THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 1077/2019

In the matter between:

MTN SERVICE PROVIDER (PTY) LTD **Appellant**

and

BELET INDUSTRIES CC t/a BELET CELLULAR **Respondent**

Neutral citation: *MTN Service Provider (Pty) Ltd v Belet Industries CC t/a Belet Cellular* (Case no 1077/2019) [2020] ZASCA 07 (15 January 2021)

Coram: ZONDI, SCHIPPERS and NICHOLLS JJA and WEINER and GOOSEN AJJA

Heard: 9 November 2020

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. It has been published on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 15 January 2021.

Summary: Interpretation of contract – between cell phone service provider and dealer of cell phone products – repudiation – dealer alleged to possess goods not supplied

by service provider – not proved – indemnity clause – dealer not precluded from recovering damages resulting from repudiation of agreement by service provider – whether dealer precluded by non-variation clause from including new store under the agreement – permissible as agreement contains procedure for an amendment due to changed circumstances – followed by service provider – appeal dismissed.

ORDER

On appeal from: Gauteng Local Division of the High Court, Johannesburg (Kathree-Setiloane J) sitting as court of first instance:

(a) The appeal is dismissed with costs;

(b) The appellant is ordered to pay 30 percent of the costs incurred in the preparation, perusal and copying of the record on an attorney and client scale.

JUDGMENT

Zondi JA (Schippers and Nicholls JJA and Weiner and Goosen AJJA concurring)

[1] 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 'territory' is defined in the agreement to mean the Republic of South Africa. 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.

[2] 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).

[3] In consequence of a contractual dispute between the parties, the full details of which will be dealt with later in the judgment, MTN on 4 November 2011 terminated the agreement with effect from 5 November 2011. 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. On 7 and 8 November 2011 MTN notified the landlords of the respective premises from which the two stores operated, of the termination of Belet's agreement and sought to be substituted as a lessee of the two stores until replacement dealers were appointed. In due course MTN installed different dealers in these stores.

[4] On 2 December 2011, Belet instituted action against MTN in the Gauteng Local Division of the High Court, Johannesburg (high court) 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.

[5] 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. In the alternative, MTN contended that Belet's claims had become prescribed. This latter defence was raised following amendment by Belet of its particulars of claim on 25 October 2016.

[6] The matter came before Kathree-Setiloane J, who after hearing the evidence, dismissed MTN's defences, upheld Belet's claim and granted the following order:

'1. The special plea is dismissed.

2. Judgment is granted in favour of the Plaintiff for:

2.1 Payment of the amount of R5 849 789.00 together with interest on this amount at the rate of 10.25% per annum from 1 March 2016 to date of payment;

2.2 Payment of the amount of R5 581 937.00 together with interest on this amount at the rate of 10.25% per annum from date of judgment to date of payment;

2.3 Costs of suit on the scale as between attorney and client which shall include all costs previously reserved and the qualifying fees of Ms Wood.'

[7] MTN appeals against the judgment and orders with leave of the court a quo. There is no appeal against the dismissal of the special plea of prescription.

Background

[8] The facts which gave rise to the termination of the agreement between MTN and Belet are briefly the following. The agreement allowed MTN to conduct a general audit of Belet's stores at any time. In terms of the agreement, on 26 August 2011 MTN informed Belet that it intended to conduct an internal audit of the Mabopane store on 2 September 2011. Mr Sulaiman, the auditor arrived just before the store opened. In preparation for the audit, Mrs Letebele, 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 Mr Sulaiman. The trolley was left with a parking assistant where Mr Sulaiman saw it.

[9] 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(the termination letter). On 4 November 2011, it confirmed the cancellation in a letter. Belet accepted the repudiation and cancelled the agreement.

[10] On 2 December 2011, Belet instituted action against MTN in the high court, seeking damages based on a breach, alternatively, a repudiation and cancellation of the agreement. It contended that, but for the repudiation, it would have continued trading for at least a further ten years and it claimed the income it would have earned, less expenses. Belet contended that the damages flow generally and naturally from MTN's breach and/ or repudiation of the agreement.

[11] Belet alleged that MTN terminated the agreement prematurely without lawful grounds and contrary to its terms. In the alternative, Belet contended that the conduct of MTN in terminating the agreement prematurely constituted a repudiation which, Belet contended, it accepted and elected to cancel the agreement.

[12] In the further alternative, Belet contended that MTN breached the material terms of the agreement in that, contrary to the provisions of clause 39.1 of the agreement, MTN failed to give proper notice to Belet to remedy the breach, and denied Belet the opportunity to dispute the issue of the 'grey goods.'

[13] MTN admitted that it terminated the agreement for reasons set out in the termination letter, and that Belet disputed its right to terminate the agreement but it denied that the agreement was prematurely cancelled and without lawful grounds.

