

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

CASE NO: 36678/2013

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED: NO

In the matter between:

MTN (PTY) LTD

Plaintiff

and

MOTLATSI MOLOPA

Defendant

JUDGMENT

MDALANA-MAYISELA J

1. The plaintiff has instituted an action against the defendant for damages. In Claim A of the amended particulars of claim the plaintiff seeks payment of the sum of R480 873,27 for damages allegedly suffered as a result of the defendant's failure to comply with the policies, procedures and processes, abuse of position of trust, attempted fraud and/or fraud. The plaintiff further seeks interest on the aforementioned amount from 15 July 2013 to date of payment; and costs for the recovery of the said amount, including legal costs.

2. In Claim B of the amended particulars of claim the plaintiff seeks a declaratory order that upon termination of defendant's employment by the plaintiff on 15 July 2013, the defendant is liable to the plaintiff in the sum of R480 873,27; that MTN Fund is authorized to deduct the defendant's pension benefits in the sum of R211 859,93 or any greater amount which accrued to the defendant and pay over the such amount to the plaintiff in terms of section 37D(1) of the Pension Fund Act 24 of 1956 ("the Act"); and further that the defendant is ordered to pay the plaintiff the difference of R480 873,27 from the amount deducted and paid over to the plaintiff by the MTN Fund. At the commencement of the proceedings I was informed by the legal representatives of the parties that the plaintiff is no longer pursuing Claim B.

3. The defendant in his plea is disputing the abovementioned claims and puts the plaintiff to the proof thereof. The defendant in his plea further raised two points *in limine*. Firstly, that there is a pending litigation relating to this action; and secondly, that the allegations made against the defendant are too wide and vague, and that the issue between the parties could have been addressed through poor capacity hearing and not through the civil action. At the commencement of the proceedings I was informed by the legal representatives of the parties that the points *in limine* no longer require determination by this Court.

4. To prove Claim A, the plaintiff called five witnesses. They are Mr Mervyn Govender, Mr Aslam Hassan, Ms Lind Mayedwa, Mr Petrus Daniel Gerhardus Steyn and Ms Hilda Ramlakan. The defendant testified in his defence and also called Ms N Dlamini as his witness.

BACKGROUND

5. The plaintiff is Mobile Telephone Networks (PTY) Ltd, a company duly incorporated and registered in accordance with the Company law of the Republic of South Africa. At all material times relevant to the plaintiff's claim, the defendant was employed by the plaintiff as Supervisor responsible for Handsets repair at the plaintiff's After-Sales Walk-in Centre in Midrand, Johannesburg. He was a designated Supervisor for national Walk-in Centres. Prior to working as Supervisor at

After-Sales Walk-in Centre, the defendant had previously worked in the Channel Support Unit within the Compliance department. By virtue of his employment with the plaintiff, he became a member of the MTN Retirement Fund, established and registered in terms of the Act for the benefit of its employees.

6. On 14 May 2013 an email was received at the plaintiff's Head Office from a customer nandlo@worldline.co.za ("the customer's email") relating to possible fraudulent activity ("the possible fraudulent activity"). The customer's email referred to an email from the defendant sent to the customer reading as follows:

'Morning

Please find my details below as discussed.

Regards

Motlatsi Molopa

Walk-in Centre Supervisor – Email: Molopa.m@mtn.co.za Cell: 0832129862'

7. Attached to the email sent to the customer by the defendant was a MTN SP Technical Services Collection Advice copy ("Collection Advice") for an Iphone 5 serial number [...]. On this Collection Advice, was a hand written note, '*Standard Bank, Motlatsi Molopa, ACC: [...]*'.

8. On 16 May 2013 the plaintiff's Call Centre department Manager, Itumeleng Kutumela forwarded the customer's email to the Senior Manager, High Volume Repair Centre ("HVRC") department, Lesley Ogle requesting him to review the possible fraudulent activity. On 22 May 2013 Mr Ogle forwarded Ms Kutumela's request to the Manager, Compliance and Support HVRC department, Mr Mervyn Govender asking him to investigate the possible fraudulent activity.

9. Mr Govender and his team conducted a preliminary review of the possible fraudulent activity and related transactions. They identified few irregularities on the reviewed transactions and Mr Govender submitted his report to Mr Ogle. On 18 June 2013 Mr Govender forwarded the customer's email to Forensic Senior Manager, Audit and Forensic Services department, Mr Petrus Steyn for a full Internal investigation. Mr Steyn has BTech Forensic Investigations Degree from UNISA, and is a Certified Fraud Examiner by the Association of Certified Fraud Examiners.

10. Mr Steyn and his team conducted a full internal investigation in terms of the MTN-SA Disciplinary Code 2011-POL-000620 dated 16 April 2012. The internal investigation's scope covered the possible fraudulent activity and other related suspicious transactions done on Repair Management System ("RMS") for the period 1 January 2012 to 31 May 2013. The relevant transactions related to payments received by an RMS user: "95-17" to the value of R480 873.27 where no record of actual money received could be found. These transactions reflected payment received on the Job Card System, Challenger ("Challenger") and therefore enabling the dispatch of handsets to customers although no actual money was received.

11. Mr Steyn, on completion of the internal investigation, and in terms of MTN-SA Fraud Risk Management Framework, prepared and submitted an Internal Forensic Investigation Report to Mr Govender. Various irregularities were found during the internal investigation and those will be dealt with in the body of this judgment.

