is without prejudice to any rights subsisting in those contents themselves. Copyright can apply only to the creative aspects of collection (see *Key Publications, Inc. v. Chinatown Today Publishing Enters., Inc., 945. F.2d 509, 515-16 (2d Cir. 1991*). The author of a database is the natural person or group of natural persons who create the base.

[86] As the author of a creative work, it is humans who own copyright to it in the first instance. There are two exceptions to this rule. The first is if the author is an employee and created the work as part of his or her job. In that case, the employer owns copyright to the work. The second exception is if the author created the work as a work for hire. In that case, the individual or company who hired the author to create the work owns the copyright to it. For purpose of copyright protection, the "sweat of the brow" approach, which acknowledges the industriousness or labour of the author as being relevant to the originality of a work, will not suffice. The mere expenditure of effort and labour only, even if substantial, will not be enough to attract copyright protection. Copyright protection requires at least a minimal degree of intellectual effort or creativity in producing the compilation. The compiler must exercise a sufficient degree of creativity or intellectual effort in the selection or arrangement of the material. Copyright only protects "original" expressions or arrangements. For copyright to subsist in any literary work, there must be an authorial creation that is causally connected with the engagement of the human intellect. This means the application of sufficient intellectual effort, creativity, or the exercise of mental labour, skill or judgment. Efforts that are not applied towards authorial creation will not suffice.

[87] For example, in *Feist Publications, Inc., v. Rural Telephone Service Co., 499 U.S. 340*, the originality test was not passed for the white pages of the telephone directory. The Supreme Court determined that the alphabetical arrangement of

names, towns, and telephone numbers in the white pages lacked sufficient originality and creativity to warrant copyright protection. While the directory as a whole might have contained some original material, the basic facts and arrangement of the white pages were considered un-copyrightable.

[88] Similarly, in *Global Yellow Pages Ltd v. Promedia Directories Pte Ltd [2017] SGCA 28*, the plaintiff had sued the defendant for copyright infringement, on the ground that the arrangement of the defendant's data in their directory was taken from and substantially similar to that of the plaintiff's. It was alleged that the defendant had copied the following: classified listings, business listings and certain data specifically implanted by the claimant in order to monitor whether its competitors were using its database – "seeds." The Singapore Court of Appeal upheld the decision that copyright could not be said to subsist in such data and that the compilations lacked "sufficient creativity or intellectual effort in the selection or arrangement of the material."

[89] In contrast, in *Key Publications, Inc. v. Chinatown Today Publishing Enterprises, Inc., 945 F.2d 509 (2d Cir. 1991)*, the creator of the Key directory, Ms. Wang, had collected business cards from businesses that she thought were of particular interest to the Chinese-American community. She sorted the information by type of business, placed each listing in the appropriate category, listed the English and Chinese names, addresses, and telephone numbers of the businesses, and published a directory in 1989. In 1990, the defendant published a yellow pages directory (the "Galore directory") that was also of particular interest to the Chinese-American community. Approximately seventy-five percent of the listings in the Galore directory had also appeared in the Key directory. The district court found that the Galore directory infringed upon Key's copyright.

[90] On appeal, the Second Circuit found that certain aspects of the Key directory were sufficiently original to qualify for copyright protection. Contending that the test of originality under *Feist Publications, Inc., v. Rural Telephone Service Co* was "not

particularly rigorous," the court found that Ms. Wang had performed an original act of selection: she excluded from her publication businesses that she believed would soon close. According to the Court, this selection showed sufficient thought and creativity to satisfy the *Feist* standard of originality. Additionally, Ms. Wang selected businesses that were of particular interest to the New York City Chinese-American community, another selective act the court deemed original.

[91] The court further held that when Ms. Wang divided the listings into different business types she performed an original act of arrangement. Although the court found that some of the categories were typical of any yellow pages listing, it reasoned that others, such as "Bean Curd & Bean Sprout Shops," were particularly relevant to the Chinese-American community. Even if Ms. Wang had chosen only typical categories, however, the court asserted that this fact would not preclude a finding of originality. Additionally, the court found that the arrangement was "in no sense mechanical, but involved creativity on the part of Ms. Wang in deciding which categories to include," reasoning that both the Copyright Act and *Feist* require originality and creativity, not novelty.

[92] The court concluded that Key Publications possessed a valid copyright in its directory and that certain aspects of the directory were original. Infringement requires proof of a "substantial similarity" between the works. Because the arrangement of the Galore directory was not "even remotely similar" to the Key directory, and because the two directories contained only a small degree of duplication, the court held that the Galore directory did not infringe the Key directory.

[93] Creating an electronic data base involves numerous decisions about its technical design, the degree of control built into its structure to accommodate the needs of different users, the scope of its actual contents, and its sources of information. Creative arrangement requires the compiler to arrange data in some manner other than in a mechanical or objective fashion. Under the arrangement theory, originality will be

recognised in any arrangement as long as it exhibits enough creativity to distinguish it from a generic, standardised arrangement such as alphabetical or numerical order. Original selection involves judgment in choosing which facts from a body of data to include in a compilation. Under the selection theory, recognition is given to use of enough creativity to raise the author's selection above the obvious and to include more than the most basic information for the author's particular compilation. Protection is given to the database compiler who shows originality in his or her selection of the nature and types of different information he or she includes in the database.

[94] Digital piracy involves the illicit reproduction, distribution, or utilisation of Digital IP like software, music, movies, games, e-books, etc. without the consent of the Digital IP owner. Doing any of these things without permission from the copyright owner will constitute copyright infringement. Such unauthorised use often infringes copyright (and possibly trademark) laws and involves various unauthorised online activities enabled by the internet and other digital technologies. The making of temporary or permanent electronic copies of works amounts to copyright infringement (see *Pastel Software (Pty) Ltd v Pink Software (Pty) Ltd (1991) 399 JOC (T) 408–10*). Digital piracy constitutes an infringement of the Digital IP rights of creators, publishers, and owners, and can result in financial losses and legal ramifications. It leads to significant economic losses for businesses, creators, and the associated job market. The expected revenues from the sales of products or services can be significantly impacted by digital piracy.

[95] The crucial issue in determining the scope of copyright in a compilation is establishing what was actually contributed by the author. Protection is limited to the originality that the compiler added in his selection and arrangement of facts. The mere arrangement, selection and co-ordination of facts in databases cannot be copyrighted (see *EBC v. D.B. Modak, (2008) 1 SCC 1*). Any database of customers must include categories for client name, business name, address, and telephone number to be useful. These categories alone in a data base would not

show enough originality to invoke the selection theory and would be akin to the telephone directory listings.

[96] However, by adding categories to the data base, such as a list of preferred services, and a statistical breakdown of aspects of each organisation, a compiler begins to depart from the obvious and most basic information and evidences sufficient originality to secure protection under the selection theory. The originality in the selection of categories comes from the compiler's recognition of the needs of his target users and his choice of categories which meet those needs.

[97] P.W.1 Mr. Mugisha Robert testified that by the time of the defendant's termination of the contract, the plaintiff had profiled and attained about 1,000,000 of MTN's customers out of the then over ten million customers of MTN. The plaintiff had created a customer subscription database which it shared with the defendant. Considering that VAS ought to be personalised and tailored to suit individual tastes, creating such a database apparently entails the categorisation of customers and products. However, none of the plaintiff's witnesses provided details on how this was achieved. No evidence was led to show that there was originality added in the way the plaintiff went about the selection and arrangement of the requisite data. There is nothing to show that the plaintiff's data was arranged in some creative manner other than in a mechanical or objective fashion.

[98] Any expression in a factual compilation is based on the compiler's selection and arrangement of data. However, the plaintiff must show that its selection and arrangement is not generally determined by functional considerations, otherwise it will be of doubtful creativity. The merger doctrine in copyright law dictates that when an idea and its expression are so intertwined that they are essentially the same, the expression cannot be copyrighted. The merger doctrine denies copyright protection if there is only one way or are very few ways to express an idea. While databases can be protected under copyright as compilations, the doctrine can limit protection if the organisation or selection of data within the

database is considered the only or most obvious way to express the underlying idea. The plaintiff therefore has not led any evidence that would trigger Clause 7.3 of the Content Provision Agreement.

b. The plaintiff's VAS customer database as a *sui generis* property.

[99] The plaintiff claims that the defendant cancelled the plaintiff's digital assets in form of the subscription databases and service keywords without notice. It contends that the defendant's unlawful expiry of the plaintiff's databases and Service Keywords, prevented the plaintiff from providing services to its subscribed customers and earning revenue as provided for under the Contract. It is the defendant's submission on the other hand that it cannot be true that the plaintiff owned a database of subscribers who were not in the first place, subscribers of the plaintiff. As a matter of fact, it is undisputed that the customers to whom content was provided are subscribers of the defendant. The controversy thus raises the issue as to whether the plaintiff had any proprietary rights in the customer subscription database it generated for purposes this contract.

[100] A database is a collection of independent works, critical data or other materials arranged in a systematic or methodical way where it can be individually accessed, managed, updated, reproduced or extracted by electronic or other means, not including computer programs used in the making or operation of databases accessible by electronic means. A database contains two primary forms of digital property: raw data on the one hand, which can be a source of knowledge or entertainment value, and tools on the other, which are programs that can be used to communicate, store, or manipulate raw data. It therefore comprises digitised information and the tools to use it. A database is capable of generating value from its collection, processing, merger, storage, or dissemination. Databases are arrayed along a continuum according to where their primary value lies. At one end are those whose value depends on the data itself. At the other end are those

databases whose critical element is the system for manipulating the data. Most are found somewhere in the middle.

[101] A database is usually made up of the following: (a) a database structure – a literary work, including: (i) a schema being a table and compilations with a certain number of columns which may vary in width and fields; and (ii) a database model (relational or other); (b) recorded data or information records, or files (usually in electronic form) - this can range from works subject to copyright protection, each a literary work, to non-protected elements such as individual facts and figures; (c) compiled data (accumulated from other sources) - the compilation itself is a literary work; and (d) database management system (DBMS) - a computer program that controls the creation, maintenance, and the use of the database. Digital infrastructures require significant investment (in hardware, software, and personnel) in order to create digital content, design dynamic user interfaces, maintain data integrity, and store large amounts of digital data.