[14] In amplification of its denial, MTN averred that in terms of the agreement, Belet was obliged to use MTN's Online Management System known as OMS 1 to which Belet had been given access and furnished with its operating procedures and directions. MTN averred further that it had notified Belet to use MTN's Point of Sales operating system (POS) for the purpose of recording, inter alia, all stock supplied and received from MTN.

[15] MTN further alleged that, in and during July 2011 and in particular prior to the audit which occurred on 2 September 2011, it instructed Belet to migrate its OMS1 system to MTN's new Online System known as OMS2. It contended that, as a result of the instruction, Belet – by the time of the audit in September 2011 – was not entitled to use OMS1 and all stock reflected on its OMS1 ought to have been transferred to OMS2. MTN alleged that the purpose of the audit it performed at Belet's Mabopane store on 2 September 2011 was to ensure that Belet was utilising the OMS2. It averred that during the audit it discovered several transgressions. These were that Belet did not record 15 items in a trolley on OMS2; Belet used an unknown POS system and failed to explain its conduct when asked to do so. MTN contended that Belet's conduct indicated an intention on the part of Belet to be dishonest and not to comply with its obligations in terms of the agreement; and/or to mislead MTN.

[16] MTN contended further that as a result of Belet's conduct, the trust between the parties was lost, could not be restored and the breach by Belet was irremediable and amounted to a repudiation of the agreement entitling MTN to cancel the agreement.

[17] MTN denied that Belet suffered damages. It contended that the damages allegedly suffered by Belet are precluded from being claimed in terms of clause 40.1 as read with clause 39.4 of the agreement. In the alternative, MTN alleged that in terms of clause 39.1 of the agreement, MTN has a right to terminate the agreement by giving 90 days written notice of termination of the agreement to Belet. MTN contended that:

'14.3.2. in terms of the special circumstances of the matter, by the Defendant terminating the Dealer Agreement on the basis of a breach of trust, the Defendant expressly alternatively impliedly notified the Plaintiff that it did not wish to have any contractual relationship with the Defendant and as a consequence, the Plaintiff ought to have known that had the Defendant terminated the said Agreement on the basis set out in clause 39.1, the Plaintiff would only have been able to earn an income for 90 days thereafter and nothing more.

14.3.3. In the circumstances, should it be found that the Defendant is liable to the Plaintiff for damages (which is denied) the Defendant pleads that such damages should be limited to a period of 90 days from date of termination based on the loss of trust between the parties in respect of the Dealer Agreement.'

[18] The appeal therefore raises three issues: 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 is 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 is 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.

Did Belet repudiate the dealer agreement?

[19] Belet alleged that the cancellation by MTN of the agreement was unlawful and amounted to a repudiation entitling it to cancel the agreement while MTN asserted that the cancellation was valid. The court a quo found that Belet did not repudiate the

agreement and that MTN was not entitled to cancel it. It held accordingly that MTN's cancellation constituted a repudiation entitling Belet to cancel the agreement.

[20] MTN challenged the conclusions of the court a quo. It contended that the court a quo failed to appreciate that in and during July 2011 and prior to the audit, MTN had instructed Belet to migrate its OMS1 system to MTN's OMS2 system. OMS2 was required to be used by Belet for everything. It alleged that the purpose of the inspection it undertook on 2 September 2011 was to ensure that Belet was utilising OMS2.

[21] MTN argued that given the express terms of the agreement and the surrounding circumstances, it was a tacit term of the agreement that Belet would at all times act in a trustworthy manner, honestly and with integrity in its dealings with MTN. It contended that honesty and trust had always been an integral part of the relationship between the parties.

[22] MTN alleged that it found (a) Belet hiding goods from the auditor in a trolley and obstructing the auditing process which affected the trust element of the parties' relationship and (b) that there were numerous problems with Belet's OMS2, in particular stock relating to the Mabopane store that was supposed to be recorded on OMS2 was not recorded thereon and stock recorded on OMS2 was not found in the store. Moreover, the goods hidden in the trolley were not recorded on Belet's OMS2.

[23] On the basis of these facts MTN inferred an intention on the part of Belet to be dishonest and not to comply with its obligations in terms of the agreement and to mislead it. It contended that in the letters it addressed to Belet after the inspection it relied on these facts as a basis for its decision to cancel the agreement. MTN pointed out that in the termination letter dated 27 September 2011, it inter alia, conveyed the following to Belet:

'7. Your conduct in hiding these goods from the auditor and thereby obstructing the auditing process amounts to a fraudulent misrepresentation and is a breach of the dealer agreement which cannot be remedied.'

[24] In the letter dated 6 October 2011 MTN stated:

'*4. …The trust with which MTN SP views [Belet] has been irreparably broken.*

5. Accordingly, MTN SP has no alternative other than to terminate the Dealer *relationship.*

6. …[Belet] is hereby given a calendar month's notice of termination that is, closure of the stores will take place on 5 November 2011.'