12. During the internal investigation it was found that the RMS user: "95-17" was allocated to the defendant. The defendant had access to RMS to receive payments when he was still employed in Channel Support Unit under the leadership of Mr Govender. His authority to transact on RMS was not revoked when he left Channel Support Unit and joined After-Sales Walk-in Centre under the leadership of the National Manager, Ms Hilda Ramlakan.

13. Mr Steyn in his Forensic Report recommended that the plaintiff consider taking disciplinary action against the defendant. Ms Ramlakan initiated a disciplinary hearing. The defendant was placed on special leave during the period of the internal investigation. On the 8th of July 2013 when served with a charge sheet, he tendered his resignation. He was charged with failure to carry out his duties; abuse of position of authority; fraud and/or attempted fraud. The disciplinary hearing was held on 12 July 2013 in his voluntary absence. On 15 July 2013 he was found guilty on all charges. The Chairperson of the disciplinary hearing recommended immediate dismissal. On the same day he was dismissed from his employment by the plaintiff with immediate effect.

14. On 1 October 2013 the plaintiff instituted the action against the defendant for damages on the grounds of failure to carry out his duties, abuse of position of authority, fraud and/or attempted fraud.

15. The plaintiff bears the onus to prove Claim A, which stands for determination, on a balance of probabilities.

FAILURE TO CARRY OUT DUTIES

16. The plaintiff avers that during the period January 2012 to May 2013, the defendant failed to carry out his duties as a Supervisor in After-sale Walk-in Centre in that he failed to implement relevant financial and administrative policies, processes and procedures ("PPPs"). The plaintiff further avers that the defendant did not ensure that payments were received from the plaintiff's customers in accordance with the PPPs, and that he misled the plaintiff into believing that the payments were received whereas no payments reflected in the plaintiff's bank account. The defendant denies these averments and puts the plaintiff to the proof thereof.

17. I first deal with the documentary evidence submitted by the plaintiff. MTN Values Dictionary outlines the meaning of two Brand Values of Leadership and Integrity, and the behaviour expected from the employees of the plaintiff, including the defendant. It provides that the employees of the plaintiff shall be accountable, honest, do what is right, truthful, trustworthy, reliable, transparent, ethical and apply sound judgment (i.e adhering to company policy or procedure). The defendant at all material times was aware of these values as evidenced in the Main Appraiser on which the defendant captured his KPI's.

18. The HVRC Walk-in Centre Handset Management Process and Procedure ("Process and Procedure") sets out the consistency across all HVRC Walk-in Centres. It sets out the procedure to be followed when a customer arrives at Walk-in Centre with a faulty handset and the end to end process from customer engagement, book-in, receiving, dispatching and storage of repaired handsets to the HVRC and the return leg into the Walk-in Centre, implementation in accordance with Corporate Policies and the relevant Clause requirements of ISO 9001: 2008. It was prepared by

Ms Ramlakan. It was published online on 31 December 2011 and the Hard Copy was printed on 14 February 2012. The Hard Copy's effective date is the printing date. The Soft Copy's effective date is the publication date. A Soft copy of the Process and Procedure was submitted as evidence.

19. In terms of the Process and Procedure, the Walk-in Centre Manager and Supervisor are accountable and responsible for the implementation of this Process and Procedure. Non-compliance with the Process and Procedure will lead to a disciplinary action being taken according to the disciplinary code and grievance procedure of MTN and/or MTN SP.

20. In terms of sub-paragraphs 1.1, 1.7, 1.9 and 1.14 of the Process and Procedure, where the customer does not have the POP or the handset is out of warranty or warranty could not be validated, the Walk-in Centre staff will take in a handset for repair but must inform the customer of the applicable charges before repair. The customer will be contacted via sms for a repair quotation. On customer's acceptance of the quotation, repair will be done. On customer's rejection of the quotation, the handset will be returned to the Walk-in Centre for collection. After the repair process has been explained to the customer, the staff will continue to book-in the handset onto Challenger system. After the job has been done and the handset is ready for collection, the staff will record the customer collection on Challenger to close job card.

21. The HVRC Handset Collection Policy ("Policy") prepared by Mr Walter Maseko of SLA Procedural & Compliance department defines the list of rules governing the process of releasing repaired or unrepaired handsets back to the customers. It is to ensure that all released handsets are given to the correct customer including accessories and that no repaired handsets are released without confirmation of full payment received where required. The policy includes the rules governing the process of releasing handsets from the point where a customer collection transaction is verified to the point where the job card for the collected handset is closed.

22. The policy applies to all the staff within HVRC, including outsource partners, contractors and security personnel. Where an employee is suspected of breaching this policy, an internal investigation will be undertaken, depending on the outcome, civil and/or criminal legal action could be taken against the employee. It is the responsibility of the Regional HVRC Manager, Team Leaders, and or Senior Leaders in the Technical Division to ensure that this Policy is adhered to by all technical staff. The Soft Copy of the Policy has been submitted as evidence. The Soft Copy of this Policy was published on 30 April 2011. The Hard Copy printing date was 8 July 2013. The Hard Copy of this Policy was only valid on printing date.

23. In terms of sub-rule 3.2 of the Policy a handset shall be released to the customer when an original job card or positive identification has been provided; and the amount outstanding for out of warranty repairs has been paid up, and the outstanding balance on the job card is zero. Proof of payment may be required.

