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A Telecommunications Service Provider's Wrongful Interruption of a Subscriber's Access to Network Usage: Any Right of Action?¹

The relationship between a service provider and its subscriber is contractual.² The contractual nature of the relationship is evidenced by the purchase of a Subscriber Identification Module ("SIM") Pack. It is beyond doubt that once a subscriber purchases a SIM Pack from a service provider, a contractual relationship is thereby created. The contractual relationship is in the nature of an adhesion contract as the subscriber negotiates from a weaker position. The service provider dictates the terms and conditions of the contract and presents them to the subscriber on a "take it or leave it" basis. The subscriber is not given any opportunity to negotiate terms with the service provider as the terms of the contract are always in a standardised form. The standard form of the contract is akin to aviation or insurance contracts when the passenger or insured is presented with the terms without any opportunity to make any input thereto, whether favourable or not.

The contractual relationship is subject to the terms and conditions contained in the SIM Pack issued to the subscriber at the point of purchase. A subscriber may enforce the terms and conditions contained in the SIM Pack imposed by the service provider and issued to the subscriber. The subscriber may, upon the service provider's breach of any of the terms and conditions contained in the SIM Pack, sue the service provider for damages he suffers as a direct consequence of the breach.³

¹ Benedict Oregbemhe, Senior Associate, Dispute Resolution Department, SPA Ajibade & Co, Lagos, Nigeria. March 2018.

² *Njikonye v. MTN Nigeria Telecommunications Limited* [2008] 9 NWLR (Pt. 1092) 339.

³ *Ibid.*

The relationship is maintained and kept alive through the regular purchasing of airtime or call credit, and by calls made to and from the SIM card issued to the subscriber. By crediting the value of the airtime or call credit to the subscriber's SIM card and allowing calls to and from the SIM card on a regular basis, the service provider expressly and unequivocally acknowledges the existence of the contractual relationship between it and the subscriber.⁴ Based on this contractual relationship, the service provider impliedly warrants and assures the subscriber's unhindered access to the network, provided that the subscriber maintains available airtime or call credit on his telephone line. It will, therefore, constitute a breach of the telecommunications contract for a service provider, without lawful grounds, to deny or interfere with a subscriber's access to its network, as long as the subscriber upholds his end of the agreement by maintaining a minimum airtime or call credit that can make or sustain a call.

A subscriber, whose access to a service provider's network or facilities is unreasonably interrupted, interfered with or denied, without any justifiable reasons, may sue for damages for breach of contract for implied unhindered access, insofar as the subscriber can prove that, at the time the interruption, interference or denial of access to the network or facilities occurred, he had enough available airtime or call credit on his telephone line, capable of making or sustaining a call. It is also implied in the contractual relationship with a service provider that, once the subscriber has enough airtime or call credit to make or sustain a call, the service provider will allow unhindered access to its network or facilities.

It is an implied duty imposed on the service provider that the subscriber will have unhindered and uninterrupted access to the network or facilities at all times, insofar as the subscriber fulfils the condition precedent implied in the relationship, i.e., availability of airtime or call credit. It is also implied in the relationship that the service provider may not over-reach the subscriber by refusing access to its network or facilities without any justifiable reasons when the subscriber maintains available or enough airtime or call credit to make or sustain a call. In the same vein, a subscriber will not be allowed access to the service provider's network or facilities, if the subscriber fails to meet the minimum condition precedent of maintaining enough or available airtime or call credit.

A service provider may not be allowed to rely on its own negligence in maintaining its networks or facilities to defeat the action of a subscriber when a wrongful interference, interruption or denial of access to the network or facilities is proven against it by the subscriber with available or enough airtime or call credit that can make or sustain a call. It will be illogical to

4 *Ibid.* See also, O.B. Oregbemhe, *Consumers Protection in Advertised Promotions and Unsolicited Commercial Calls and Text Message in Nigeria*, Business Law Review, Nigerian Journal of Business and Corporate Law, Vol. 2, No. 4, (December 2011), Hybrid Consult, Lagos, p. 11

allow a service provider to plead, as a defence, a defect or snag in its own network or facilities to the suit of a subscriber for the wrongful interruption, interference and denial of access to the same.

A subscriber may sue a service provider for damages for loss of business if the subscriber is wrongfully denied access to the service provider's network or facilities and thereby suffers a loss of such business. This is because most businesses, nowadays, are conducted through the use of a telephone and an interference with, interruption of, and denial of access to, a telephone network or facilities may prove fatal and detrimental to business prospects. A subscriber must prove that he has available or enough airtime or call credit to make or sustain a call, that the call was unjustifiably interfered with or interrupted, and that he was denied access to the service provider's network or facilities. The loss suffered by the subscriber must be a direct consequence of the interference with, interruption of, or denial of access to, the service provider's network or facilities. The subscriber must prove that he would have been awarded the business or received a benefit but for the wrongful interference, interruption or denial of access to the service provider's network or facilities.

