REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2011/40453

DATE: 23/11/2011

REPORTABLE

In the matter between:

BRILLIANT CELLULAR CC Applicant

and

MTN SERVICE PROVIDER (PTY) LIMITED Respondent

REASONS FOR JUDGMENT

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[1] On 1 November 2011, Wepener J made the following order in this matter on an urgent application:

1.1 The application is postponed to the Ordinary Opposed Motion Court Roll of the week of 8 November 2011.

1.2 The Applicant shall deliver its Replying Affidavit by 17h00 on Wednesday 2 November 2011.

1.3 Entirely without prejudice to the Respondent's rights and without any admission whatsoever on its part, the Respondent shall without prejudice to its contentions that the letter of termination of 6 October 2011 is valid, extend the termination date from 5 November 2011 to close of business on Friday 11 November 2011.

1.4 Costs are reserved.

[2] On 11 November 2011, after having read the papers and heard judgment by both Counsel in this matter, I made the following order:-

2.1 This application is dismissed with costs.

[3] On that same day, I was requested to provide reasons for the aforementioned order. The reasons for this order follow.

Background

[4] On 30 September 2010, the parties entered into a written Dealer Agreement, in terms of which the applicant was defined as the Dealer and the

respondent was defined as the Service Provider. A copy of this agreement was annexed to the applicant's founding affidavit as annexure "FA1".

[5] For the purposes of this matter, the important terms of the aforementioned Dealer Agreement are as follows:

> "1. **Preamble**
>
> 1.1 The Service Provider is a company or close corporation duly incorporated in accordance with the company laws of South Africa and conducts business as an exclusive cellular telephony Service Provider of the Operators' products and services, in the Republic of South Africa.
>
> 1.2 The Dealer is a company duly incorporated in accordance with the company laws of South Africa and conducts business as, among others, a Dealer of cellular telephony products and services, in the Territory.
>
> 1.3 The Service Provider wishes to appoint the Dealer to market, promote and facilitate distribution by the Service Provider of Network Services and stock in the Territory.
>
> 1.4 The Dealer wishes to accept such appointment.

1.5 The parties wish to record their respective rights and obligations regarding the matters contemplated herein.

...

4. **Duration**

4.1 This Agreement shall commence on the Effective Date and will continue for an indefinite period, unless terminated earlier in accordance with the provisions of this Agreement.

5. **Undertakings by the Dealer**

5.1 The Dealer undertakes, throughout the term of this Agreement:

…

5.1.4 to ensure that the good name and reputation of the Service Provider and the Operator are at all times protected and enhanced in the fulfilment of its obligations under this Agreement;

5.1.5 to comply with the Service Provider's directions and ensure that a prominent sign is displayed in the Dealer Stores indicating that the Dealer is an authorised Dealer, licensed by way of a Dealer Agreement concluded with

the Service Provider to trade on the Service Provider's behalf;

5.1.6 to procure that such promotional or advertising material as may be provided by the Service Provider from time to time to the Dealer is displayed at all times at its Dealer Stores in accordance with the directions and requirements of the Service Provider;

…

5.1.8 not to display or procure the display of any advertising or promotional material pertaining to the subject matter of this Agreement, without obtaining the prior written approval of the Service Provider, as the format and content of such material;

5.1.9 to act in accordance with the instructions and direction provided and standards set by the Service Provider, from time to time, regarding advertising, promotion and publicity in relation to the subject matter of this Agreement;

5.1.10 to actively participate in and promote all special offers and Tariffs offered by the Service Provider for distribution through the Dealer Stores from time to time, and the

manner and in accordance with the terms stipulated by the Service Provider;

5.1.11 to provide all necessary human and other resources required to efficiently sell, supply and/or distribute the Service Provider's services and products through the Dealer Stores and to adequately fulfil its obligations in terms of this Agreement;

5.1.12 to obtain the prior written consent of the Service Provider to promote and/or sell any stock from any Dealer Store, not referred to in this Agreement;

5.1.13 to utilise the Service Provider's system to which the Dealer has been granted access for the specific purpose for which it was granted;

5.1.14 to exercise full control over and take full responsibility for its Authorised Employees, their acts and/or omissions;

…

5.1.18 not to, under any circumstances whatsoever, induce or persuade any Customer of the Service Provider to subscribed to any service or purchase any product

offered by a Competing Third Party, unless otherwise authorised in writing by the Service Provider;

…

5.6 The Dealer shall utilise the Point Of Sale System/s ("POS") chosen by the Service Provider as and when stipulated by the Service Provider. The Service Provider shall bear all costs associated with migrating the Dealer to the Service Provider's POS and of acquiring the POS. The Dealer shall allow the Service Provider read-only access to its POS at all times. The Dealer expressly consents to such access.