[25] And finally in the letter dated 4 November 2011, MTN informed Belet, *inter alia* that:

'*2. As the trust element of our relationship has been broken down irretrievably our position is not changed and the dealer agreement between MTN SP and Belet Industries CC t/a trading as Belet Cellular.*

3. (sic) has been terminated in terms of our letter dated 27 September 2011.'

[26] Belet's conduct, argued MTN, constituted a repudiation of the agreement entitling it to cancel the agreement which it did.

[27] MTN has not been consistent in the manner in which it pleaded its defence. In its letter of cancellation of 27 September 2011, it sought to justify its cancellation on the basis that some of the goods that were found in a trolley were not supplied by it to Belet. They were grey goods and were held in violation of the agreement. MTN asserted that Belet's conduct in hiding these goods from the auditor amounted to a fraudulent misrepresentation as it obstructed the auditing process and was in breach of the agreement which could not be remedied.

[28] As I have pointed out, in subsequent correspondence MTN accused Belet of failing to 'acknowledge and recognise that such an act is irremediable.' Despite requests by Belet to meet with Mr Forrester, MTN's National Franchise Manager to sort out the issue, this was refused. On 4 November 2011 MTN wrote to Belet's erstwhile attorneys to confirm that the agreement 'has been terminated in terms of our letter dated 27 September 2011'.

[29] In the original plea MTN alleged that 15 items in the trolley were 'grey goods' and that Belet's representative told the auditor that he had been advised 'to hide the

said products until the audit was completed.' It then alleged that this breach was irremediable and amounted to a repudiation of the agreement entitling it to cancel same. The original plea contained no reference to the OMS2 system, being the POS system which MTN required Belet to use as from July 2011. In MTN's amended plea, a different justification for the cancellation was pleaded. MTN abandoned the allegation of possession of 'grey goods' and sought to justify its cancellation on the basis that Belet's conduct constituted a breach of trust and amounted to repudiation of the agreement.

[30] The court *a quo* correctly found that there was no evidence that the goods in the trolley had to be recorded on OMS2, and that there was no obligation that they had to be kept in the store. It was also common cause at the trial that MTN had never asked Belet for an explanation for the goods in the trolley. The allegation of an unknown POS being used was entirely refuted and effectively abandoned at the trial. In this regard, the court a quo held that since MTN did not, during argument persist with its pleaded case that Belet breached the dealer agreement by using an unknown POS, it saw no need to deal with that allegation. These factual findings are not challenged in MTN's notice of application for leave to appeal or in its heads of argument.

[31] In its heads of argument on appeal, MTN advanced yet another version to justify its summary cancellation. It submitted that the 'hiding of the goods by Belet in the trolley' and Belet's failure to comply with the OMS2 system indicated an intention on the part of Belet, first, to be dishonest and not to comply with its obligations in terms of the agreement; and second, to mislead MTN and obstruct the auditing process, was in breach of trust, and constituted a repudiation of the agreement by Belet. It has never been MTN's case that it cancelled the agreement because Belet failed to generally comply with the OMS2 system. Unsurprisingly, this allegation was never raised in the letters of cancellation of 27 September and 4 November 2011.

[32] The court a quo correctly concluded that there was no evidential basis on which to find that by placing the 15 items in black plastic bags, and removing them from the store, Belet was in breach of the agreement. This conclusion was based on the finding that the agreement is silent as to where stock must be kept and that MTN did not lead

evidence indicating that written instructions were given or Standard Operating Procedures published as envisaged in the agreement. Both Mr and Mrs Letebele testified that all of these 15 items had previously been paid for by Belet. They were either obsolete or defective. They stated that there was no reason to hide these goods. The court a quo accepted Mrs Letebele's evidence that the goods in the trolley were all paid for, and that she could therefore keep them wherever she wished. This was confirmed by Mr Sulaiman, who testified that once stock had gone beyond the 60 days for returns and had been paid for, the dealer could do with it what it liked.

[33] MTN contended further that Belet's breach of the agreement was material and could not be remedied by the payment of money. This is so, MTN argued, because it resulted in a breach of the trust relationship between the parties. MTN submitted that it was accordingly not required to give Belet a notice to remedy the breach. The court a quo rejected MTN's contention. It reasoned that clause 37.1 makes it clear that even in the case where the breach appears irremediable by the payment of money, MTN is still required to give Belet notice to remedy its breach before it cancels the agreement. I cannot find fault with the court a quo's finding. If MTN was dissatisfied with the manner in which Belet was implementing the OMS2 system or considered it to be in breach of a contractual term, it should and ought to have notified Belet of this breach. Such a breach would have been remediable and would fall squarely within the provisions of clause 37.

[34] 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.