[102] In the legal sense as well as the popular sense, ownership has traditionally been viewed as a relation between a person and a thing, with the person possessing the maximum right to use of the thing that is owned. Data is not "property" in the usual sense. Electronic data does not constitute goods as data itself, being information, is not property at all (see *OBG Ltd v. Allan [2007] UKHL 21 at [275]; [2008]1 AC 1; [2007] 2 WLR 920*; *Your Response Ltd v. Data Team Business Media Ltd [2014] EWCA Civ 281*; *Boardman v. Phipps [1967] 2 AC 46 (HL) at 127*; and *Oxford v. Moss [1978] 68 Cr App Rep 183*). Information itself is not a physical object capable of possession independently of the physical medium in which it is held. Adapting traditional possession theories to digital reality is necessary to keep up with the institutional and technological changes in current society, ensuring legal certainty and the protection of digital assets as objects of economic and social value. Today's view of ownership therefore has shifted from the protected relation between a person and a thing to a "bundle of rights" whereby a thing can be owned by more than one person, and co-owners possess particular but limited rights.

These rights may not always coexist in a physical object, but may be split apart and separately transferred.

[103] In Europe, databases as a *sui generis* property received recognition with the adoption of the EU *Directive on the Legal Protection of Databases* in 1996, by way of Directive No. 96/9/EC of the European Parliament and of the Council, of 11th March, 1996. This was mainly because databases were not sufficiently protected in all Member States by existing legislation at the time. Its main purpose was to harmonise legal arrangements throughout the Community. In the United Kingdom, the EU *Directive on the Legal Protection of Databases*, received direct implementation through the enactment of *The Copyright and Rights in Databases Regulations, 1997* thereby amending *The Copyright, Designs and Patents Act, 1988*. The *sui generis* database right belongs to the “maker” of the database, typically the person or entity who bears the risk of the investment in creating the database. Like copyright, *sui generis* rights are automatic and do not require registration.

[104] Whereas this concept has its origin in statute, it has over the period now of nearly thirty years’ application, infected the development of the common law. As Lord Denning observed in *Eves v. Eves [1975] 1 WLR 1338; [1975] 3 All ER 768* that “equity is not past the age of childbearing,” the common law too cannot stand still but must be capable of development on a case by case basis; to ensure that the principles of the common law are apt to do practical justice in a living society. Courts, within the framework of precedent and legal principles, have the flexibility to create new rules and adapt existing ones to meet societal needs. Indeed, common law as well is capable of giving birth to new legal principles and adapting existing ones to the needs of society.

[105] The common law has the capacity to draw inspiration from many different sources. For example, concepts such as legitimate expectation, proportionality, legal certainty, now well entrenched in public law, were greatly enriched by continental

European implants. Common law has embraced these legal importations from foreign sources as its own. They have become part of the means of the common law's power of continuous self-correction. The common law had long before statute integrated intangible assets into property law. Even before specific laws were enacted to protect things like intellectual property or contractual rights, common law principles provided frameworks for recognising and protecting these assets.

[106] Property law deals with the allocation, use, and transfer of wealth and the objects of wealth. At common law, before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability (see *National Provincial Bank Ltd v. Ainsworth [1965] AC 1175 (HL) at 1247–1248*). In *Kremen v. Cohen 337 F.3d 1024 (2003) at 1029–30*, a three-part test was applied in order to determine whether a property right existed: first, there must be an interest capable of precise definition; second, it must be capable of exclusive possession or control; and third, the putative owner must have established a legitimate claim to exclusivity. In modern possession theory therefore, two elements are always present: a thing and a will exercised over it.

[107] A computer database is capable of meeting this criterion in that it contains computer-readable strings of characters recorded on networks of computers established for the purpose of recording those strings which are sufficiently distinct to be capable of then being allocated uniquely to an account holder on that particular network. The degree of control necessary for ownership (namely the power to exclude others) is achieved by the computer software allocating to each public key a second set of data made available only to the holder of the account. The collection of data has some degree of permanence or stability and is potentially desirable to third parties such that they would want themselves to obtain ownership of it and is thus capable of bilateral transactions.

[108] The possibility that some forms of data may constitute property could have profound implications for the protection and commercialisation of commercial and industrial data. Recognition of a database as *a sui generis* intangible property therefore is intended to protect the investment behind compiling a database, even if it lacks originality. Therefore, if data is kept confidential it is effectively "owned" by the person who first compiles, makes or creates the work into a material form by applying some form of intellectual effort and skill and thereby controls; - (1) access to it, and (2) the grant of permissions to use it. Databases which, by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation, can be "owned." *Sui generis* ownership of a database does not necessitate originality; industrious collection granting commercial value is enough.

[109] The "industrious collection" doctrine, or "sweat of the brow" theory, supports *sui generis* database ownership rights by arguing that significant investment in compiling a database, regardless of originality, warrants protection. This model extends protection to the database's content, even if the facts themselves are not novel, incentivising the creation of databases by rewarding the effort and investment involved in their compilation. A database may therefore be recognised as property if, by reason of the selection or arrangement of the contents, it constitutes the author's own collection, conferring upon the owner the right to prevent unauthorised extraction and/or or re-utilisation of the whole or of a substantial part of their data collections. The recognition of *sui generis* proprietary rights in databases is essential for enabling businesses to recoup costs and fund continual updating, which benefits users. It is a distinct intellectual property right, separate from copyright, that protects the investment in creating a database, even if the database's structure or arrangement is not original. Natural and legal persons can benefit from *sui generis* database protection.

[110] Businesses can protect data and create certainty of use rights through the data rights clause in their contracts. In such clauses, the parties agree on which party

"owns" (i.e. controls) the data that is generated under the agreement. It is equally important for the contract to make it clear what should happen to the data when the contract comes to an end. The data owner may not always be the party maintaining the database. As a corollary, the party that does maintain the relevant database should be obliged to prevent unauthorised access, and maintain the security of the data and any databases, documentation or other records containing that data. The intention is to secure exclusivity over information that would provide a competitive advantage. Where the creator of the work is an employee, the employer owns the copyright in the work. The author can also assign their rights to the work to another person, who then becomes the owner.

[111] There are many legitimate firms which take data from existing databases and add value to them by inserting new information or arranging the information in a different way. Non-original databases can acquire property status if the investment in obtaining, verifying and presenting the data was substantial. Ownership does not flow from compiling the underlying data, but from taking the initiative and risk for investment, considered with respect to capital, human labour, or technological resources applied in its production. The owner or maker of the database is the person who takes the initiative in obtaining, verifying or presenting the contents of a database and assumes the risk of investing in the same. Data which is scattered among a variety of sources can be matched, collated, and reproduced in new formats that can give value to otherwise random facts. New patterns, trends, and associations can be identified through the merging of vast amounts of disparate data. Through creative selection and depiction of their data, database producers can generate value-added products that merit legal protection.

[112] The maker of a database who shows that there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents, has the right to prevent extraction and/or re-utilisation of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database, irrespective of the eligibility of that database or its

content for protection by copyright or by other rights (see *77m Limited v. Ordnance Survey Limited [2019] EWHC 3007 (Ch), para 259 – 271*). "Extraction" here means the permanent or temporary transfer of contents to another medium by any means or form; and "re-utilisation" means making the contents available to the public by any means. The extent of one's coordination, selection, and arrangement of the data compilations determines the scope of one's ownership rights. Investment is construed widely and covers financial, human and technical resources but substantial investment in terms of quantity or quality or a combination of both, must be demonstrated.

[113] Whereas compiling a database of phone records is inadequate for copyright as the arrangement lacks sufficient creativity, where it involves assuming the risk of substantial investment in its qualitative and/or quantitative collection, verification, arrangement or presentation ("sweat-of-the-brow" effort made in compiling the data), that may create *sui generis* property rights therein. For purposes of ownership, originality is not synonymous with novelty. Only minimal originality in the selection/coordination is required. It qualifies as property if it possesses some minimal degree of creativity. The "maker" of a database is the individual or company who takes the initiative in creating the database and who assumes the financial risk.

[114] A subsequent compiler remains free to use the facts contained in another's data collection to aid in preparing a competing work, so long as the competing work does not feature the same selection and arrangement. For a compilation to qualify as property based on the collection and assembly of pre-existing data, the selection, coordination, or arrangement of that data should have resulted in work that is original, by virtue of the selection, coordination, or arrangement of the data contained in the work. The resultant work should feature an original selection or arrangement of that data. Selection implies the exercise of judgment in choosing which facts from a given body of data to include in a compilation.

[115] What matters is skill and creativity in selecting and assembling an original arrangement, even if no new material is added. Arrangement refers to the ordering or grouping of data into lists or categories that go beyond the mere mechanical grouping of data as such, for example, the alphabetical, chronological, or sequential listings of data. The maker must have made a substantial investment in the obtaining, verification or presentation of the data. In *77m Limited v. Ordnance Survey Limited* (*op cit*) for example, given the high number of addresses, the investment in verifying them was exactly what a database right was created to protect. This level of investment meant there was a protectable database right.

[116] Any substantial change, evaluated qualitatively or quantitatively, to the contents of a database, including any substantial change resulting from the accumulation of successive additions, deletions or alterations, which would result in the database being considered to be a substantial new investment, evaluated qualitatively or quantitatively, qualifies the database resulting from that investment for its own term of protection. Investment is considered from the perspective of the resources used to seek out existing independent materials and collect them in the database. It does not cover the resources used for the creation of materials which make up the contents of a database (see *The British Horseracing Board Ltd and Others v. William Hill Organization Ltd [2005] EWCA Civ 863, [2005] RPC 35*). It is understood to refer to the resources used, with a view to ensuring the reliability of the information contained in that database, to monitor the accuracy of the materials collected when the database was created and during its operation. The resources used for verification during the stage of creation of materials which are subsequently collected in a database do not fall within that definition.