…

5.8 The Dealer will ensure and direct that all Authorised Employees have access to and receive a copy of the electronic communication received from the Service Provider on a daily basis and where necessary direct that the requests are actioned so as to timeously comply with instructions contained therein.

…

5.16 The Dealer undertakes not to sell Prepaid Products and/or Post paid Products to any third party other than a Customer of the Operator, who intends connecting and utilising such products on the Network and to make the necessary enquiries to ensure itself that, in the Dealer's reasonable opinion, such Customer does not intend onselling such products to any third parties. It

shall be incumbent upon the Dealer to prove to the Service Provider that such enquiry has been conducted. Provided that the Dealer has undertaken such an enquiry, the Dealer shall bear no liability to the Service Provider if it subsequently transpires that the Customer is not *bona fide*.

…

5.21 The Dealer shall use its best endeavours to comply with such Standard Operating Procedures, which the Service Provider may publish, from time to time and to notify the Service Provider promptly in writing where such Standard Operating Procedures do not appear to be appropriate or function so as to afford efficient or effective practices.

…

9. **Terminal Equipment and Warranty**:

…

9.3 The Dealer shall not be entitled to install or procure the installation of Terminal Equipment in vehicles, save wtih the prior written consent of the Service Provider.

9.4 Where the Dealer intends to conduct installation procedures contemplated in clause 9.3 above, the Dealer undertakes to refer parties wishing to procure the installation of any products in

their vehicles, only to experts recommended by the Service Provider, from time to time, during the term of this Agreement.

…

9.9 All repairs to Terminal Equipment shall be carried out by the Service Provider or its duly authorised agent only, unless otherwise authorised in writing by the Service Provider, provided that any repairs which fall outside of the terms of the warranty, may be charged for by the Service Provider or its authorised agent to the Customer.

…

22. **Lease of Dealer's Stores**

22.1 In the event of the Dealer entering into any lease and/or arrangement with a Landlord to lease any premises, in which the Dealer intends conducting its Business in terms of this Agreement, the Dealer shall notify the Landlord of the premises from which the Business is carried out, of the Service Provider's ownership of the relevant shop fixtures and fittings and stock, which may still be owned by the Service Provider, which assets shall be specifically excluded from the Landlord's hypothec. Such letter shall be substantially in the form set out in **Annexure "G"** hereto.

22.2 Upon signature of this Agreement, copies of any current leases in existence for the purpose of conducting the Business of a Dealer must be provided to the Service Provider.

…

25. **Inspection of Premises**

25.1 The Service Provider reserves the right to inspect, on notice during normal working hours and without notice if such inspection is conducted as part of the Mystery Shopper Programme, the Dealer's premises. All other inspections will require prior notification to the Dealer. Such inspection shall be carried out by the Service Provider with the minimum of interference to the normal business activities of the Dealer. If, as a result of such inspection, and after having been given a written notice to that effect, the Dealer is found, in the Service Provider's reasonable opinion to be conducting its business in anyway that falls below the standard required in terms of this Agreement, or the standards reasonably required of a Dealer and/or that any equipment and fixtures are not in good order and condition, the Dealer shall be in breach of this Agreement.

…

27. **Confidentiality Requirements**

27.1 The Dealer shall ensure that its Authorised Employees assigned to the Dealer Stores are familiar with the applicable laws, regulations and standards pertaining to the services and/or data interchange between the parties, and to ensure that the Authorised Employees are aware of the Dealer's obligations in terms of this Agreement.

…

37. **Breach**

37.1 Notwithstanding any other provision to the contrary contained in this Agreement, and without prejudice to any other rights or remedies which the parties may have, either party ("the aggrieved party") may terminate this Agreement without liability to the other, immediately on giving notice to the other, if the other party ("the defaulting party") commits a material breach of any of the terms of this Agreement and fails to remedy such material breach within 7 (seven) days of that party being notified in writing of the material breach.