Whether the liability of MTN is limited / excluded by clause 40.1 read with clause 39

[35] Clause 39 deals with termination of the agreement and its consequences. Sub-clause 39.4 in its relevant terms provides as follows:

'Upon termination of this Agreement due to any reason whatsoever the following shall apply:

39.4.1. the termination shall be without prejudice to any other claims or remedies accrued by either party immediately prior to the date of termination;

. . .

39.4.3. the Dealer shall immediately discontinue any allocation of Stock to Customers or potential Customers;

39.4.4. the Dealer shall immediately cease to use or display any mark or logo, whether registered or unregistered, which is proprietary to the Service Provider or the Operator and shall make or cause to be made such changes to its advertising in all media, vehicles, shop frontage, the interior of its premises, stationery and the like, so as to distinguish its business, to the satisfaction of the Service Provider, from one that is being carried on in association with the Service Provider;

. . .

39.4.8. the Dealer shall, cease forthwith to qualify for any discounts, commissions and any other amounts to which it would otherwise have been entitled.'

Like clause 40.1, clause 39 survives the termination of the agreement.

[36] MTN argued that Belet is not entitled to claim damages arising from inability to earn commissions and income from the sale of network services and stock, because in terms of clauses 39 and 40 of the agreement the parties specifically agreed that, upon termination of the agreement, Belet would not have any stock and would not be entitled to earn any commission or other amount. In support of this contention, MTN relied on the evidence of Mr Letebele and Ms Wood, who testified that their understanding was that once there had been a cancellation of the agreement Belet would not get an allocation of stock from MTN and would therefore not earn any commission or income.

[37] MTN's reliance on clause 39 and in particular sub-clause 39.4.8 is misplaced for two reasons. First, properly read in its context clause 39 has nothing to do with the limitation or exclusion of liability in the event of repudiation of the agreement. Belet is not claiming specific performance. It claims damages. It alleges that, but for MTN's repudiation, the agreement would not have terminated, clause 39.4 would never have come into operation, and it would have operated its two stores for another ten years. It claims to be put into the position that it would have been in, had the contract been

properly performed. Second, questions of interpretation of documents are matters of law and are the exclusive preserve of the court.[1] The court is therefore not bound by the subjective interpretation that either Mr Letebele or Ms Wood placed on clause 39.4. The court a quo, therefore, correctly found that clause 39.4 does not preclude Belet's claim.

[38] MTN's further argument is that clause 40.1 limits the liability of the parties to each other, that this limitation applies equally to either a breach or cancellation of the agreement. This is so, MTN argued, because in terms of clause 40.4 the provisions of clause 40.1 survive any termination of the agreement for any reason. MTN contended that Belet's claim for damages is precluded by clause 40.1 as the second sentence defines what is meant by 'direct damages and in doing so excludes financial loss, loss of business, profit, savings, revenue, or goodwill suffered or sustained by the Dealer howsoever arising.'

[39] MTN's contention is based on the wording of clause 40.1 which has two parts. It provides as follows:

'Liability and indemnity

Except for consequential damages which arise as a result of the Dealer not complying with the provisions of clause 31, the liability of the parties to each other under this Agreement will be limited to direct damages. For the avoidance of doubt, this excludes financial loss, loss of business, profit, savings, revenue, or goodwill suffered or sustained by the Dealer howsoever arising.'

[40] MTN argued that the reference to 'consequential damages' in the first part of the first sentence relates to damages it may suffer as a result of Belet's failure to comply with clause 31 of the agreement. Stated differently, its argument was that claims for 'consequential damages' can only accrue to MTN. It further argued that in the second part of the first sentence, both parties are treated equally and it specifically provides that the liability of the parties to each other under the agreement would be limited to 'direct damages'.

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[1] *International Business Machines South Africa (Pty) Ltd v Commissioner for Customs and Excise* [1985] 2 ALL SA 596 (A) at 609.

[41] Based on this construction, MTN submitted that the liability of Belet to MTN is limited on a dual basis. Firstly, for 'consequential damages' relating to a failure to comply with clause 31. Secondly, its liability for 'direct damages' is further limited by the second sentence of clause 40.1.

[42] MTN contended that the second sentence in clause 40.1 precludes Belet from claiming damages for financial loss, loss of business, profit, savings, revenue, or goodwill suffered or sustained by Belet, howsoever arising. In developing this argument MTN, argued that the second sentence caters for and is no different to the consequences that arise as a result of a cancellation of the agreement in terms of clauses 39.4.3 and 39.4.8. These clauses preclude Belet from claiming financial loss, loss of business, profit, savings and revenue it sustained due to any reason whatsoever.