[117] P.W.1 Mr. Mugisha Robert testified that by the time of the defendant's termination of the contract, the plaintiff had profiled and attained about 1,000,000 of MTN's customers out of the then over ten million customers of MTN. Profiling telecom customers for value-added services involved gathering and analysing data to understand customer behaviour, needs, and potential for specific services. This

data can then be used to segment customers and personalise VAS offers, increasing revenue and customer satisfaction. They had over 200 key words to distinguish particular services within their package. The activities of the plaintiff in this suit can be described as content aggregation. It involved organising, consolidating and personalising VAS offers in one central location, making it easier to manage and share. Aggregators often use automated processes to search for content based on keywords or other characteristics. Content curation is for end-users who rely on handpicked and focused content. It can be described as the action of finding, choosing and presenting relevant content on a specific subject matter. While the defendant owned the search interface, content ownership vested in the plaintiff which had to pay a fee for its customers' access to that content and for the defendant's search interface on its remote servers.

[118] The form of the selection and arrangement of information relating to the VAS customers was original to the plaintiff as the database creator and separable from the dictates of function. There was substantial investment in quantitative and qualitative terms, in the collection, verification, arrangement and presentation of that data, which was independent of the resources used to create those materials. Content curation consisted of finding material relevant to the plaintiff's customers from a variety of sources, and sharing it strategically through communication channels provided by the defendant. Although the search for customer data and the verification of its accuracy at the time the database was created did not require the plaintiff to use particular resources because the data was that created by the defendant and was available to the plaintiff, the fact remains that its systematic or methodical arrangement in the plaintiff's database, the organisation of its individual accessibility and the verification of its accuracy for VAS purposes throughout the contract period, required substantial investment in quantitative and/or qualitative terms on the part of the plaintiff.

[119] P.W.1 Mr. Mugisha Robert testified that the plaintiff invested in the business by developing software, recruiting a team to develop content, buy equipment,

advertising on radio televisions and print, for it to profile MTN customers. This is corroborated by circumstantial evidence comprising the terms of the contract and the conduct of the parties. The plaintiff therefore has proved that independent capital, human labour, and technological resources were invested in the compilation of the plaintiff's VAS customer database.

[120] In alternative, it is still open to this Court to recognise the existence of a possessory right over intangible property, independent of ownership. A possessory right over intangible property refers to the exclusive right to use, control, and exclude others from using something intangible, such as a brand, knowledge, or intellectual property, without necessarily owning it outright. A person infringes the proprietary rights of another when they do something that is the exclusive right of the "possessory right owner," without the permission of that "owner," for example by reproducing the database without consent, or rendering it inaccessible.

[121] Conversion is a commonly used and important property tort. The tort is particularly relevant when the property in question is taken or detained without justification, and the owner would like to recover it. Under the current law, the tort of conversion applies only to tangible moveable property or chattels (see *Your Response Ltd v. Datateam Business Media Ltd [2014] EWCA Civ 281; [2015] QB 41*; *[2014] WLR (D) 131*). The common law had historically drawn a distinction between tangible and intangible property for the purposes of property-based torts. Without possession, the doctrines of conversion and trespass would be inapplicable to intangibles. A person has possession of a physical thing if the person has established effective control over that thing and manifests an intent to maintain such control to the exclusion of others.

[122] It is arbitrary though in modern times to determine whether digital assets are amenable to conversion based on the tangible/intangible distinction. Refusing to extend the tort of conversion to digital assets will lead to unfair treatment between digital assets and other assets. It also provides inadequate protection for digital

assets, which can be interfered with in ways similar to tangibles. The tort of conversion should be extended to digital assets because they are property capable of possession. If the tort of conversion is applied to digital assets, owners of digital assets would have a powerful legal tool to protect their interests. If the law is to adapt to keep up with technological advances in the absence of legislation, it is within the Courts' powers to reconsider the common law rules applicable to property.

[123] Possession is not limited to tangible objects. The possession of intangibles is defined by the ability to control and utilise something that has no physical substance. Possession of an intangible asset means having the ability to use, sell, or license the asset, as well as exclude others from doing so. For example, in *Canivate Growing Systems Ltd. v. Brazier. 2019 BCSC 899*, when a founder of a company registered the company's domain name personally, and subsequently refused to transfer the registration to the company, the Supreme Court of British Columbia found that a modern conception of conversion must include wrongful interference with intangible goods, such as electronic data, websites and email.

[124] In that case the respondent and two others agreed to develop their greenhouse technology for use in the cannabis industry. In 2017, the respondent registered the *canivate.com* domain name in his own name, and later the company was incorporated. The Company established a website at the Domain Name and company email addresses associated with the Domain Name. When the business relationship between the parties became strained in early 2018, the respondent took steps to interfere with the Company's use of the Domain Name, by disabling: (i) administrative access for the Company's employees; (ii) email addresses ending in @canivate.com; and (iii) the entire website. The Company sued the respondent seeking damages against him for his interference with the Domain Name and to have the Domain Name transferred into the Company's name. One of the issues that arose in the proceedings was whether the respondent's

interference with the Domain Name’s settings amounted to the tort of conversion. The Court stated;

> In the electronic age in which we live, I find that it would be incongruous if conversion were limited to physical goods, or tangible chattels. In the case at bar, the defendant exerted exclusive control over *Canivate’s* website as soon as he removed administrative control of canivate.com from the company. The defendant held the only key to the website which was critical to operations of the company, and prevented *Canivate* from using its website and email addresses. I find that a modern conception of conversion must include wrongful interference with intangible goods, such as electronic data, websites and email.

[125] Similarly, in *Ruscoe v. Cryptopia Ltd (in Liquidation) [2020] NZHC 728* the New Zealand High Court held that cryptocurrencies, as digital assets, are a form of property that are capable of being held on trust. Conversion requires proof of plaintiff’s ownership or superior possessory right to identifiable property and defendants’ unauthorised exercise of dominion over the property excluding plaintiff’s right. A person may commit the tort of conversion by accessing, exercising control over, and destroying electronic data belonging to another (see *NW Media Holdings Corp. v. IBT Media Inc., 2023 NY Slip Op. 30875 (U*). In a functional sense, the owner of electronic data can be deprived of its use when the data is deleted, modified, or withheld.

[126] Therefore, the concept of conversion extends to intangible assets like digital property, as long as the owner has a legally recognised right to possess it. The scope of protection afforded by the database right is broad, once such a right is confirmed to exist. The common law tort of conversion now encompasses digital, electronic and virtual information. Wrongful interference with another’s digital property in a manner that is inconsistent with the owner’s rights of possession, will constitute the tort of conversion. Preventing a legitimate owner from accessing their own digital property, is an act of conversion. Denying access to a significant

portion of a protected database infringes the *sui generis* database right only if such reutilisation risks preventing the rights-holder from benefiting from the fruits of their original investment.

[127] In order to succeed in a claim for damages, the plaintiff must have a valid right to possess the property in question, the defendant must have engaged in an act that is inconsistent with the plaintiff's right to possess the property, the defendant must have acted with the intention to deny the owner's rights, or to assert a right inconsistent with them, and the plaintiff must have suffered damages as a result of the conversion. The court may award damages to compensate the owner for the loss of the property or any other harm caused by the conversion.

[128] By an email dated 17th August, 2015 the defendant's Mr. Bob Lutaaya confirmed that the plaintiff's database had been "expired" as a unilateral "business decision" of the defendant. The "expiry" of a digital database refers to a predetermined point in time after which data stored within the database is no longer considered valid or accessible. It means the data is no longer stored within an active database system. It might still be possible to restore it from a backup, such as archival backup, especially if the database system offers long-term retention or point-in-time recovery options. This means that the data within that database is considered lost and cannot be retrieved unless it has been backed up or a recovery process is available within the specific database system. Once expired, a database is no longer available for retrieval and may be permanently deleted. When it is permanently deleted, it is removed from the system and is not accessible for restoration. If no backups exist or the system does not offer restoration, the database is considered lost. There is no evidence adduced by the defendant in the instant case to show that the plaintiff's database is capable of restoration, for which reason it is considered lost.

[129] By Clause 6.2 of the contract, the defendant reserved the right to immediately cancel any services, or content that did not adhere to its Information Services

Provision Policy, or any of its other standards or policies, at its discretion, on written notice to the Plaintiff. Under Clause 5.1.8 of the Contract, it also reserved the right to remove subscribed customers from the database for billing purposes in the event that a subscribed customer was not successfully billed for a period that was to be determined and agreed by both parties. D.W.1 Ms. Fiona Kurikiko Gumisitriza explained that it was because the customers were receiving a lot of spam for which they had not subscribed yet they being charged for the messages. The defendant had implemented DND directive yet it continued to receive complaints. The defendant decided to give the customers a fresh start. There was no other way of dealing with customer complaints because of the varied ability to understand the instructors sent to them.

[130] However, nowhere in the contract did the defendant reserve the right to unilaterally "expire" the plaintiff's VAS customer database as a "business decision." The inability of some customers to understand the instructors sent to them in the implementation of the Uganda Communications Commission DND Directive is not a reasonable justification for retiring it. This could have bene addressed by customer sensitisation. The same explanation was given to the Uganda Communications Commission and was rejected, and justifiably so, in its ruling of 27th March, 2018. In retiring the plaintiff's database, the defendant not only breached the contract but it also committed the tort of conversion. The defendant therefore retired the plaintiffs VAS customer database without any legitimate business, operational or technical justification.