24. Sub-rule 3.4 of the Policy provides as follows:

'If a payment has been made on a job card / service request, the customer shall be required to prove the payment by means of a POS receipt from a service centre, with a valid bank stamped deposit slip or EFT:

3.4.1 Out-of-warranty handsets shall be invoiced in RMS when the amount outstanding has been paid;

3.4.2 The invoice number and value must be captured onto the Repair Management System in order to clear the outstanding balance to zero;

3.4.3 A copy of the POS invoice or bank deposit slip must be made and kept with the despatch note for the related job card / service request.

25. At all material times the defendant was aware of the Policy and Process and Procedure, as evidenced by the email sent by Ms Ramlakan to the employees in her department, including the defendant, dated 3 October 2012 attaching the PPPs and advising the employees to familiarize themselves with the PPPs. The defendant also sent these PPPs to the staff on 19 October 2012.

26. According to defendant's Job Profile submitted by the plaintiff, his job description as a Supervisor in Walk-in Centre entailed provision of day-to-day

management, support and guidance to the Walk-in Centre, implementing plans, controls and standards for optimum performance and alignment with Consumer Channel (Branded) and MTN strategies. In relation to internal processes he was required to manage cash for the Walk-in Centre in accordance with PPPs governing cash management; to ensure the daily capturing of relevant financial and administrative documentation as per processes, policies and systems defined by MTN SA; and to implement MTN policies, processes and systems at POS level, ensuring compliance and making recommendations for corrective actions where necessary. The defendant should have been aware of the aforementioned PPPs from the date of their online publication as he was responsible for the implementation of the PPPs and compliance therewith.

27. I now deal with the oral evidence led by the plaintiff and the defendant. It is common cause that, at all material times, the RMS user code: 95-17 was allocated to the defendant; that it was system generated to a particular employee; and that it could not be shared by employees.

28. It is also common cause that the plaintiff's ABSA banking details would be sent via sms to the customers for payment of repair charges. That there were two options for payment by customers. First option was to make EFT or to deposit directly into plaintiff's ABSA bank account. Second option was to make payment at any MTN branded store.

29. It is also common cause that it was not within the scope of responsibility of Walk-in Centre employees to receive payment from customers for repair charges. Their responsibility was to validate payment on Challenger before despatching a handset to the customer. The handset could only be dispatched to the customer when the balance on Challenger was zero.

30. Ms Linda Mayedwa, the plaintiff's Warehouse Receiving Supervisor, testified that she knew the defendant from when the HVRC department was based within the Warehouse and they served together in the Employment Forum. In 2013 she phoned the defendant asking for a quotation for the screen repair of her iPhone. The defendant said that it would depend on the size of the phone and advised her to

book-in the phone for quotation. She then took her phone to the defendant at Walk-in Centre. She received a quotation of plus R2 500.00 via sms. She accepted the quotation.

31. The following day the defendant phoned her advising her that the handset was ready for collection. She told him that she would collect the handset during lunch time and she asked for MTN HVRC's banking details in order to deposit the repair charge. He said that she didn't have to deposit the money into the bank and that he gave her a staff discount and so she could only bring R1 500.00.

32. During lunch time her colleague gave her a lift to Walk-in Centre. When she was by the gate she gave the defendant a call informing him that she was in the premises. He told her to come to the canteen area. She went to him, gave him R1 500.00 and he gave her the iPhone. Thereafter she left. The canteen is an open space and is on the same floor with the reception area.

33. Later on she got a call from Mr Steyn asking her to write an email to him and explain how the defendant assisted her with her iPhone repair. On 5 July 2013 she sent an email to Mr Steyn as requested. Mr Steyn in his testimony confirmed the evidence of Ms Mayedwa in respect of the email she sent to him

34. It is common cause that Ms Mayedwa's job card is 3324202. The defendant processed her job card. The quotation amount was R2 516.26.

35. It is also common cause that the defendant actioned payment for her job card on RMS on 16 January 2013. The RMS report submitted in Court shows that no actual payment was received by the plaintiff for Ms Mayedwa's job card.

36. The only issue in dispute is whether the defendant received R1 500.00 cash from Ms Mayedwa in contravention of the PPPs, and whether he gave her the handset at the canteen.

37. The defendant denied receiving R1 500.00 cash from Ms Mayedwa. He denied that he met Ms Mayedwa at the Canteen. He did not give an explanation as

to why he did a write-off for Ms Mayedwa's job card if Ms Mayedwa accepted the quotation of R2 516.26 for the repair of her phone. He informed Mr Steyn that he did write-offs for difficult customers. The evidence before me shows that Ms Mayedwa was not a difficult customer, she was willing to pay cash for the repairs and she paid.

38. I find that Ms Mayedwa's evidence is more probable and is true. The defendant testified that Ms Mayedwa is a person of integrity. He corroborated Ms Mayedwa's evidence from her first call about a request for quotation until when the defendant called her advising her that the handset was ready for collection. Her evidence, on how she paid for the repair of her handset was corroborated by Mr Steyn.

39. The defendant and his witness Ms Dlamini testified that Ms Mayedwa was trying to implicate the defendant in this matter because she was close to his wife, and at that time his wife was bitter because he was cheating with a colleague. The bitterness these witnesses were testifying about was based on rumours. I rejected that evidence during the trial as hearsay evidence. I find the defendant and Ms Dlamini's testimonies in trying to discredit Ms Mayedwa as a witness, as fabrication. I accept the evidence of Ms Mayedwa that she gave the defendant R1 500.00 cash for payment for the handset repair at the Canteen.