[43] Belet contended, on the contrary, that the purpose of clause 40.1 is to exclude consequential damages and must for that reason be interpreted to mean that liability is limited to direct damages. The second sentence serves to illustrate what types of claims may constitute consequential damages, and thus are not claimable. Belet, however, argued that since the question of whether damages are direct or consequential is a factual one, one cannot predetermine that a certain type of damages is either one or the other.[2]

[44] Clause 40.1 is not a model of clarity. A similar argument was initially raised by MTN by way of an exception to Belet's particulars of claim before the amendment. The exception was upheld by the high court, but its judgment was subsequently overturned by this Court.[3] It held that the clause was ambiguous and could bear the meaning contended for by Belet.

[45] The issue between the parties turns on the interpretation of clause 40.1 and in particular, whether the types of loss referred to in the second sentence of the limitation clause are examples of 'consequential damages' or the 'direct damages' the recovery

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[2] *Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 at 22.
[3] *Belet Industries CC t/a Belet Cellular v MTN Service Provider (Pty) Ltd* [2014] ZASCA 181; para 10-12.

of which is excluded. The recent cases of this Court have made it clear that in interpreting any document, while the starting point is inevitably the language of the document, 'the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being', the apparent purpose to which the document is directed and the material known to those responsible for its production.[4]

[46] There are two fundamental problems with the construction contended for by MTN. First, in general under the common law, an innocent party to a contract is entitled to be placed in the position it would have occupied had the contract been performed, so far as that can be done by the payment of money, and without undue hardship to the defaulting party. Such damages only are awarded as flow naturally from the breach, or as may reasonably be supposed to have been in the contemplation of the contracting parties as likely to result therefrom. The parties are taken to have intended their legal rights and obligations to be governed by the common law unless they have plainly and unambiguously indicated the contrary. Where one of the parties wishes to be absolved either wholly or partially from an obligation or liability which would or could arise at common law from a contract of the kind which the parties intend to conclude, it is for that party to ensure that the extent to which it is to be absolved is plainly spelled out.[5] There is no evidence that this was intended to be the case in the present matter.

[47] Secondly, on MTN's construction, it would mean that clause 40.1 suffers from internal inconsistency in that, in the first sentence it recognises a claim for direct damages while in the second sentence it excludes the same claim. To avoid an internal conflict and to render clause 40.1 meaningful, one would have to ignore the first part of the first sentence which reads: 'the liability of the parties to each other under this Agreement will be limited direct damages.' This is not a sensible meaning, because it renders clause 37 - which recognises that in the event of a breach of the agreement

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[4] *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2013] ZASCA 176; 2014 (2) SA 494 (SCA) para 12; *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* [2009] ZASCA 7; 2009 (4) SA 399 (SCA) para 29-40; *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18; and *Norvatis v Maphil* [2015] ZASCA 111; 2016 (1) SA 518 (SCA) para 27.

[5] *First National Bank of Southern Africa Ltd v Rosenblum* [2001] 4 All SA 355 (A) para 6.

an aggrieved party is entitled to sue for damages – nugatory. MTN's construction ignores the context in which clause 40.1 appears in relation to how the parties' liability to each other would be limited. As correctly pointed out by Belet, the purpose of the first sentence is to limit the parties' liability to each other – except in relation to damages flowing from a breach of clause 31 - to direct damages.

[48] Belet's claim is for the loss of net income which flows naturally from the repudiation of the agreement. It is this loss which Belet alleged it had suffered as a result of the repudiation of the agreement. It was conceded by MTN that the loss claimed by Belet constitutes direct damages. The conclusion of the high court that clause 40.1 of the agreement does not absolve MTN of liability for Belet's claimed loss of income can, therefore, not be faulted.

Whether the Jubilee Mall store is also subject to the agreement.

[49] It is common cause that during April 2011, Belet closed the Temba City Store and opened its store in the Jubilee Mall with the knowledge and concurrence of MTN. MTN approved the relocation of the store, determined the design of the Jubilee Mall store and appointed the contractors and subcontractors who fitted out the store, paid them for the work done and appointed its own supervisor to the project. Thereafter MTN claimed a fitting out allowance from the landlord and it provided Belet with promotional material for the opening of the store. Once the store was set up, MTN supplied stock to the store, linked it to the OMS and paid commissions to Belet for sales made by the store. As in the case of the Mabopane store MTN also subjected the Jubilee Mall store to an internal audit.

[50] However, despite these objective facts MTN argued that the Jubilee Mall store should not be taken into account in computing Belet's damages for the reasons that the Jubilee Mall store is not reflected in annexure 'A' to the agreement; the agreement contains a non-variation clause; Belet is unable to produce an amended annexure 'A' reflecting the Jubilee Mall store and countersigned by MTN and that Belet cannot prove which part of the loss of income is attributable to the Mabopane store and which to the Jubilee Mall store. The court a quo rejected MTN's contentions and concluded that the Jubilee Mall store formed part of the agreement.