[131] In paragraphs 13 (i) and 17 of his witness statement, P.W.1 Mr. Mugisha Robert testified that under the terms of the contract dated 22nd December, 2014 the plaintiff was obliged to hand over its profiled database of subscribers to the defendant, and in turn, the defendant would maintain, manage and update the plaintiff's subscription database. Consequently, the plaintiff handed over its most valuable assets in the form of the unique Keywords and the profiled database to the defendant. A duty to return property at the end of a contract is a common

obligation, particularly in situations where one party holds or uses property belonging to another party during the contract's term. This duty ensures that assets are returned to their rightful owner, preventing disputes and protecting the value of those assets. It was implicit in Clause 7.4 of the contract that, when it came to an end, the defendant was under an obligation to send to the plaintiff by electronic means, a copy of the VAS customer database in its latest form. It was, therefore, in breach in refusing to do so.

[132] The plaintiff has proved that it had a valid right to repossess its VAS customer database at the end of the contract. By initially denying the plaintiff access and later expiring the database instead, the defendant engaged in an act that is inconsistent with the plaintiff's right to repossess the database. The defendant's act was committed with the intention of denying the plaintiff enjoyment of its ownership rights, or constituted conversion by way of assertion of a right inconsistent with the plaintiff its ownership rights. As a result of being denied access to the database, the plaintiff suffered loss of business income. In paragraph 18 of his witness statement, P.W.3 Mr. Patrick Kizito Mubiru testified that the plaintiff lost revenue resulting from the misappropriation of the plaintiff's keywords and expiry of its database by the defendant.

ii. <u>Failure to bill the subscribers for revenue sharing</u>.
iii. <u>Failure to send regular SMS reminders to subscribed customers to remind them of what services they had subscribed to and the amount they were billed for the services</u>.

[133] In paragraphs 19 to 28 of his witness statement, P.W.1 Mr. Mugisha Robert testified that between 14th and 15th December 2014, the plaintiff observed that the defendant's billing platform was not returning any successful content deliveries/billing and contacted the defendant for billing support by way of an email. The plaintiff sent a second follow-up email about the same problem to the defendant on 18th December, 2014 and the problem was rectified. The service was

restored and due to the improved new billing system, and the eventual successful content delivery, the plaintiff's daily success rate by count kept improving day by day as processed and authenticated by the defendant's daily reports to the plaintiff. However, in August 2015, the plaintiff experienced further billing problems, and all billing requests returned failed, reporting zero successful content delivery by count in the authenticated reports received from the defendant's Billing Platform.

[134] A breach of contract occurs when a party neglects, refuses or fails to perform any part of its bargain or any term of the contract, express or implied, written or oral, without a legitimate legal excuse, resulting in damage or loss to the other party (see *Waga B. Francis v. The Chief Administrative Officer Maracha and another, H.C. Civil Suit No. 0005 of 2016*). The various excuses that a party to a contract can rely on to justifiably avoid performance include; failure of a condition, supervening events, impossibility, impracticability, frustration of purpose, anticipatory repudiation, and later agreements between the parties (including modifications, waivers, rescissions, and accord and satisfactions.

[135] Upon migration to the Subscriptions Billing Platform, the defendant had in its letter of 18th December, 2014 assured the plaintiff that the monthly expiry going forward would be part of the rules and guidelines. The defendant undertook the obligation to regularly remind customers of the services they were subscribed to and how they could opt out. This was subsequently expressly incorporated in Clause 5.1.7 of the agreement dated 22nd December, 2014. The defendant instead retired the plaintiff's entire VAS customer database, thereby abdicating its contractual obligation to bill the subscribers for revenue sharing and send regular SMS reminders to subscribed customers to remind them of what services they had subscribed to and the amount they were billed for the services. The defendant has not advanced any lawful justification for this failure.

iv. <u>Unfair or anti-competition practices</u>.

[136] One of the objectives of *The Uganda Communications Act, 2013* is introduce, encourage and enable competition in the communications sector through regulation and licensing of competitive operators to achieve rapid network expansion, standardisation as well as operation of competitively priced and quality services, with a view to protecting consumers from excessive tariffs and the prevention of unfair competitive practices. Chapter IX of the Act is directed at promoting fair competition, prohibiting and punishing unfair completion practices. The basic economic ideology behind these provisions is the maximisation of the wealth of society by condemning practices which permit inefficient output reductions and price increases, while at the same time approving and promoting practices that are competitive.

[137] Section 53 (1) of the Act prohibits operators from engaging in any activities, which have, or are intended or are likely to have, the effect of unfairly preventing, restricting or distorting competition in relation to any business activity relating to communications services, such as effecting anticompetitive changes in the market structure. Any abuse by an operator, independently or with others, of a dominant position which unfairly excludes or limits competition between the operator and any other party is deemed unfair competition. A dominant position denotes a position of market power enjoyed by an operator, which enables the operator to prevent effective competition being maintained in the relevant market by giving it the power to behave, to an appreciable extent, independently of its competitors and customers.

[138] The elements of an unfair competition by common law conversion are: (a) the creation of plaintiff's product (i.e., the database) through extensive time, labour, skill, and money; (b) the defendant's use of that product in competition with the plaintiff, thereby gaining a special advantage in that competition (i.e., a "free ride") because defendant is burdened with little or none of the expense incurred by the

plaintiff; and (c) commercial damage to the plaintiff. A claim for unfair competition by misappropriation or conversion and use does not require proof of secrecy. In order to succeed, the plaintiff must prove anti-competition injury, that is to say, injury of the type the Act was intended to prevent that flows from that which makes defendant's acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.

[139] P.W.1 Mr. Mugisha Robert and P.W.3 Mr. Patrick Kizito Mubiru, testified that the defendant also provides Value-Added Services to its customers. D.W.1 Ms. Fiona Kurikiko Gumisitriza confirmed this. P.W.1 contended though that by reason of this fact, the defendant viewed the plaintiff as a competitor to justify its unlawful actions. The defendant's actions of expiring/deleting the plaintiff's keywords and databases and its failure to bill the plaintiff's customers were not authorised by UCC. Instead, the defendant's unlawful actions were intended to unfairly prevent, restrict and distort competition in relation to the plaintiff's business. The defendant misused its dominant position as the custodian of the plaintiff's keywords and databases to unfairly drive the plaintiff out of business. In paragraph 35 of his witness statement, P.W.1 Mr. Mugisha Robert testified that the defendant selectively implemented the UCC directive to its advantage to kill off competing third parties so as to boost its internal MTN play revenue.

[140] Exclusionary conduct involves anticompetitive practices that a dominant firm uses to maintain or strengthen its market power, such as foreclosing rivals or deterring potential entrants, other than by having lower costs and therefore lower prices. It encompasses conduct that is reasonably capable of creating, enlarging or prolonging monopoly power by impairing the opportunities of rivals that either does not benefit consumers at all, or is unnecessary for the particular consumer benefits claimed for them, or that produces harms disproportionate to any resulting benefits. An exclusionary practice is designed by the perpetrator to exclude rivals so that it can attain or maintain monopoly power. Through exclusionary conduct

that raises their costs or cuts off their access to customers or suppliers, competitors may be disadvantaged, harmed or eliminated.

[141] According to Rules 5 (2) and 6 (1) (b) of *The Communications (Fair Competition) Regulations, 2005* an operator licensed under the Act is prohibited from engaging in any activity, whether by act or omission, which has or is intended to or is likely to have the effect of unfairly preventing, restricting or distorting competition where the act or omission is done in the course of or as a result of or in connection with any business activity relating to communication services. These restraints may include driving another firm out of business, preventing it from expanding output, or deterring it from entering the market in the first place. When a monopolist's actions are designed to prevent one or more new or potential competitors from gaining a foothold in the market by exclusionary, i.e. predatory, conduct, its success in that goal is not only injurious to the potential competitor but also to competition in general. The prevention of even one significant competitor from the market may lead to higher prices and reduced output. Conduct which has the potential to drive a competitor from the market.

[142] Businesses may be dominant, indeed, they may use their dominance but they may never abuse that dominance. Rule 5 (1) (b) of *The Communications (Fair Competition) Regulations, 2005* prohibits the abuse of a dominant position. In some limited cases, dominant enterprises may even be required to perform burdensome obligations, such as granting competitors access to their infrastructure or technology. Abuse of a dominant position in unfair competition occurs when a company with significant market power uses that power to restrict competition or harm competitors in ways that are unfair or illegal. This can include practices like predatory pricing, exclusive dealing, refusal to deal, and excessive pricing. An enterprise is considered dominant where it supplies or acquires at least 25% of services in the market, or where three or fewer enterprises supply or acquire at least 50% of the services in the market. One of the manifestations of dominance is where a business can use its market power to behave to an

appreciable extent independently of its competitors, customers and ultimately consumers, thereby affording it to engage in anti-competitive conduct and exclude or deter competitors from the market.

[143] A dominant firm's refusal to deal with a competitor can constitute an abuse of its dominant position if it effectively eliminates competition or restricts market access. By denying a competitor access to a product or service that is necessary for the competitor to operate, a dominant firm abuses its dominant position where the refusal is not justified by legitimate commercial or technical reasons. The product or service denied must be essential for the competitor to operate. Refusal to deal may constitute an abuse of a dominant position if the competitor does not have a reasonable alternative source of supply or service. In the instant case, the plaintiff abused its dominant position when it denied the plaintiff access to its VAS customer database in circumstances where the denial is not justified by legitimate commercial or technical reasons, yet there was no reasonable actual or potential substitute or alternative source of that service. The defendant genuinely has a tight grip on the market by virtue of the infrastructure it has created that its competitors require access to and it abused its market power when it closed the plaintiff out of business without justifiable cause.

[144] Obtaining a monopoly by superior products or services, innovation, or business acumen is legal; however, the same result achieved by exclusionary or predatory acts may raise anticompetitive concerns. Conduct is considered anticompetitive only if it has a significant negative impact on competition. The efficient competitor test is used to assess whether a dominant firm's conduct has foreclosed rivals who would have been able to compete on equal terms. It presumes that conduct by a dominant firm is anticompetitive only if it leads to the exclusion of a hypothetical, equally efficient competitor. The question is whether the defendant engaged in undertakings which make it more difficult for competitors, which are as efficient, to enter or remain on the market, by using means other than those which come within the scope of competition on the merits.