40. The defendant knew about the PPPs on the payment for handset repair. Before joining Walk-in Centre Department, he worked as an administrative officer in Channel Support Department where he was performing financial transactions on RMS payment system. He had knowledge of the ABSA banking details that were being provided to the customers to pay for handset repairs. Ms Mayedwa requested the plaintiff's banking details for payment for the repair of her handset. The defendant failed to provide Ms Mayedwa with ABSA banking details. He also did not advise her to pay at any MTN branded store. He received R1 500.00 cash from Ms Mayedwa for the repair of her handset and he did not deposit it into the plaintiff's ABSA bank account. He received the R1 500.00 cash for his own benefit. He contravened the PPPs.

41. Mr Steyn testified that he was notified by Mr Govender regarding two incidents of suspected fraudulent activities relating to job card number 3500798 and a job card number 3500708.

42. In relation to job card number 3500798, Ms Sithenjiwe Dlomo on 14 May 2013 booked-in her iPhone 5 serial number [...] for the repair. The handset was physically damaged and it was out of warranty. The handset was exchanged same day. The defendant processed a write-off on RMS for this job card. The customer and the defendant signed a collection advice same day. The defendant wrote his standard Bank account details on the collection advice.

43. Ms Dlomo did not make payment into his bank account and she reported this incident at the plaintiff's Head Office and that triggered the internal investigation into this matter. The defendant admitted to Mr Steyn and in Court that those were his banking details.

44. The defendant was well aware of the plaintiff's PPPs on payment for repairs by customers. He knew that according to the PPPs, the customer would be advised to pay at any MTN Branded store or into ABSA bank account. He failed to advise the customer accordingly. He contravened the PPPs on payment for repairs by giving the customer his banking details and by dispatching the handset without proof of payment.

45. In relation to job card 3500708, the HTC ONE X S720E with IME number 353426056082662 was booked-in for repair on 28 March 2013. The quotation was sent to HVRC and accepted by the defendant on 3 April 2013. The exchange of the handset was approved and replaced with the one with IME number 354461057848687. On 9 April 2013 a payment was recorded on Challenger and the handset was dispatched same day. The HVRC management queried the payment transaction on 20 May 2013 and requested a proof of payment from the defendant. The defendant responded by saying that he was busy and would check. The defendant made payment in the form of cash on 24 May 2013. The defendant did not dispute Mr Steyn's testimony in relation to job card 3500708. The defendant

contravened the PPPs by dispatching the handset before the payment was made to the plaintiff.

46. According to Ms Ramlakan, the defendant participated in the drafting of the PPPs, and therefore he had knowledge of them. In terms of the PPPs, as a supervisor he was responsible for compliance and implementation thereof.

47. I find that the defendant contravened the PPPs, more specifically Sub-rule 3.2 of the Policy, by dispatching the handsets in job cards 3500798, 3500708, and 3324202 without first validating payment. He failed to carry out his duties as a supervisor in Walk-in Centre department during the period January 2012 to May 2013. As a result of his failure to carry out his duties, the plaintiff suffered damages.

ABUSE OF POSITION OF TRUST

48. The plaintiff avers that during the period January 2012 to May 2013, the defendant abused his position of trust, in that he continued to transact on plaintiff's RMS after having been appointed into another department which did not have the authority to use RMS.

49. It is common cause between the parties that the defendant did 287 write-offs on the RMS during the period January 2012 to May 2013. It is also common cause that no actual money was received by the plaintiff for the 287 job cards. It is also common cause that the handsets in all the 287 job cards were dispatched to the customers.

50. The issue in dispute is whether the defendant had authority to do write-offs on the RMS when employed as a Supervisor at After-sales Walk-in Centre and whether he complied with the Policy and Procedure applicable to write-offs when doing the write-offs in issue.

51. Mr Govender testified that he was a line manager of the defendant when he was still employed in Channel Support and Compliance department. At all material times, the Channel Support department was responsible for performing financial

transactions on RMS, including write-offs. The defendant was given authority and access code to process payment and other financial transactions on RMS in Channel Support department because that was his primary function. It is common cause that the access code Mr Govender was referring to was RMS user code:95-17.

52. The defendant left Channel Support department when he was appointed a Supervisor in After-sales Walk-in Centre department. The defendant's line manager at Walk-in Centre was Ms Ramlakan. Walk-in Centre was responsible for servicing customers, face to face, to do handset repairs. It was not the functionality of the Walk-in Centre to process payment and perform other financial transactions on RMS. All the employees of Walk-in-Centre including Ms Ramlakan did not have the authority or access codes to perform financial transactions, including write-offs, on RMS.

53. Mr Govender stated that the defendant had a duty to disclose his access code to RMS to Ms Ramlakan when he joined Walk-in Centre to ensure that his access code was removed from RMS. Failure by the defendant to do so amounted to conflict of interest, because the plaintiff, from the governance perspective, wanted to ensure that there was a segregation of duties between the Channel Support and Walk-in Centre departments and minimum risk.

54. Ms Ramlakan testified that the defendant as a Supervisor in Walk-in Centre did not have the authority neither the delegation to utilise RMS. It was not within his scope of responsibility to perform financial transactions on RMS. She stated that she also did not have authority to utilise RMS, neither did she have access to RMS, neither did she have authority to grant access to RMS. This system was utilised by a team of Mr Govender which was a completely different department. Authorisation for RMS would be given by the senior management team and it was not in her delegation to authorise or approve access to any individual. The segregation of duties dictated that only the Channel Support department was responsible to perform write-off or accept payment on RMS.

