



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF
APPEAL

From: The Registrar, Supreme Court of Appeal

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MTN Service Provider (Pty) Ltd v Belet Industries CC t/a Belet Cellular (Case no 1077/2019)
[2020] ZASCA 06

Today the Supreme Court of Appeal (SCA) handed down judgment dismissing the appeal against an order of the Gauteng Division of the High Court, Johannesburg; and ordered the appellant to pay 30 percent of the costs incurred in the preparation, perusal and copying of the record on an attorney and client scale.

The issues before the SCA were first, whether MTN's cancellation of the agreement constituted a repudiation of the agreement, or whether MTN was entitled to terminate it at the time and in the manner in which it did; second, whether Belet was precluded from recovering the damages suffered by it because of clause 40.1 and/or clause 39.2 of the agreement and third, whether Belet was precluded from recovering any damages suffered as a result of the closure of its Jubilee Mall store because this store did not fall within the ambit of the agreement.

On 14 October 2010, the appellant, MTN Service Provider (Pty) Ltd (MTN) and the respondent, Belet Industries CC t/a Belet Cellular (Belet) concluded a dealer agreement (the agreement) in terms of which MTN appointed Belet to market, promote and facilitate distribution by MTN of network services and stock in the territory. The agreement was to continue 'for an indefinite period unless terminated earlier in accordance with the provisions of this agreement'. The agreement replaced the previous agreement concluded by the parties on 4 April 2003 (the 2003 agreement). In return for its services Belet was to receive payment by way of commissions and discounts for pre-paid stock. During the currency of the 2003 agreement, Belet had traded from different stores but at the time of the conclusion of the agreement, it traded from two stores; one at the Central City Shopping Mall in Mabopane (the Mabopane store) and the other at the Temba City Mall in Temba (the Temba City store). During April 2011 Belet closed the Temba City store and on 27 April 2011 it opened a further store within the nearby Jubilee Mall (the Jubilee Mall store). It was common cause that Belet applied in writing during September 2010 for permission to relocate the Temba City store to one at the Jubilee Mall.

The agreement allowed MTN to conduct a general audit of Belet's stores at any time. In terms of the agreement, MTN informed Belet that it intended to conduct an internal audit of the Mabopane store on 2 September 2011. The auditor arrived just before the store opened. In preparation for the audit, the General Manager instructed the shop assistants to place obsolete items, which she considered unnecessary for the audit, into black bags. There was no space for the bags in the store and she asked the assistants to place them in a shopping trolley and keep it outside the store until the audit was

completed. The assistant removed the trolley in front of the auditor. The trolley was left with a parking assistant where the auditor saw it. In consequence MTN claimed that 15 items in the trolley constituted grey goods, ie goods not supplied to Belet by MTN, and 'were held in violation' of the terms of the agreement. It contended further that Belet had hidden these goods from the auditor and in doing so obstructed the auditing process. As a result, MTN summarily cancelled the agreement by letter dated 27 September 2011. It confirmed the cancellation in a letter. Belet accepted the repudiation and cancelled the agreement.

In consequence of the contractual dispute between the parties, MTN terminated the agreement. MTN dispossessed Belet of its business by placing guards outside both stores and refusing Belet access to the stores, taking back all stock, terminating the electronic access to the systems needed to trade and refusing to supply further stock. Thereafter Belet instituted action against MTN in the court a quo in which it claimed payment of R13 120 933, alternatively the amount of no less than R3 629 615.50, as damages. The essential basis of the claim was that MTN's termination of the agreement constituted a breach, alternatively a repudiation of the agreement, resulting in Belet suffering damages. MTN defended the action. It denied the breach, alternatively repudiation, of the agreement or that Belet had suffered damages. It averred that it terminated the agreement because Belet had repudiated the agreement.

The SCA held on the first issue that the court a quo correctly found that there was no evidence that the goods in the trolley had to be recorded and that there was no obligation that they had to be kept in the store. The SCA held further that it was also common cause at the trial that MTN had never asked Belet for an explanation for the goods in the trolley. In these circumstances the court a quo was correct in finding that Belet did not repudiate the agreement, that MTN was not entitled to cancel it and that MTN's cancellation constituted a repudiation of the agreement.

As to the second issue the SCA found that the conclusion by the high court that clause 40.1 of the agreement did not absolve MTN of liability for Belet's claimed loss of income, could not be faulted. The SCA concluded - with regard to the third issue - that Belet's submission that the emails, in context, created an agreement in writing that the Temba City store would be replaced by the Jubilee Mall store in essence constituted a variation in writing, in effect substituting the Temba City store with the Jubilee Mall store.

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