[145] Abuse of a dominant position could be established, *inter alia*, where the conduct complained of produced exclusionary effects in respect of competitors that were as efficient as the perpetrator of that conduct in terms of cost structure, capacity to innovate, quality, or where that conduct was based on the use of means other than those which come within the scope of “normal” competition, that is to say, competition on the merits (see *Unilever Italia Mkt. Operations Srl v. Autorita` Garante della Concorrenza e del Mercato Case C-680/20, EU:C:2023:33*).

[146] Engaging in unfair methods of competition that improperly deter or are likely to deter new entrants in the communications market or restrict or are likely to restrict existing competition in the communications market, for reasons unrelated to the availability, price or quality of the service that a prospective or current operator offers or seeks to offer, through provision of false or misleading information to competitors, or interference with end-user or supplier relationship, is an act of unfair competition within the meaning of Rule 6 (1) (*i*), (i) and (iv) of *The Communications (Fair Competition) Regulations, 2005*.

[147] The defendant’s general customer database happened to constitute the material out of which both parties were seeking to make profits at the same time and in the same VAS field. Out of that source, the plaintiff had specifically obtained and profiled its category VAS Customer database. In its ruling of 27th March, 2018 the Uganda Communications Commission found, and justifiably so, that “the blatant expiry of the said databases by MTN Uganda Limited was unjustified, unfair and a clear violation of fair competition, all of which amount to violations of rules 5 (1), (2) & (3) and 6 of *The Communications (Fair Competition) Regulations 2005*.” Therefore, when it undertook the measure complained of with the purpose and effect of causing the plaintiff, as a rival, to exit from the market, the defendant violated norms that *The Uganda Communications Act, 2013* seeks to protect. The defendant foreclosed competition by granting itself the power to either allow or disallow a new entrant in the market. Its conduct amounted to denying the plaintiff

market access as its competitor. The defendant's conduct is not only harmful to the spirit of competition, but it also caused the plaintiff considerable business loss.

v. Claims for outstanding payments and liquidated sums;

[148] A liquidated claim is a demand for a specific, predetermined amount of money that is fixed or may be calculated according to a known formula, often based on specific contractual provisions or ascertained by law. The plaintiff seeks; a) an order of recovery of shs. 1,256,624,946/= being interest on the outstanding payment of the invoices raised between January, 2015 and August, 2015; b) an order of recovery of shs. 8,375,715,765/= being loss of income for the 29 months of the contract; and c) interest at the rate of 25% per annum on special damages from the date of filing the suit until payment in full.

a. Accumulated in interest on delayed payments.

[149] According to item (j) of Appendix "C" entitled "Fees, Payment and Revenue Share for Content Provisioning and Service Provisioning," it was agreed that "MTN shall effect payment thirty (30) days after receipt of an accurate invoice from the Service Provider." When a contract calls for performance on a particular day, the contract is breached if the party fails to perform on that day. When the plaintiff presented its bill of shs. 979,008,565/= the defendant only paid shs. 450,000,000/= leaving a balance of shs. 529,008,565/= outstanding. The plaintiff seeks recovery of shs. 1,256,624,946/= from the defendant, which is interest at the rate of 25% per annum on delayed payment of the invoices raised. In paragraphs 16 and 22 of his witness statement, P.W.3 Mr. Patrick Kizito Mubiru testified that the defendant only made a "take it or leave it" offer of 4% interest on unpaid invoices issued by the plaintiff between January, 2015 and August, 2015 totalling shs. 529,008,565/= instead, which the plaintiff turned down on account of being unfair and not considerate of the UCC Ruling.

[150] The plaintiff further claims accrued interest from 9th February, 2018 when the contract was terminated, up to 14th June, 2022 when the sum of shs. 450,000,000/= was paid (leaving a balance of shs. 529,008,565/= outstanding), i.e. a period of four (4) years and two (2) months. The claim for accrued interest in that respect is a sum of shs. 937,015,604/= at the rate of 25% per annum. The interest accrued on the outstanding balance of shs. 529,008,565/= at the rate of 25% per annum for the period of six (6) years and seven (7) months from August, 2015 when payment was due to 14th June, 2022 the date of the report by P.W.2 in the sum of shs. 319,609,341/= making a combined total of shs. 1,256,624,946/=

[151] In paragraphs 16, 18 and 20 (iv) of her witness statement, D.W.2 Ms. Sarah Bateta Okwi testified that in respect of the claim made for interest at 25% per annum on the amount of shs. 529,008,565/=, the UCC has never made any such decision capable of enforcement by the plaintiff. There is no decision made by UCC for recovery of interest and or loss of business as claimed in this case. The plaintiffs case seeks to enforce claims which have never been made by UCC. The defendant complied with the directive of UCC in its ruling requiring the defendant to pay shs. 529,008,565/= to the plaintiff which amount has since been paid by the defendant and received by the plaintiff. Computation of interest on the outstanding value of shs. 529,008,526/= has no basis as the plaintiff agreed in a meeting held with the defendant that the shs. 450,000,000/= would be the full and final settlement. Also capitalising the interest for the period between August, 2015 and February, 2018 has no basis.

[152] It is trite that a shilling today does not equal to a shilling, say, five years ago, due to the effects of inflation. It is therefore necessary to award interest on overdue payments to reflect the time value of money principle. Because money can grow when invested, any delay is a lost opportunity for growth. If the contract which is the subject of the suit contains an agreed-upon interest rate, that same rate is used to determine pre-judgment interest. Otherwise, by virtue of section 26 (2) of *The Civil Procedure Act*, the award of interest is at the discretion of the Court.

[153] A plaintiff is entitled to such rate of interest as would not neglect the prevailing economic value of money, but at the same time one which would insulate him or her against any further economic vagaries and the inflation and depreciation of the currency in the event that the money awarded is not promptly paid when it falls due (see *Mohanlal Kakubhai Radia v. Warid Telecom Ltd, H. C. Civil Suit No. 234 of 2011* and *Kinyera v. The Management Committee of Laroo Boarding Primary School, H.C. Civil Suit No. 099 of 2013*). Consequently, this having been a commercial transaction, interest at the rate of 25% per annum from the date the amount fell due until the date of filing the suit is justifiable. The plaintiff has thus proved its entitlement to recovery of the sum of 1,256,624,946/= as accrued interest.

b. Expenditure incurred on business promotion.

[154] Losses that do not directly and naturally result from the breach, but are rather a specific consequence of the breach, particularly when the breaching party knew or had reason to know about the circumstances that could cause such loss, are recoverable as special damages. If the damages that flow from a breach of contract lack foreseeability, they will not be recoverable. The recoverable damages should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach (see *Hadley v. Baxendale (1854), 9 Ex. 341 at 354; 156 Eng. Rep. 145 at 151*). The exact amount of a loss need not be foreseeable; it is the nature of the event that distinguishes between claims for ordinary or consequential damages.

[155] It is on that account that the plaintiff claims shs. 300,000,000/= spent on a business promotion undertaken by the plaintiff, that the defendant had just approved to run for three months in September, 2014, which aired on NTV and thirty (30) radio stations across the country, when the database was shortly thereafter retired in

August, 2015 and subsequently terminated on 9th February, 2018. It is the plaintiff's case that its business was stifled of working capital, and suffered inconvenience and loss.

[156] Being a claim for special damages, the law is that not only must they be specifically pleaded but they must also be strictly proved (see *Borham-Carter v. Hyde Park Hotel [1948] 64 TLR*; *Masaka Municipal Council v. Semogerere [1998-2000] HCB 23* and *Musoke David v. Departed Asians Property Custodian Board [1990-1994] E.A. 219*). Special damages compensate the plaintiff for quantifiable monetary losses such as; past expenses, lost earnings, out-of-pocket costs incurred directly as the result of the breach. It is trite law though that strict proof does not necessarily always require documentary evidence (see *Kyambadde v. Mpigi District Administration, [1983] HCB 44; Haji Asuman Mutekanga v. Equator Growers (U) Ltd, S.C. Civil Appeal No.7 of 1995* and *Gapco (U) Ltd v. A.S. Transporters (U) Ltd C. A. Civil Appeal No. 18 of 2004*).

[157] This claim was pleaded in paragraph 4 (t) of the plaint. In paragraphs 22 and 49 of his witness statement, P.W.1 Mr. Mugisha Robert testified that upon being notified of the retirement of its VAS customer database, the plaintiff reminded the defendant that it had just spent over shs. 300,000,000/= on a promotion that the defendant had just approved to run for three months in September, 2014 which aired on NTV and thirty radio stations across the country, and it was unfair to retire/ delete the plaintiff's profiled database. He testified that the promotion was part of the plaintiff's four-year business plan to grow its business. This aspect of his testimony was not discredited by cross-examination. By way of corroboration, the witness produced a copy of a memorandum of understanding its executed with M/s Africa Broadcasting Uganda Limited (NTV) on 9th September, 2014. The latter undertook to offer air time to broadcast the plaintiff's promotion and promotional spot placements on the station according to the design of the campaign, for a period of 14 weeks.

[158] The value of a business investment is based on the market's perception at a specific point in time of the business' future prospects and in particular the future cash flow that the business is likely to generate. In the circumstances of this case, and in light of the planned investment period, the plaintiff's outlay of the shs. 300,000,000/= turned out to be an unsuitable investment by reason of the defendant's breach. The plaintiff's projected and desired level of return on that outlay and its appetite for downside risk, the type of return and the investment horizon and liquidity needed, were entirely distorted by the defendant's wrongful action. In absence of any evidence to show that the prospective future cash flows of this investment were realised, this outlay is treated as a loss to the plaintiff's business and therefore recoverable from the defendant as consequential loss.

c. <u>Loss of income for the 29 months of the contract</u>.