[51] MTN attacked the court a quo's conclusion and argued that on the pleadings, the facts and the law, its finding was incorrect. As regards the pleadings it contended that in the original particulars of claim, the application for leave to appeal against the upholding of the exception, and in Belet's reply to MTN's request for trial particulars, there was no reference to the Jubilee Mall store. Additionally, continued MTN's argument, in Belet's application to amend its particulars of claim, Mr Letebele stated under oath that clause 35.2 was not applicable and that it had not applied for an additional store, nor had it been required to close any store. MTN contended that it defended the claim on the basis that Belet was relying on a relocation as opposed to the removal or addition of a new store and as a result, only clause 45 of the agreement was applicable. It argued that Belet should not have been allowed to rely on clause 35.2 to support an argument that the agreement had been lawfully varied. This was inappropriate, so it was argued, as Belet was bound by the concessions made by its counsel. MTN argued that Belet should not have presented an argument in conflict with the parties' common understanding as to what exactly the issues were in the trial and in support of this proposition, relied on *Filta-Matrix (Pty) Ltd v Freudenberg and Others* 1998 (1) SA 606 (SCA) at 614B-C. In *Filta-Matrix* this Court held that 'to allow a party, without special circumstances, to resile from an agreement deliberately reached at a pre-trial conference would be to negate the object of Rule 37, which is to limit issues and to curtail the scope of the litigation (cf *Price NO v Allied-JBS Building Society* 1980 (3) SA 874 (A) at 882D-H). If a party elects to limit the ambit of his case, the election is usually binding.'

[52] The court a quo considered and rejected MTN's contentions in these terms:

'[93] Properly construed, clause 35.2 applied to the situation where a dealer has successfully applied for an additional dealer store or has been required to close a Dealer Store. In these instances, the Dealer will be required to complete a new set of annexure documents in order to incorporate or remove as the case may be, the dealer stores in question from the Dealer Agreement. On the evidence, once Belet applied to relocate the Temba City store to Jubilee Mall, the Temba City store was required to close down and, in terms of clause 35.2, a new set of annexures was required to remove it from the Dealer Agreement and replace it with the Jubilee Mall store. Thus, whether the opening of the Jubilee Mall is regarded as a relocation or an additional store, clause 35.2 would have application. Accordingly, I am

unable to agree with MTN that Belet is disallowed from relying on clause 35.2 of the Dealer Agreement because it did not originally rely upon it.'

[53] I agree with the reasoning of the court a quo. Clause 35.2 provides:

'Where the Dealer has successfully applied for an additional Dealer Store or has been required to close a Dealer Store, the Dealer will be required to complete a new set of Annexure documents in order to incorporate or remove as the case may be, the Dealer Stores in question from this Dealer Agreement.'

[54] Clause 45 provides:

'**Alterations**

No alterations, consensual cancellation, variation of, or addition hereto shall be of any force or effect unless reduced to writing and signed by the duly authorised representatives of both parties and attached to this Agreement. Notwithstanding the above, the Service Provider reserves the right to amend the provisions of the Annexures "E1", "E2", "B" and "F" by furnishing the Dealer with a sixty (60) day written notice to that effect.'

[55] It is not a variation, as envisaged in clause 45, where the agreement makes specific provision (and prescribes its own procedures) for an amendment by virtue of a change of circumstances. It appears from clause 35.2 that the parties foresaw that, during the currency of the agreement, dealer stores could be removed from, or added to, the ambit of the agreement. They chose to make specific provision for the procedure that would be followed in such a case. Belet would then be required to sign a new set of annexures, but there was no requirement that MTN would have to countersign the annexures. If the addition or removal of a store fell within clause 45, it would have been entirely superfluous to require, in clause 35.2, that Belet would be required to sign new annexures.

[56] Annexure 'B' to the agreement, headed Performance Management, sets out the targets which the dealer must meet in respect of material targets (relating to the number of connections) and so-called immaterial targets relating to accounts and service. Clause 1.1 of Annexure 'B' provides that "[U]pon the addition or removal of any Store from the Dealer, the targets and thus this Annexure "B" will be adjusted accordingly." This is exactly what happened in this case. Together with the amended

annexure “A”, Ms Allers of MTN sent Mr Letebele a new annexure “B” which reflected new targets for the Jubilee Mall store.

[57] Clause 35.2 presupposes that MTN would have already approved the additional store. All that would then be required to avoid disputes is that Belet signified its assent by way of the amended annexures, which were to be prepared by MTN (and it would not have prepared these documents if it had not in fact agreed to the removal/addition).

[58] MTN’s argument that Belet should not be allowed to rely on clause 35.2 because its counsel had, in interlocutory proceedings, disavowed any reliance on it, should fail for the simple reason that a submission by counsel, or a witness, as to the meaning of a contractual clause does not bind the party, or the court. The interpretation of the agreement is a matter of law and not evidence.[6] A party is bound by its pleadings. Belet in its amended particulars alleged that MTN had agreed that Belet would close the Temba City store and open the Jubilee Mall store in its place.