55. Ms Ramlakan stated that when the defendant joined her department she did not know that he had an access code to transact on RMS, as a result she did not ask for his access code to be removed. She became aware that he had access code to RMS when the defendant in 2012 failed to validate payment on Challenger before releasing a handset to the customer. He had actioned the payment on RMS where it was not within his scope of responsibility.

56. Ms Ramlakan issued a written warning to the defendant in November 2012. This written warning was very clear that he should not utilise RMS because he had no authority and that it was not within his scope of responsibility. She also requested Compliance department to remove his access code. She became aware that the access code was not removed after Mr Steyn's internal investigation was completed. The final written warning did not deter the defendant as he continued transacting on RMS until the internal investigation was conducted in May 2013.

57. The defendant testified that when he joined Walk-in Centre, in terms of the PPPs he was required to disclose to his line manager all the systems he had access to in order that they should be removed. This evidence corroborated Mr Govender's evidence that the defendant had a duty to disclose his RMS access to Ms Ramlakan.

58. He testified that he declared in writing to Ms Ramlakan that he had RMS access code to perform financial transactions. However, he failed to produce proof of his written declaration. Ms Ramlakan disputed this allegation when it was put to her by defendant's counsel.

59. The defendant when asked in his examination-in-chief if he had authority to transact on RMS as a Walk-in Centre Supervisor, he gave three different answers. They were:

'Question: ...were you authorised to work on RMS when you were at Walk-in Centre?

*Answer: M'Lady I was **authorized** ...*

Question: Who authorised you to work on RMS?

*Answer: ... RMS was authorised when I first joined the channel support. Then I moved to the Walk-in Centre as a Supervisor... when I move to Walk-in Centre, when I move to another department, all the systems that you do not need they get taken away. That process is managed by a team. **So the issue of whether I had authority or not, I thought I had authority. If I did not have authority that system would have been taken away.***

.....

Question: Were you expressly given authority, as a Supervisor at Walk-in Centre to have access to RMS?

*Answer:..... **So it would have been done expressly.***

Question:..... was it stated in your job description that as a Walk-in Centre Supervisor you had a responsibility to use RMS and to perform write-offs on the RMS?

*Answer:then when you talk about a job description they are not going to be talking about you have this system or you have that system. They are going to be talking about rights, or invoicing, or you know the action that you have been taken. **So automatically if you have authority to write-off that means you have authority to have RMS. So I will not say someone said you can use RMS but if you are authorised to write-off then that means the system that write-off you able to use it.***

.....

Question: Were you given the authority at that stage?

Answer: I was given M'Lady yes.

Question: who gave you the authority?

*Answer: **It would have been given by my line manager.***

Question:.....was it verbally or in writing?

*Answer: **It was given to me in writing M'Lady.'***

60. Ms Ramlakan disputed the defendant's version that she gave him authority in writing to transact on RMS. She also stated that she did not verbally authorise the defendant to transact on RMS. The defendant failed to produce the said written authority.

61. The job description of the defendant did not entail a responsibility to perform financial transaction, including write-off, on RMS. Therefore, the “*automatic authority*” the defendant relied on had no basis.

62. The defendant testified that he thought he had authority to transact on RMS while employed in Walk-in Centre, because the access to RMS that was given to him while employed in Channel Support department, was not removed when he joined the Walk-in Centre. Ms Ramlakan disputed this implied authority, and testified that his access to RMS was not removed when he joined Walk-in Centre because he failed to disclose it to her. She further testified that when she became aware that he had access to RMS she took an action against him and warned him to stop using RMS. He ignored the written warning and continued to use RMS.

63. On 4 February 2013 Ms Ramlakan sent an email to the defendant requesting him to complete the attached sheet on the analysis of each user’s current system access plus functionality on the systems, including RMS. On 13 February 2013 the defendant sent an email attaching the completed sheet. On that sheet the defendant marked his access as ‘Read’ only access. That declaration was not true and it was misleading because the defendant continued to do write-offs on RMS until May 2013.

64. I accept the evidence of Mr Govender and Ms Ramlakan that at all material times, the employees, including Ms Ramlakan and the defendant, of the Walk-in Centre department did not have authority to perform financial transactions on RMS. That the defendant, when he joined Walk-in Centre, had a duty to disclose his access to RMS so that it could be removed, as it was not within his scope of responsibility to utilise RMS. That when he joined Walk-in-Centre, he failed to disclose his access to RMS. That when he was warned to stop transacting on RMS, he ignored the written warning and continued to transact on RMS without authority.

65. I reject the version of the defendant that he had authority in various forms to transact on RMS while employed in Walk-in Centre. I find his version to be false. The defendant was not a good witness. He was evasive and he contradicted himself in

material respects. His evidence in-chief around the issue of authority was so bad that his counsel stated that he was confused by the testimony of the defendant.

66. Mr Govender and Ms Ramlakan gave their evidence in a clear and satisfactory manner. There were no contradictions in their evidence on the issue in dispute. Some material aspects of their evidence were corroborated and not disputed by the defendant. Part of their evidence was also corroborated by documentary evidence submitted by the plaintiff. I find them to be credible witnesses.

67. I find that the defendant misused his access to RMS that was given to him when he was employed at Channel Support department, and that he had no authority to access RMS and action payments when he worked as a supervisor at Walk-in Centre. I also find that he was a dishonest employee and that he misled Ms Ramlakan when he declared that his access to RMS was '*Read*' only access. I find that defendant abused his position of trust when he was employed as a supervisor in Walk-in Centre department. As a results thereof, the plaintiff suffered damages.