[159] In paragraphs 15 and 20 (iii) of her witness statement, D.W.2 Ms. Sarah Bateta Okwi testified that the claims made by the plaintiff for alleged loss of business and revenue are speculative. It is impossible for the plaintiff to have earned this revenue over the period while the plaintiff was a content provider. The report is speculative in that it assumes that there would be no intervening factors in the relationship between the parties. The UCC DND directive was itself an intervening factor and there are always other disruptive business factors outside contractual matters that can change the trends of the business and its income which can be evidenced in a normal product life cycle curve. Particular to the content business, the growth in data usage and smart phone penetration today are factors that have definitely disrupted this business and thus cannot maintain business income at the same level.

[160] It is trite that any system of unfair competition enforcement that takes private damages actions seriously must permit plaintiffs to estimate damages by mechanisms that are reasonably within their reach. Assessment of damages is not simply a matter of collecting and tabulating invoices. Rather, it typically requires

complex economic models to demonstrate a "but for" world in which the fair competition violation did not occur. In a case like this raising fairly novel issues, and the fact that uncertainty is often caused by the defendant's control of essential information, any legal rule that requires the plaintiff to establish the projected losses with even modest precision, would effectively be a rule of non-recovery.

[161] The risk of the uncertainty in damages measurement which is created by the defendant's own wrongdoing must ultimately fall on the defendant itself (see *Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 379, 47 S.Ct. 400, 405 (1927*). The defendant's profits are often not a fair test of plaintiff's loss for "the rights of the owner are not limited by the rogue's manipulation of the stolen property" (see *Conviser v. Brownstone & Co. et al., 209 App. Div. 584, 205 N. Y. Supp. 82 (2d Dep't 1924*). Nor should the plaintiff's recovery depend upon facts which are only in the defendant's possession, or upon the defendant's bookkeeping, or upon his own ability to extract information and figures from a hostile competitor. Proof in these cases need not be exact, not only because of difficulties of proof, but also because exact proof is not required. mathematical accuracy is not possible; all that is necessary in order to prove actual damages is to furnish some reasonable basis or data on which to calculate them, and whenever the evidence is sufficiently definite to show the pecuniary loss suffered by the complainant, he is entitled to be reimbursed. Defendants are often wanton wrongdoers and if so, it is considered fair that every doubt and difficulty should be resolved against them.

[162] It is in that context that on the other hand, P.W.3 Mr. Patrick Kizito Mubiru presented exhibit P. Ex.20 and the graph illustrating the growth rate on basis of which projections of the loss incurred were made. It is corroborated by P.W.2 Ms. Ann Namatovu Muguluma, who in her report indicated that over the two-year period from August, 2013 to August, 2015 the plaintiff's revenues were growing steadily except in the period November, 2014 to January, 2015 when the defendant expired the database. However, upon reinstating it, the revenues picked

up again in February 2015 (shs. 87,613,669/=) and steadily rose to shs. 288,965,214/= in May 2015. Thereafter they started dropping in June, 2015 when the defendant started switching off of the plaintiff's key words until it finally expired the VAS customer database in August, 2015. She came to the following conclusion;

> iv. We confirmed that the revenue for May 2015 of shs. 288,965,214 was the most appropriate figure to project revenue for the period September 2015 to February 2018 as the basic assumptions for business growth were last constant in that month. The company remained conservative in its projections in that whereas the historic trends continued to predict growth in the business, the company assumed no growth in its projections.
>
> v. The company used the guiding principle of forecasting revenue conservatively. We therefore concluded that the revenue estimates were methodically and systematically established.
>
> vi. We ascertained that the computation of lost revenue of shs. 8,375,715,765 for the period August, 2015 to 9 February, 2018 was reasonable.
>
> ………………..
>
> Based on the work done and our findings, we confirm that the overall claim by VAS Garage Limited (VAS Garage) from MTN of Uganda shillings Nine billion six hundred thirty-two million three hundred forty thousand seven hundred eleven (shs. 9,632,340,711.29) is accurate, valid and reasonable. The breakdown of this claim is shown on Appendix I.

[163] Experts, play a pivotal role in providing valuable insights and specialised opinions on technical or scientific matters or information which is likely to be outside the experience, knowledge or beyond the grasp of the Court. Experts possess specialised knowledge, skills, and experience in their respective fields. Their reports offer a deep understanding of technical or scientific issues relevant to a case. Expert testimony is part of judicial decision-making concerning the communication of special knowledge to the Court. It is an opinion stated under oath by a qualified individual during a trial. Such testimony can aid in clarifying

complex concepts, presenting scientific evidence, evaluating data, and assisting in understanding the implications of certain actions or events. Expert witnesses can help the Court navigate through intricate subjects, and ultimately contribute to the establishment of accurate facts and informed decisions. By presenting objective analysis and explanations, experts assist the Court in making informed decisions based on evidence.

[164] Although the Court must give proper respect to the opinion of an expert, such opinion is not binding on the Court. Such evidence must be considered along with all other available evidence, and the court would be entitled to reject it if the expert opinion is not soundly based (see *Uganda v. No. 8710 P.C. Clephas Ntura [1977] HCB 103*; *Namatovu Margarey v. Tom Kaaya and another, H.C, Civil Suit No.432 of 2005*; *Dr. Henry Kamanyiro Kakembo v. Roko Construction Ltd, C.A. Civil Appeal No. 05 of 2005* and *Kimani v. Republic [2000] 2 E.A 417*). A Court is not compelled to accept the evidence of an expert but is entitled to accept or reject that evidence like any other, bearing in mind the whole of the evidence in the case. It is axiomatic that the Court is entitled to disagree with an expert witness. The Court may differ from the expert's presented position and understanding if it has a reasonable basis for doing so. The expert provides the Court with facts and an opinion thereon according to his or her special knowledge, education and experience from which the Court can then draw its conclusions. Expert testimony, like all other evidence, must be given only appropriate weight. It must be as influential in the overall decision-making process as it deserves: no more, no less.

[165] Courts evaluate expert opinions by assessing the expertise of the witness, the basis of their opinion, and the potential for bias or influence. They consider factors like the quality of data, the validity of methods, and whether the opinion relies on inferences or results from tests. Ultimately, the court determines the weight to give the expert's opinion based on the totality of the evidence presented. The Court may choose to accept the expert's opinion in whole or in part, or they may decide to disregard it entirely if they are not convinced of its validity or reliability. The Court

must verify and determine whether the expert opinion is objectively convincing. In so doing, the Court has to consider all objections that have been made against the expert opinion by the parties. In paragraph 20 (i) and (ii) of her witness statement, D.W.2 Ms. Sarah Bateta Okwi testified that the report is based on a wrong assumption that the defendant's implementation of the UCC's directive was unlawful. The UCC did not make any finding of unlawfulness. Further that it has no foundation or basis in the CPA and therefore, the report and findings proceed on a wrong premise.

[166] The weight to be given to expert evidence will derive from how that evidence is assessed in the context of all other evidence. The defendant had the opportunity to cross-examine P.W.2 to challenge her qualifications, methods, and conclusions. During that process, the Court was able to evaluate her reliability as a witness and the soundness of her opinion. Most importantly, the Court was able to examine the reasons given for her opinion and the extent to which it was supported by the evidence availed to her. The Court was able to decide what weight to attach to her opinion by examining the internal consistency and logic of her evidence; the care with which she considered the subject and presented her evidence; her precision and accuracy of thought as demonstrated by her answers; how she responded to searching and informed cross-examination and in particular the extent to which she faced up to and accepted the logic of the propositions put to her in cross-examination. She was prepared to concede to points that seemed to be correct. The Court was able to assess the extent to which she was conceived of her opinion and demonstration of a flexibility of mind which may involve changing or modifying opinions previously held, as well as to assess whether or not she was biased or lacked independence.

[167] The use of an ex-post approach to assessing damages is widely accepted in unfair competition matters where heads of loss include things like past economic loss, future economic loss, amongst other heads of claim for damages. The method used in order to evaluate the lost profits claims depends on the specifics of the

case. Generally, forward-looking methods, such as the discounted cash flow method, are widely accepted as appropriate methods to assess the lost profits or income. In a nutshell, the discounted cash flow method measures the present value of the future cash flows available to equity and, therefore, is suitable for the valuation of lost profits of going concerns with a proved record of profitability. Having considered that the objections to this approach are mere argument without any controverting evidence offered by the defendant, the Court has come to the conclusion that not only was P.W.2 adequately qualified, but also that her methods were reliable. The conclusions drawn by P.W.2 are thus objectively convincing. If damages cannot be estimated with exactitude, the best reasonable estimate must be made.

[168] The standard of proof required to establish lost profits, lost revenue or income is not very high. The assessment of damages for lost profits is not a precise science involving an inquiry with a counterfactual premise, namely the consideration of the profits that would have been made if a wrongful act, which did in fact occur, had not occurred. A claimant must generally show that its enterprise either has a track record of profitability rooted in a perennial history of operations, or has binding contractual revenue obligations in place that establish the expectation of profit at a certain level over a given number of years. For a contract that had run for only a couple of years or so, the lost income claimed in the instant case is not speculative since it is based on the optimum revenue for the month of May, 2015 of shs. 288,965,214/=. The court therefor finds that the plaintiff has proved its claim for the recovery of shs. 8,375,715,765/= being lost income for the 29 months of the contract.

Second issue; whether the plaintiff is entitled to the remedies sought.