[59] The court a quo upheld Belet’s contention that in terms of general contractual principles, a party is not allowed to approbate and reprobate and that MTN is precluded from now asserting that the Jubilee Mall store did not form part of the agreement.[7] MTN contended that the court a quo erred in this regard. It argued that at no time during the trial was any evidence led that showed that MTN insisted that the Jubilee Mall store was subject to the agreement and none of the witnesses for Belet gave evidence that the parties had any verbal discussions or communications regarding a written variation of the agreement.

[60] On the undisputed facts the court a quo was correct in finding that MTN, having relied on the Jubilee Mall store being subject to the agreement, could not now, when sued, contend that it was not. MTN conducted two audits of this store. It would, but for the provisions of the agreement, have had no right to do so. It set performance targets for this store. But for the provisions of the agreement it would have had no right to do so. After purportedly terminating the agreement it insisted that it was entitled to debar

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[6] *KPMG Chartered Accountants (SA) v Securefin Ltd* [2009] ZASCA 7; 2009 (4) SA 399 (SCA) para 39-40.
[7] *Telcordia Technologies Inc v Telkom SA Ltd* [2006] ZASCA 112; 2007 (3) SA 266 (SCA) para 12.

Belet from access to the premises of the Jubilee Mall store (leased by Belet), to take back all stock in the premises, to substitute itself as lessee and to offer the store to a different dealer. But for the provisions of the agreement, it would have had no right to do so. I agree with Belet's contention that having so insisted that the Jubilee Mall store was subject to the agreement, notwithstanding that the agreement may not have been properly varied, it is not open to MTN to now assert that there has been non-compliance with the non-variation clause. MTN's contention should therefore fail.

[61] In any event, even if clause 45 was applicable, in my view there was a proper written variation. Clause 45, in its terms, does not specifically require that an amendment to the 'approved Dealer Stores' must happen by way of a new annexure 'A' to the agreement being drafted and signed by the parties. Any written document, signed by both parties, would therefore suffice. As was held by this Court in *Spring Forest Trading CC*,[8] a name appended to an email would constitute a signature.

[62] It is common cause that Belet applied in writing during September 2010 for permission to relocate the Temba City store to one at the Jubilee Mall. On 1 November 2010, Belet accepted an offer to lease from the landlord of the Jubilee Mall subject to its approval by MTN by 30 November 2010. On 10 November 2010 Mr Govender, the Account Manager of MTN wrote to Mr Kevin Reichert of MTN's Site Procurement and Storebuild referencing Belet's discussion with him and Ms Eleanor Mitrovich, and requesting confirmation that:

- 'Store relocation has been approved from Temba to Jubilee Mall
- Confirm store build schedule for Q1 occupation on 1 May 2011.'

Mr Reichert responded on 11 November 2010 stating: 'we have the motivation and El [Mitrovich] has signed off the feasibility for this relocation.'

[63] Mr Letebele responded seeking confirmation that *'this would be planned for beneficial occupation on 1st April, and trading by 1st May please'.* Mr Govender forwarded this email to Mr Reichert and Mr Kapp of MTN. On 17 November 2010 Mr Govender sent an email to Mr Letebele stating *'please see attachment for Jubilee Mall approval letter. As per discussion with Kevin [Reichert] yesterday, dates have been*

[8] *Spring Forest Trading CC v Wilberry* [2014] ZASCA 178; 2015 (2) SA 118 (SCA) paras 18 and 25-27.

confirmed 1st April 2011.' The attachment consisting of a letter addressed to *'To whom it may concern'*, is headed *'Re: Belet Industries Application for a store in the upcoming new Jubilee Mall in 2011'.* It stated that:

'MTN SP (Pty) Limited hereby confirms Beni Letebele of Belet Industries as the preferred dealer for an application of a dealership store in the upcoming Jubilee Market in 2011. This would be a relocation of Temba City store to new store in Jubilee Mall.'

It is signed by Mr Govender and Mr Anton Kapp of MTN.

[64] I agree with counsel for Belet's submission that these emails, in context, constitute an agreement in writing that the Temba City store would be replaced by the Jubilee Mall store and therefore, to the extent that clause 45 applies, Belet's application for permission and MTN's emails of 10 November 2010 and 17 November 2010 constitute a variation in writing, substituting the Temba City store with the Jubilee Mall store.

Quantum of Belet's claim

[65] The court a quo, relying on the uncontested evidence of Ms Wood, Belet's expert, found that Belet had suffered damages and granted an order for the amount of R5 849 789 and the second amount of R5 581 937 plus costs plus interest at the applicable rate. It also found that MTN adduced no evidence that, but for its repudiation of the agreement, it would have exercised its rights in terms of clause 39.1 and when it would have done so. The court a quo held that clause 39.1 was therefore inapplicable.