FRAUD AND/OR ATTEMPTED FRAUD

68. The plaintiff avers that during the period January 2012 to May 2013 the defendant performed fraudulent payment transactions on RMS and he misrepresented himself by giving a false presentation of facts to mislead the plaintiff, he drew undue advantage and benefit which he was not entitled to, in that he received, by means of fraud, cash payments from the plaintiff's customers in circumstances in which such payments were not paid over to the plaintiff.

69. The plaintiff further avers that during the period January 2012 to May 2013, the defendant fraudulently performed 287 unauthorised write-offs on RMS, in that he received, by means of fraud, cash payments from the plaintiff's customers, and such payments were not paid to the plaintiff. As a result of the said fraudulent and unauthorised write-offs the plaintiff lost an amount of R480 873.27.

70. The plaintiff in its claim is relying on a fraudulent misrepresentation and the onus of proof rests with it. The plaintiff is required to prove the following:

- (a) A representation of a false fact;
- (b) Knowledge by the representor that the representation is false;
- (c) The representor must have intended that the representee should act upon the representation;
- (d) The representation induced the representee to act upon it;
- (e) And the representee suffered loss as the result of the representation.

71. The wrong of fraudulent misrepresentation or deceit consists in the act of making a wilfully false representation to another with intent that he shall act in reliance on it, and with the result that he does so act and suffers harm in consequence. The misrepresentation is made to the plaintiff or an authorised representative (see *McKerron The law of Delict (7 ed) 210*). In the case of a company the misrepresentation is made to a representative or its board of directors (*S v Heller 1971 2 SA 29 (A) 37.*)

72. At the commencement of the proceedings counsel for the defendant informed me that the defendant admits that he performed the write-offs in issue but denies that he was unauthorised and that they were fraudulent. The amount is disputed on the basis that it is exaggerated.

73. I have already made a finding that the defendant had no authority to perform write-offs on RMS. What needs to be determined at this stage is whether the 287 write-offs performed by the defendant were fraudulent or not.

74. Mr Hassam, the plaintiff's Aftersales billing supervisor, testified that he is responsible for administration of the Challenger system. He also has the knowledge of Repair Management System. He has been working for the plaintiff for 20 years. During the period between January 2012 and May 2013 he was a technical support supervisor. He was responsible for administration of Challenger and maintenance of the users nationally.

75. His testimony was in relation to the reports extracted from RMS and Challenger systems. The reports were for the period between January 2012 and May 2013. He explained that RMS is a payment system and Challenger is a system

where a job card is created and the status of the job card is updated. Challenger and RMS are two stand-alone systems and they are running through an integration module. The Challenger was integrated into RMS for transacting and payment purposes. What happens is that when you transact on RMS and enter a Challenger job card number, RMS pulls the last available status from Challenger telling you what the status of the job was at the time when the transaction was processed. If the status is 'Awaiting collect, notify', the Challenger will display an amount outstanding on the job card. Before the job card can be closed, the outstanding balance needs to be paid or zeroed off.

76. When you action payment on RMS in relation to a job card, the information is written back into Challenger saying the job has been completed. There is a slight time difference from the time a transaction is performed on RMS till it reflects on Challenger. Once the outstanding balance has been paid or zeroed off, the customer is notified to come and collect a handset.

77. The report extracted from RMS shows that all the transactions on that spreadsheet were done by an employee with a code number 95-17. It is common cause that the code belongs to the defendant and he admitted that he performed all these transactions.

78. On the RMS spreadsheet there is a column containing the number [...]. This number is an Epics account number. Epics is a billing system that the plaintiff uses. This account number is specifically allocated to technical division for repair services, meaning any payment into this account number is journal to the technical services account. It allows the plaintiff to identify revenue that is coming into the business from technical services division. The amount that reflects on Challenger system as outstanding would have to be paid into this Epic account.

79. There is also a column called 'OMS payment receipt number'. It is a point of sale system that is being used at MTN branded stores. For repairs done, a customer has two options for payment. The first option is to pay into ABSA bank account which is assigned to technical division. The second option a customer makes payment on the OMS point of sale system at any MTN branded store and will receive the proof of

payment. The user of the RMS captures the payment transaction or receipt number on the OMS payment receipt column.

80. If paid into ABSA bank account a customer shall bring the proof of payment to Walk-in Centre and the transaction will be processed. The proof of payment will be captured on the 'ABSA Deposit' column.

81. The RMS report submitted in Court showed that in all the 287 transactions done on RMS by the employee code number 95-17, the ABSA Deposit column and OMS Payment Receipt columns were left blank. The last column 'Comment' on the spreadsheet says 'No payment'. Mr Hassam explained that 'No Payment' in 'Comment' column meant that the payment was merely processed in RMS to zero off the Challenger job (meaning a write-off was done).

82. There was no physical or actual payment made at MTN branded store or into the plaintiff's ABSA bank account for all these job cards. The handsets on all these write-offs were out of warranty therefore the customers would have been billed for the repairs. The defendant captured the job cards as "paid" in column '[...]' without the actual payment been made into ABSA bank or MTN branded store. The total amount captured on RMS by the defendant between January 2012 and May 2013 was R480873.27.

83. Mr Hassam stated that Walk-in Centre employees were not authorised to have access to RMS. They were not allowed to take payments directly from customers. They were not authorised to perform write-offs. All write-offs had to be authorised by the Channel Support manager, Mr Govender. And only after approval that a Channel Support administrator would perform the write-off.