[169] Recovery of liquidated claims requires strict proof while that of unliquidated claims requires proof of loss, damage or injury, since they must be assessed based on the actual loss suffered.

i. The claim for liquidated sums;

[170] The liquidated claims made and which the plaintiff has already proved to the required standard are; - (a) shs. 1,256,624,946/= being interest on the outstanding payment of the invoices raised between January, 2015 and August, 2015; (b) shs. 300,000,000/= spent on a business promotion undertaken by the plaintiff, that the defendant had just approved to run for three months in September, 2014, which aired on NTV and thirty (30) radio stations across the country (c) and shs. 8,375,715,765/= being loss of income for the 29 months of the contract. The plaintiff is entitled to the recovery of those sums.

ii. The claim for unliquidated sums;

[171] The plaintiff seeks; a) general damages; and, b) interest at the rate of 10% per annum on general damages from the date of filing the suit until payment in full; and c) costs for two Counsel.

a. General damages for breach of contract;

[172] In paragraphs 11. 12 and 21 of his witness statement, P.W.3 Mr. Patrick Kizito Mubiru testified that the plaintiff invested in various marketing and promotions campaigns to grow its business with a four-year return on investment strategy through the recruitment of subscribers and retaining them, The plaintiff deliberately invested in partnerships to influence subscribers to join its services such as; television stations, radio Stations, media personalities, sports experts in the media, pastors of big congregation churches, property companies that provided merchandise for winning by its subscribers, and had prepared for the future through the development and deployment of new services that would directly bill from mobile money and avoid or reduce the defendant's exorbitant revenue share imposed on the Plaintiffs gross revenue generated on monthly basis. The defendant illegally and unfairly denied the plaintiff the opportunity to earn a living

for a period of over two years, and thereafter defendant terminated its contract ending its revenue share relationship immediately after the plaintiff reported the matter to the Uganda Communications Commission.

[173] When contract is breached, the law may either reinstate the plaintiff by placing him in the position he was in before the failure to perform, or put him in the position he would have occupied had the contract been performed. P.W.2 Ms. Ann Namatovu Muguluma, a Certified Public Accountant presented her report in which it is indicated that the plaintiff used the last earnings of shs. 288,817,785 billed in May 2015, before the database was expired, to project the revenue lost for the period August 2015 to the date of contract termination in February, 2018. She confirmed that the number of years over which revenue projections were made of two (2) years and five (5) months) covered the period from August, 2015 when the plaintiff's VAS database was expired by the defendant, to 9th February, 2018 when the contract was terminated by the defendant.

[174] She ascertained that the net revenue from the business from the time the plaintiff's VAS database was expired to the termination of the contract as shs. 8,375,715,765/= was accurate, reasonable and conservative. Had the defendant performed its contractual obligation to bill the subscribers for revenue sharing and send regular SMS reminders to subscribed customers to remind them of what services they had subscribed to and the amount they were billed for the services, or otherwise had contract been performed, the plaintiff would have earned that sum which therefore is recoverable as compensatory damages for breach of contract.

b. <u>General damages for conversion</u>;

[175] Conversion is the unlawful and wrongful exercise of dominion, ownership or control over the property of another, such as taking, using or destroying the property, to the exclusion of the exercise of the same rights by the owner, either permanently

or for an indefinite time. It is an intentional exercise of dominion or control over a chattel, which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel. In determining the seriousness of the interference and the justice of requiring the actor to pay the full value, the following factors are important: (a) the extent and duration of the actor's exercise of dominion or control; (b) the actor's intent to assert a right in fact inconsistent with the other's right of control; (c) the actor's good faith; (d) the extent and duration of the resulting interference with the other's right of control; (e) the harm done to the chattel; and (f) the expense and inconvenience caused to the other. The damages in a conversion claim are calculated based on the market value of the property at the time of conversion, with the law treating conversion as a forced sale of the plaintiff's property.

[176] General damages are compensatory, and are confined to losses, damage and injuries actually sustained as consequences of wrongful acts. In *Canivate Growing Systems Ltd. v. Brazier* (*op cit*), the damages assessment focused on compensation for the tort of conversion, specifically the wrongful interference with the domain name "canivate.com." The court sought to place the plaintiff in the same position they would have been in had the domain name not been registered and used by the defendant, effectively assessing the value of the domain name at the time of the conversion. This was done by applying the principle of a "forced sale," meaning the court treated the defendant's actions as if they had forced the plaintiff to sell the domain name. The damages awarded aimed to compensate the plaintiff for the loss of this intangible asset.

[177] The plaintiff's claim under this head is essentially for compensation for business losses incurred due to the unavailability of, or denial of access to its VAS customer database that occurred when it was expired in August, 2015. With a projected steady growth rate, the plaintiff estimated its business loss at shs. 8,375,715,765/= over the subsequent three-year period, until the eventual termination of the contract on 9th February, 2018. In paragraph 9 of his witness statement, P.W.3 Mr.

Patrick Kizito Mubiru testified that based on the revenue for May, 2015 of shs. 288,965,214/= the plaintiff was able to project revenue for the period from August, 2015 when the plaintiff's database was expired to 9th February 2018 when the contract was terminated, as being shs. 8,375,715,765/= at the bare minimum. In its ruling of 27th March, 2018 the Uganda Communications Commission found that "had it not been for MTN's breach of the CPA 2014 between the parties, and its abuse of dominance coupled with unfair business practices, VAS would neither have lost its business nor suffered the losses in revenue that it has to date."

[178] The value of a database is significantly influenced by the correctness, dependability, and completeness of the data housed inside. The market value of the plaintiff's VAS customer database at the time it was wrongfully retired by the defendant can be gauged from the monthly income of shs. 288,965,214/= that it was capable of generating. Taking that to be its potential revenue generating capacity, considering its attributes and characteristics, alongside its then current and potential use, factoring in the potential reach and size of its target market, the costs associated with collecting, storing, and maintaining the database, the rate at which the data may become obsolete in a field characterised by rapid innovation, but limited by the absence of evidence regarding usage patterns and subscription behaviour, and without the benefit of comparable values of datasets of a similar nature that have previously been sold or licensed, I am inclined to ascribe a conservative three-year lifetime to the database in issue. I would therefore estimate its value to be in the region of five to six times its revenue generating capacity at the time, hence between shs. 1,500,000,000/= to 1,800,000,000/= On that account I would consider an award of a sum of shs. 990,000,000/= forced sale value, as general damages for its conversion by the defendant.

c. <u>General damages for unfair competition</u>;

[179] Public policy requires that unfair competitors must not be allowed to profit by their wrongful methods and that those who have been injured by them should receive

adequate compensation for the loss or injury they have suffered. Damages for unfair competition may thus be determined by either the amount that the violator gained or by the amount that claimant lost. In suits brought by competitors for exclusionary practices, the measure of damages is based on the plaintiff's business losses, not on the defendant's monopoly gains. Damages may also be awarded with the aim, as far as possible, to wipe out all the consequences of the act of unfair competition and re-establish the situation which would, in all probability, have existed if that act had not been committed. Such deterrent effect can be secured only through awards which will deter a defendant and others, from indulging in similar practices in the future. Ultimately, the compensation must be commensurate with the loss and not disproportionate, ensuring fairness and proportionality.

[180] In comparative terms, the penal provisions limit the amount that may be imposed as a fine to a sum not exceeding ten percent of the annual turnover of the operator (see section 55 (7) (b) of *The Uganda Communications Act, 2013*). The rationale for this penalty are manifold; to render fair competition violations non-profitable, to achieve general deterrence since not all violations are detected, the punishment should leave the monopolist worse off and society better off. In order to effectively end the infringement and restore competition in the market, the Communications Commission is required, in certain circumstances, to do more than merely prohibiting the unlawful conduct. While sanctions penalise or punish, remedies cure, correct, or prevent.

[181] A sanction punishes the infringement and effectively brings it to an end, while a remedy intends to terminate the defendant's unlawful conduct, prevent its recurrence, and re-establish the opportunity for competition in the affected market. In the fiscal year 2024, MTN Uganda's total revenue is reported to have reached shs. 3.172 trillion, representing an 18.9% increase compared to the previous year. The implication is that had penal proceedings been taken by the Uganda

Communications Commission against the defendant, the defendant could have faced a fine of anywhere up to shs. 317,200,000,000/=

[182] In paragraph 19 of the plaint, the plaintiff asserted that the defendant deliberately and adamantly declined to comply with the Ruling of the Uganda Communications Commission, whereupon the plaintiff, in a letter dated 4th April 2018, wrote to the Commission inviting it to impose sanctions on the defendant, but this yielded no response. In order to ensure that private actors enforce the unfair competition laws when the government agency does not do so, the damages awarded should be adequate otherwise, in cases such as this where the government agency fails to uncover or chooses not to punish the unlawful conduct, the risk of losing will outweigh the rewards of winning the suit and plaintiffs will not take that risk.

[183] Damages for unfair competition should also be adequate to deter anticompetitive conduct, without resulting in a windfall for an injured plaintiff. Damages may also aim to deprive the defendant of any of the benefits of the illegal conduct, and break up or render impotent the monopoly power found to be in violation of the Act, with the only requirement that they have to be proportionate to the infringement. Wrongdoers that are caught should be made an example to others such that the risk/reward calculation for firms contemplating anticompetitive behaviour dictates against such behaviour. It is noteworthy that for the year ended 31st December, 2023 the defendant declared a dividend of shs. 143,300,000,000/=

[184] Where possible, the Court may aim at placing the competitors in the situation that would have existed today in the absence of the infringement, so that, looking forward, they may develop their businesses unimpeded by the consequences of the infringement. A proper relief therefore must be effective to redress the violations and to restore competition. It may also be achieved by comparing the actual or likely future situation in the relevant market (with the dominant undertaking's conduct in place) with an appropriate counterfactual, such as the simple absence of the conduct in question or with another realistic alternative

scenario, having regard to established business practices. For instance, comparing the prices in a geographical market where the abusive practices took place with the prices prevailing in a different geographical market can help assess consumer harm.

[185] Re-establishing the opportunity for competition in the affected market may for example require restoring a competitor who had been excluded by the dominant undertaking by giving some advantages such as handing over customer lists or technology licence, but this may not be ideal in the fast-moving data-driven markets, that are characterised by rapid innovation. Raw data is an amorphous entity with ever-changing quality and quantity. It remains extremely challenging to quantify the amount and identify the type of data that would be the subject of mandatory sharing. The Court has to determining the appropriate risk-adjusted discount rate in light of the fact that the award converts at stream of future loss of business profits into a single lump sum. On the facts of this case, placing the plaintiff in the situation that would have existed today in the absence of the infringement is not feasible. Instead, Damages for unfair competition should also be adequate to deter anticompetitive conduct.