The Circumstances under Which a Telecommunications Service Provider May Lawfully Interfere with, Interrupt, and/or Deny a Subscriber Access to its Network or Facilities

A service provider may lawfully interrupt, interfere with and/or deny a subscriber access to its network or facilities notwithstanding that the subscriber has available or enough airtime or call credit to make or sustain a call. It should be noted that implied in the contractual relationship between the service provider and the subscriber is the lawful use of the service and not the fostering or condoning of criminality or criminal activities. A subscriber's access to a service provider's network or facilities may be interfered with, interrupted or denied by the service provider, without any liability, for the following reasons:

- (a) If the purpose for the subscriber's access to the network or facilities is for the commission of a crime or criminality or to further an unlawful or illegal purpose;
- (b) If there is a valid and subsisting court order against the subscriber's access to the network;
- (c) If the interference, interruption or denial of access is to prevent terrorism or related activities;
- (d) When the subscriber does not have enough or available airtime or call credit to make or sustain a call;
- (e) Due to a malicious damage or wilful act of third party;

- (f) Due to an “Act of God” or *force majeure* or an act beyond the control of the service provider;
- (g) Due to governmental interference;
- (h) Defects in the subscriber’s telephone equipment;
- (i) When the subscriber’s telephone line is de-activated due to none/improper/incomplete registration/documentation in accordance with the Nigerian Communications Commission (Registration of Telephone Subscribers) Regulations, 2011.

If it is proven that the service provider’s interference, interruption and/or denial of a subscriber access to its network or facilities is due to the above mentioned reasons, then, there would have been justifiable reasons for such interference, interruption and/or denial of access. The service provider would have acted within the confines of the law to interfere with, interrupt and deny the subscriber access to its network or facilities without incurring any liability.

Granted that a subscriber, whose access to a service provider’s network or facilities is unreasonably interfered with, interrupted and/or denied, may sue for damages for breach of the implied unhindered access, the court may, based on public policy grounds and the peculiarities of telecommunications business, refuse to award damages. There is no gainsaying the fact that call congestion and dropped calls are normal in the telecommunication business, and to award to every subscriber, damages every time a subscriber is denied access to a service provider network or facilities or his calls are interfered with or interrupted, will technically open up a floodgate of litigations against service providers.

To avoid opening up a floodgate of litigation from aggrieved subscribers, the writer is of the opinion that the court may prescribe minimum requirements which litigants must fulfil prior to filing any action for breach of the implied unhindered access to the service provider’s network. Furthermore, the court needs to evaluate the claim at the preliminary stage and determine whether the action may be proper for trial. In this regard, the court is required to encourage settlement of such claims through alternative dispute resolution mechanism or any other form of ADR most appropriate for resolving small telecommunications claims. In addition, the Nigerian Telecommunication Commission is required to prescribe guidelines for determining small claims of unlawful interruption or denial of access to the service provider’s network. The guidelines to be prescribed as suggested by the writer may include the Nigerian Telecommunication Commission setting up a small claims panel to look into breach of the implied unhindered access to a service provider’s network so as to address the grievance of such subscriber.

However, if an action for breach of the implied unhindered access to a service provider's network is commenced in court rather than determination through the Nigerian Telecommunication Commission's dispute resolution mechanism as suggested above, the court may refuse to award damages in favour of a subscriber for unjustifiable interference with, interruption of and denial of access to a service provider network or facilities if the subscriber does not suffer any damage as a direct consequence of such interference, interruption and denial of access. It is the injury or damage suffered by the subscriber that the law compensates – and not the interference, interruption or denial of access.

In conclusion, we are of the opinion that due to the contractual nature of the relationship between a service provider and its subscribers, an unjustifiable interference with, interruption of, and denial of a subscriber's access to a service provider's network or facilities, confers on the subscriber a right to seek redress in a court of competent jurisdiction. A subscriber, whose access to a service provider network or facilities is unjustifiably interfered with, interrupted and denied, is also entitled to damages, provided that the subscriber can prove that he has suffered such loss or damage as a direct consequence of the unjustifiable interference, interruption and denial of access. In the absence of proof of damage to the subscriber, the court should award nominal damages to compensate for the unjustifiable interference, interruption, and denial of access.

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