84. Mr Govender explained that one of the daily responsibilities Channel Support staff had was to receive the bank statement, confirm all the repair payments received the day before, process and invoice the transactions on RMS. When the invoicing was completed, the outstanding amount on Challenger would then be automatically zeroed off. Thereafter, the Walk-in centre employee would release the handset to the customer.

85. When the payment was made at MTN branded store, the customer would be required to bring a physical proof of payment, in the form of a receipt for collection of the handset. The Walk-in Centre employee would be required to validate the proof of payment by doing physical check and login a USD call to Channel Support team attaching the proof of payment and confirming that he/she validated it. On that call he/she would ask Channel Support team to invoice and release the job on RMS so that the handset could be handed over to the customer. The Channel Support team would validate payment, invoice it and release the job.

86. Mr Govender stated that there was no other option for payment, however in exceptional circumstances and only on authorization from the Channel Support manager, the Channel Support team was allowed to effect a discount on the system whether it was ten percent or twenty percent, or would waive (write-off) a repair charge where there was a system error, or the technician had selected a wrong part, or a warranty was not properly assessed at the very onset, or the customer produced proof of purchase post repair.

87. There was a specific procedure that needed to be complied with before waiving a payment. The request for a waiver of payment had to be in writing. It would be sent by the supervisor of the department to the line manager. The line manager would be the first to check and validate the reason for the request to see if it was an exceptional circumstance. If satisfied, the line would forward the request to the Channel Support manager, Mr Govender. As the compliance manager, Mr Govender if satisfied, would approve the payment waiver request and instruct his Channel Support team to proceed with the waiver transaction.

88. Mr Govender stated that the defendant had no authority to process waiver / write-off transactions on RMS. It was not within his scope of work, neither his function required him to perform such transactions. He had no reasons whatsoever to process such transactions. Moreover, he did not comply with the aforementioned procedure and manual controls for a payment waiver.

89. It was put to Mr Govender that the defendant would testify that whatever transaction he processed was authorised by Ms Ramlakan, and that these write-offs to go on for two years without being noticed showed that there was something wrong at MTN. The first transaction could have been picked up within a week.

90. Mr Govender disputed that they were authorised, he stated that just by mere number of transactions over that period would have been questionable, and him as a final signatory on such authorisations he would not have signed off on them.

91. Furthermore, it was put to Mr Govender that the aforementioned payment waiver procedure didn't apply to the defendant. He was on another platform as a supervisor. Matters had to be escalated to him, and as part of his job he had to make quick decisions, and those quick decisions were the write-offs. It was confirmed on behalf of the defendant that all those write-offs were recorded on RMS payment system.

92. Mr Govender disputed that the aforementioned payment waiver procedure was not applicable to the defendant. He stated that the plaintiff's PPPs, including the aforementioned payment waiver procedure applied to everyone in the relevant departments of MTN. The defendant as the supervisor of the department was directly responsible for ensuring that all the employees, including himself were fully compliant with the company policies, processes and procedures. Nobody was above the PPPs.

93. It was further put to the witness, that the defendant did write-offs in the interest of the plaintiff and that was not a secret. The write-offs were recorded on the system for everyone to pick them up. Mr Govender disputed that the write-offs were done in the interest of the plaintiff. He said that it was never the defendant's responsibility to do write-offs and he was not authorised.

94. Ms Ramlakan also explained the payment waiver procedure in the Walk-in Centre department. That her team member would prepare a written request, including the motivation for a write-off and submit it to her. She would acknowledge a request and submit it to Compliance department team, where the Compliance

manager, Mr Govender or a senior manager would sign off on the write-off document. Thereafter, a USD call would be logged, where documents would be uploaded and the Compliance team would process the write-off. Her signature on the write-off document would not be an authority to proceed with the write-off, it would indicate her approval as a requestor but the authority lies with the Compliance senior management team, Mr Govender and Mr Lesley.

95. She stated that all the write-offs in question were never requested in writing or verbally by the defendant. He did not comply with the aforementioned write-off procedure. The defendant was not authorised to process those write-offs on RMS.

96. The defendant in his defence, led the evidence of Ms Nomvuso Dlamini, an ex-MTN employee who was a Challenger Support administrator. Her responsibility was to extract challenger reports. She had no access to RMS because she was an employee of After-sales Walk-in Centre department. She had access to Challenger system. She was reporting to the defendant. This witness was not of any assistance to the defendant's case because she testified about what was recorded on Challenger system. The main issue in dispute in this matter is the authority to access RMS and to perform write-offs on RMS in contravention of the PPPs. It is common cause that the defendant performed write-offs on RMS that reflected on Challenger. It is also common cause that the Walk-in Centre employees on reliance on what was recorded on Challenger, released handsets to the customers.

97. The defendant has not disputed that there were no written requests made by him for these write-offs. He testified that sometimes he made quick decisions to waive a payment and other times he got verbal authorisation from management. The plaintiff denied that he got verbal authorisation from the management and led evidence to that effect. Ms Ramlakan said that a verbal request for a write-off was not allowed.

98. Mr Govender stated that a write-off or payment waiver was only authorised under exceptional circumstances. The defendant failed to present evidence showing that there were exceptional circumstances justifying the waiver of payment in all the 287 write-offs. His version was that he performed these write-offs in the interest of

the plaintiff, to keep the customers happy. However, this reason doesn't fall amongst the exceptional circumstances mentioned by Mr Govender. Ms Ramlakan said that it was not necessary to perform these write offs. The evidence led by the plaintiff that it suffered loss as a result of the defendant's conduct, rebutted the defendant's version that these write-offs were done in the interest of the plaintiff.