[66] MTN argued that since Belet was unable to prove its variation as pleaded and inasmuch as the evidence relating to quantum could only relate to the Mabopane Store, Belet's claim should fail. In addition, it argued that the court a quo failed to take into account material aspects of Belet's claim and the evidence of Ms Wood. MTN alleged that Ms Wood had determined the value of Belet's business in 2015 in terms of clause 33.2.3 of the agreement. It argued that it is entirely inapposite to use the provisions of clause 33.2.3 to determine the damages suffered by Belet as they only apply to determine the purchase price of the business in the event of its disposal. In view of the findings I have made in relation to whether the Jubilee Mall store was subject of the agreement, it is unnecessary to deal with MTN's argument. In any event,

the quantum of Belet's claim was agreed during the course of the trial between Ms Wood, Belet's expert and Prof Wainer, MTN's expert.

Costs

[67] The court a quo upheld Belet's claim and imposed a punitive costs order on MTN. The scale of the costs order made by the court a quo is not placed in issue by MTN and since the determination of costs involves the exercise of discretion by the trial court there is no basis for this Court to interfere with it in the absence of evidence of misdirection.

[68] With regard to the costs of appeal it was submitted by Belet that MTN should be ordered to pay the costs, on an attorney and client scale, necessitated by the inclusion in the appeal record, documents which were unnecessary for the determination of the appeal. In this appeal the Court was furnished with a record comprising 13 volumes running into some 2500 pages and an additional supplementary volume. In consequence this Court directed the Registrar to send a note to the parties' legal representatives informing them that at the hearing of the appeal, they would be expected to furnish reasons why they should not be penalised in so far as the recovery of their fees is concerned for non-compliance with the Rules of this Court regarding the record of the appeal and a core bundle. Their attention was drawn to the judgment of this Court in *Van Aardt v Galway* [2011] ZASCA 201; 2012 (2) SA 312 (SCA); [2012] 2 All SA 78 (SCA). This Court held at para 36:

'[36] The practice note requires a statement of counsel's view, in the form of a list, of those parts of the record that need to be considered in order to decide the case. The fact that his or her opponent may disagree is neither here nor there. That will emerge from the opponent's practice note. In addition the list is to be confined to those parts of the record that are 'necessary' for that purpose. Documents and evidence are not to be included in the list on the off chance that someone might wish to refer to them. The list should include only those parts of the record that counsel is likely to refer to either in support for the argument, or for rebuttal, or to highlight flaws in the judgment appealed against. It is inappropriate to include material on the basis that if a particular question is asked, or explanation is sought, it may be necessary to refer to it. What is required is a list setting out the portions of the pleadings, the documents and the particular passages in the record of evidence that counsel believes are necessary to determine the case. The list must identify by reference to volumes and pages where those parts of the record are to be found. Lastly, it would be a salutary practice for counsel to prepare

the list in positive terms, identifying the parts of the record necessary for the determination of the appeal, rather than, as seems frequently to be the case, identifying portions that need not be read. The list is supposed to assist the judges in identifying what needs to be read. It should not be treated as the commencement of a process of elimination of unnecessary material.'

[69] MTN ignored the rules of this Court, relating to 'the preparation of the records by attorneys and the practice directive relating to the filing of a practice note by counsel specifying the portions of record that counsel regards as necessary to be read.' The list in MTN's practice note does not identify by reference to volumes and pages where those parts of the record are to be found. The explanation proffered by MTN is that the parties were unable to agree on the documents to be included in the core bundle.

[70] Belet alleged that it had repeatedly drawn to MTN's attention that a number of documents included in the record should be excluded as they were not necessary for the determination of the appeal and that MTN ignored the suggestion. In its practice note Belet identified those portions of the record that were needed in order to decide the appeal. Belet accordingly submitted that MTN should be ordered to pay the costs, on an attorney and client scale, necessitated by the inclusion in the appeal record of these unnecessary documents.

[71] It is clear from the practice note prepared by Belet that it was unnecessary for this Court to read approximately 30 percent of the record. In my view, MTN should be ordered to pay the costs, on an attorney and client scale, occasioned by the inclusion in the appeal record of 30 percent of the record.

[72] The following order is made:

(a) The appeal is dismissed with costs;

(b) The appellant is ordered to pay 30 percent of the costs incurred in the preparation, perusal and copying of the record on an attorney and client scale.

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D H Zondi
Judge of Appeal

Appearances:

For appellant:	T Motau SC (with him B Maselle)
Instructed by:	Macrobert Attorneys, Pretoria
	Phatshoane Henney Attorneys, Bloemfontein
For respondent:	A de Kok SC
Instructed by:	Cheadle Thompson & Haysom Inc, Johannesburg
	McIntyre van der Post, Bloemfontein