[186] In some jurisdictions such as the USA, the “three times rule” has been adopted in awarding damages for unfair competition. This rule refers to the potential for a Court to award a party three times the amount of actual damages, also known as treble damages. The goal of treble damages is to deter unfair competition, discourage deceptive practices, and fully compensate the injured party. It's a stronger form of compensation than simply awarding actual damages, which may not fully reflect the harm caused by unfair competition. If that rule were to be adopted and applied to the facts of this cause, the sum of shs. 8,375,715,765/= of actual loss would be trebled result in an award of a sum of shs. 25,127,147,295/= which would be wholly disproportionate.

[187] Instead, taking approximately 1% of the dividend declared in the year 2023 as an appropriate measure, this would result in a sum of shs. 1,433,000,000/= as an amount of general damages capable of deterring future unfair competition by the defendant. I am of the considered view that in this case, the Court should not only make a fair approximation of the plaintiff's loss, but also in the interest of society, should impress the defendant with the fact that it does not pay to use unfair competitive methods. In order to deter future unfair competition by the defendant while at the same time compensating the plaintiff for the harm caused, I would therefore consider an award of a sum of shs. 1,500,000,000/= as general damages for unfair competition.

d. The totality principle in the assessment of general damages under multiple heads.

[188] When multiple grounds for damages are established in the same case, the court must consider if any part of the award overlaps with other remedies or if certain aspects of the injury or loss are being compensated twice. The defendant may incur two forms of liability arising from two different obligations; one is liability to indemnify the plaintiff for the injury inflicted on him, the other is the obligation to restore what he has gained by his own wrong. The two sometimes overlap. If it appears that double counting or overcompensation is occurring, the Court may adjust the award accordingly.

[189] The correct approach to an assessment of general damages for mixed heads of claims arising from the same transaction, in order to carry out any necessary adjustment so as to avoid any possible overcompensation, is that the Court "steps back" and considers whether the total award represents double counting or overcompensation, ensuring that the injured party is fairly compensated without receiving excessive payments. The Court should either apply a modest discount to the combined sum of the awards to reflect the overlap of claims starting with most substantial award in the usual way, or in the alternative, the Court starts with

the smaller and then applies a modest increase to reflect the additional claims under the other heads.

[190] It is always necessary to stand back from the compilation of individual figures, whether assistance has been derived from comparable cases or not, to consider whether the award should be greater than the sum of the parts in order properly to reflect the combined effect of all violations upon the plaintiff or, on the contrary, should be smaller than the sum of the parts in order to remove an element of double counting. In some cases, no doubt a minority, no adjustment will be necessary because the total will properly reflect the overall loss. In others, and probably the majority, an adjustment and occasionally a significant adjustment may be necessary. I find in the instant case the damages recoverable for conversion overlap with those recoverable for unfair competition. In order to carry out any necessary adjustment so as to avoid any possible overcompensation, the Court hereby awards the plaintiff a sum of shs. 1,395,952,628/= as combined general damages for both conversion and unfair competition.

e. <u>Interest on the awards</u>;

[191] By virtue of section 26 (2) of *The Civil Procedure Act,* where and insofar as a decree is for the payment of money, this court is empowered, in the decree, to order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree, with further interest at such rate as the court deems reasonable from the date of the decree to the date of payment or to such earlier date as the court thinks fit. An award of interest at the rate of 19% per annum from the date of this judgment until payment in full is appropriate.

f. <u>A certificate of costs for two counsel</u>;

[192] According to Rule 41 of *The Advocates (Remuneration and Taxation of Costs) Rules*, the costs of more than one advocate may be allowed in causes or matters in which the judge at the trial or on delivery of judgment shall have certified under his or her hand that more than one advocate was reasonable and proper, having regard, in the case of a plaintiff, to the amount recovered or paid in settlement or the relief awarded or the nature, importance or difficulty of the case. Whether the court should allow a certificate for more than two counsel depends on whether the services of more than two counsel are reasonably necessary for the adequate presentation of the case. A certificate can benefit either the plaintiff or the defendant in a case, depending on who is the successful party and is therefore entitled to recover costs from the other party.

[193] Such exceptional circumstances would include cases which involve a high degree of complexity of facts and/or law, or where there are many issues of both fact and law and trial is lengthy. There are times when engagement of two advocates by a party can be a luxury for which an opponent should not be made to pay (see *Katoto Hatwib v. Kato Muhammad and another, C.A. Election Petition Appeal No. 23 of 2021* and *Galisonga Julius v. Katuntu Abdu and another, C.A. Election Petition Appeal No. 53 of 2021*). Legal proceedings must be conducted with reasonable costs that are proportional to the level of complexity of cases. The mere fact that the opposing party was represented by more than one counsel is not a factor to justify the engagement of an equal number of counsel by the winning party.

[194] The available body of authority suggests that the grant of a certificate of two counsel is a matter of the Court's discretion. The Court should bear in mind that in the interest of the underlying objectives of civil procedure in this jurisdiction to increase the cost-effectiveness of proceedings and promote reasonable proportion and procedural economy in their conduct, that the costs of counsel recoverable from an opposing party should be limited. A balance has to be struck between the

advantages of the more efficient presentation of the client's case and the extra expense involved in instructing two counsel rather than one. Such certificates may be granted only in cases involving issues of sufficient importance and complexity. There should be "something exceptional" which justifies a certificate of two counsel. The mere fact that the questions involved are of great general or public importance is not in itself sufficient. In the same vein, complexity on its own may not be enough. A case may be complex, but it may not require the level of work that would require two counsel. A case concerned with very important novel issues with far-reaching consequences though, may be found to be sufficiently exceptional.

[195] The Court will consider factors such as; - (a) the complexity of the cause or matter in which the issue arises and the difficulty or novelty of the questions involved; (b) the skill, specialised knowledge and responsibility required of, and the time and labour expended by, the advocates; (c) the number and importance of the documents (however brief) prepared or perused; (d) the place and circumstances in which the business involved was transacted; (e) the urgency and importance of the cause or matter to the client; and (f) where money or property is involved, its amount or value. neither the fact that both sides happened to be represented by two advocates, nor the fact that one or both sides regard it as a matter of importance, nor the fact that the other side accepts the application for a certificate for two advocates, are conclusive.

[196] The determination of whether the case is fit for a certificate for two advocates must be dependent upon the appreciation by the Court of the nature of the suit (see *Pollok House Ltd v. Nairobi Wholesalers Ltd (No. 2) [1972] 1 EA 172; Mutembuli Yusuf v. Nangomu Moses Musamba and another, C.A. Election Petition Appeal No. 43 of 2016; Paul K. Ssemwogerere and two others v. Attorney General. S.C. Constitutional Appeal No. 1 of 2002; Prof. Ephraim Rwabu Kamuntu v. Attorney General, H.C. Civil Suit No. 38 of 2016*; *Monitor Publications Ltd v. Attorney General, H.C. Civil Suit No. 747 of 2013 Charles Onyango Obbo and another v.*

Attorney General, S.C. Constitutional Appeal No. 2 of 2002 and *In Re WT Potts, Ex parte Epstein v. The Trustee and the Bankrupt, [1935] 1 Ch 334, 341*). The Court should consider the difficulty of the case, the complexity and/or novelty of the issues of fact or law involved, and any demands which the case makes for the exercise of special professional skills.

[197] In granting the certificate for two counsel, the Court must give reasons (see *The Commissioner General Uganda Revenue Authority v. Meera Investments Ltd, S.C. Civil Appeal No. 22 of 2007* and *Hon. Ogwari Polycarp v. Ochwa David, C.A Election Petition Appeal No. 4 of 2022*). Whether the court should allow a certificate for two counsel depends on whether the services of more than one counsel are reasonably necessary for the adequate presentation of the case. A certificate may be granted in respect of two counsel if and only if in the opinion of the court the case involves substantial novel or complex issues of law or fact such that it could not be adequately presented by one counsel.

[198] Having regard to the above factors and all the facts and circumstances of the present case, I find that there are exceptional circumstances which warrant the grant of a Certificate of two Counsel for the following reasons: - although the case is not of such exceptional length, it is of considerable complexity and novelty. The use of more than two advocates was reasonably necessary for the adequate preparation and presentation of the case. Although not involving numerous witnesses nor a large volume of documents, nor a large amount of evidence, it involved the determination of intricate legal issues and crucial legal principles arising from complex technical evidence. The outcome of the case has a significant impact or ramifications beyond the immediate parties. The monetary and non-monetary value of the case is high; a large sum of money is at stake. A Certificate of costs for two counsel is therefore justified and is hereby granted.

g. The costs of the suit;

[199] According to section 27 (2) of *The Civil Procedure Act,* costs of any action, cause or matter follow the event unless Court for good cause orders otherwise. The plaintiff being the successful party in this case is therefore entitled to costs of the suit.

Final Orders;

[200] For the foregoing reasons, Judgment is entered for the plaintiff against the defendant, in the following terms;

a) Shs. 1,256,624,946/= being accrued interest on the outstanding payment on invoices.
b) Shs. 300,000,000/= spent on a business promotion undertaken in September, 2014.
c) Shs. 8,375,715,765/= being loss of income for 29 months of the contract.
d) Shs. 1,395,952,628/= as general damages for conversion and unfair competition.
e) A Certificate of costs for two counsel.
f) Interest on the awards in (a) to (d) above at the rate of 19% per annum from the date of judgment until payment in full.
g) The costs of the suit.

…Stephen Mubiru…

Stephen Mubiru
Judge,
21st April, 2025

Appearances;

For the plaintiff : M/s Kaggwa & Kaggwa Advocates, appearing jointly with
: M/s OSH Advocates.
For the defendant : M/s S & L Advocates.