99. Furthermore, the write-offs done by the defendant in relation to Ms Dlomo's job card 3500708 where he solicited funds for his own benefit, and Ms Mayedwa's job card 3324202 where he received cash R1 500.00 for himself, rebutted his version that he performed these write-offs in the interest of the plaintiff and to keep the customers happy.

100. The defendant made false representations on the RMS that the payments in relation to all these job cards were waived by management, whereas he knew that the write-offs were not authorised, and that also he was not authorised to access RMS and waive payments.

101. He had intention that his misrepresentations should reflect on Challenger and that the plaintiff's representatives should act upon his misrepresentations and release handsets to the customers. The plaintiff's Walk-in Centre representatives acted upon the defendant's misrepresentation, made on RMS and reflected on Challenger, and released the handsets to the customers in all these job cards.

102. He also drew undue advantage and benefit which he was not entitled to, in that he received cash payments from the plaintiff's customers and such cash payments were not paid over to the plaintiff.

103. The defendant's conduct discussed above has caused the plaintiff to suffer the loss.

104. For the reasons mentioned above, I find that all the plaintiff's witnesses were credible witnesses, and that the defendant and his witness were not credible witnesses. I reject the defence of the plaintiff in relation to Claim A of the particulars of claim as not being reasonably possibly true.

105. I am satisfied that the plaintiff has discharged the onus on a balance of probabilities that the defendant committed 287 counts of fraud in the form of fraudulent misrepresentations by performing write-offs without complying with the PPPs and procedure on payment waiver, and without the necessary authority to access RMS.

DAMAGES

106. The plaintiff has claimed damages in the amount of R480 873.27 for the loss suffered as a result of the defendant's failure to carry out duties, abuse of position of trust, and fraud and/attempted fraud.

107. Where the employee has committed a misconduct or fraud, the employer is entitled to claim damages suffered as a result of the employee's misconduct.

108. I have made the findings above, that the defendant failed to carry out his duties, he abused his position of trust, and he committed 287 counts of fraud.

109. In regard to the element of causation, I have made a finding above, that the plaintiff suffered loss as a result of the defendant's misconduct and fraud.

110. What has to be determined at this stage is whether the defendant had intention to cause harm to the plaintiff. The intention to cause harm in this case could be inferred from the proven facts that the defendant received undue advantage and benefit which he was not entitled to, by receiving cash payments from the plaintiff's customers.

111. Furthermore, the defendant was issued with a written warning in November 2012 and warned that he should stop using RMS to process unauthorised write-offs. He ignored the written warning and continued to commit misconduct and fraud until May 2013. He was not deterred by the written warning. He abused his position of trust, as a result the plaintiff suffered damages.

112. The defendant had a legal duty, as the employee of the plaintiff, to act positively and comply with the PPPs and payment waiver procedure to prevent harm to the plaintiff. His version that he believed that as a supervisor, the PPPs and payment waiver procedure were not applicable to him, created unfavourable impression about him to the Court. The PPPs expressly provided that the supervisor was responsible for ensuring compliance and implementation thereof. His Job Profile expressly provided that a resolution of customer's query or problem must be within the parameters set by Company policy. He deliberately contravened the PPPs and payment waiver procedure in order to draw undue advantage and benefit which he was not entitled to. As a result of that contravention, the plaintiff suffered loss.

113. On the reasons stated above, I find that he had a direct intention to cause harm to the plaintiff.

114. The plaintiff is entitled by means of compensation to be placed in the same position as he or she would have been if the defendant has not committed the misconduct and fraud. At common law the amount of the plaintiff's damages is therefore the difference between its present position and the position in which it would have been had the defendant not committed the misconduct and fraud (see *Victoria Falls & TvL Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 452).

115. The plaintiff led oral and documentary evidence to prove the value of loss. According to the reports extracted from RMS and Challenger systems, and the forensic investigation report of Mr Steyn, the value of loss suffered by the plaintiff is R480 873.27. I am satisfied that the plaintiff led credible evidence to prove the value of loss.

116. The defendant disputed the amount of damages on the basis that it was exaggerated. However, he failed to lead evidence substantiating his allegation of exaggeration. I therefore, reject his defence of exaggeration.

117. In the premises, I find that the plaintiff suffered damages as a result of the defendant's misconduct and fraud discussed above.

118. As to costs, I find no reason why costs should not follow the result.

119. Accordingly, I make the following order:

119.1 The defendant, upon his termination of employment on 15 July 2013, is liable to the plaintiff:

- (i) In the amount of R480 873.27;
- (ii) Interest on the aforementioned amount at the applicable rate of interest from 15 July 2013 to date of final payment;
- (iii) Costs for recovery of the aforementioned amount and such costs to include legal costs (inclusive of Counsel's costs).

MMP Mdalana-Mayisela
Judge of the High Court
Gauteng Division

(Digitally submitted by uploading on Caselines and emailing to the parties. The delivery of this judgment was delayed because the Court and the parties requested a transcribed record of the proceedings immediately after finalization of the trial. The first part of the transcribed record was received in April 2021 and the second part was received in May 2021)

Date of delivery: 30 July 2021

Appearances:

On behalf of the Plaintiff: Adv AM Mthembu

Instructed by: Mashiane Moodley & Monama Inc.

On behalf of the Defendant: Mr N Mkhize

Instructed by: Mkhize Attorneys