37.2 Notwithstanding the provisions of clause 37.1 the aggrieved party shall be entitled to terminate this Agreement at any time,

after having provided the defaulting party with 14 (fourteen) days written notice to remedy the breach if:

37.2.1 the defaulting party commits a second or subsequent breach of this Agreement, after having remedied an earlier similar breach during the preceding 12 (twelve) months duration after written notice to do so; or

37.2.2 there is a Change in control of the Dealer or in any person, body or entity who has stood as surety for the obligations of the Dealer to the Service Provider without the prior written consent of the Service Provider, or if such person, body, or entity is placed under provisional or final liquidation or under provisional or final receivership or judicial management or if that party becomes insolvent or compromises or attempts to compromise with its creditors;

…

38. **Disputes**

If any dispute arises between the parties in connection with this Agreement or its subject matter:

38.1 The aggrieved party shall request a meeting in writing which request shall contain the following:

38.1.1 the date on which such meeting shall take place, which date shall not be more than 7 (seven) days from the date of the request.

38.1.2 the reason for the meeting together with an agenda;

38.1.3 details of the parties being requested to attend the meeting; and

38.1.4 the time and venue of the meeting.

39. **Termination and Consequences**

39.1 Termination of this Agreement for any reason other than by way of breach will occur by Service Provider giving at least 90 (ninety) days notice in writing to the Dealer.

…

42. **Exclusivity and Restraints**

42.1 The Service Provider reserves the right to appoint other Dealers from time to time, on whatsoever terms and conditions as are negotiated with those other Dealers, from time to time in the Service Provider's discretion the Dealer accordingly

acknowledges that its rights under this Agreement are not exclusive in any respects.

42.2 Subject to clause 42.8, the Dealer undertakes, during the term of this Agreement, and for a period of 6 (six) months after its termination for whatever reason, not to:

42.2.1 provide services of the same or similar nature to those set out in this Agreement to a Competing Third Party or its agent; or

42.2.2 sell Terminal Equipment and/or any wireless telephony products to Customers of a Competing Third Party; or

42.2.3 promote the services of a Competing Third Party; or

42.2.4 procure the entry into Agreements as agent or otherwise between such Competing Third Party and its Customers for the provision of that Competing Third Party's services.

42.3 The Dealer further undertakes during the term of this Agreement not to be concerned or interested in any capacity whatsoever, whether directly or indirectly, in the provision of services anywhere in the Territory by a Competing Third Party which are the same or substantially similar to any of those provided by it to

the Service Provider, save with the prior written consent of the Service Provider.

42.4 The Dealer undertakes not to be involved, or interested, in any capacity whatsoever, whether as proprietor, partner, director, shareholder, member, employee, consultant, contractor, financier, agent, representative, trustee or beneficiary of a trust or otherwise, and whether directly or indirectly, during the term of this Agreement in the Territory, in any business of a Competing Third Party which supplies, sells or distributes any services which are the same or substantially similar to those provided by the Dealer to the Service Provider, in terms of this Agreement, save without prior written consent of the Service Provider."

[6] Against the background as detailed in this agreement, the respondent arranged for an audit or mystery shop to be concluded at two of the stores owned and operated by the applicant, being those situated at Balfour and Westonaria on 19 September 2011. In both instances, airtime that operated on the direct competitor of the respondent was purchased in such stores. Thus culminated in the letter which appears as annexure "FA2" to the founding affidavit being sent by the respondent to the applicant on 26 September 2011.

[7] In such letter, Jody Forrester, the National Franchise Manager of the respondent informed the applicant's Mark Olivier as follows:

"**SALE OF COMPETING THIRD PARTY PRODUCTS IN DEALER STORES**.

1. It has recently come to our attention that you have been selling Competing Third Party pre-paid airtime to customers through your Dealer Stores.

2. One of the Brilliant Cellular Dealer Stores through which the competing pre-paid airtime has been sold to customers is located in Balfour.

3 Your conduct is in violation of the core terms of our Dealer Agreement regarding exclusivity and restraint and is not remediable.

4 We invite you to dispute the above allegations by no later than 30 September 2011.

5 Should you fail to provide MTN SP with satisfactory evidence that you have not been selling pre-paid airtime of Competing Third Parties from your Dealer Stores, MTN SP shall have no option

but to terminate the Dealer Agreements on 7 (seven) days written notice."

[8] In response thereto, the applicant's representative, the same Mr Olivier stated:

"1. The agreement does not contain a provision dealing with so-called 'core terms which are not remediable' as contended for by the Respondent; (FA, para 15)

2. The agreement does however contain provisions which deal with a breach and the cancellation of the agreement; (FA, para 16)

3. Reference is thereafter made to the aforementioned clause 37."

[9] On 29 September 2011, the applicant's attorneys of record addressed a letter to the Respondent, a copy of which, despite being marked "without prejudice" appears as annexure "FA3" to the founding affidavit and in which the following is stated:

"1. Our client (The applicant) regrets to confirm that it has happened at the Balfour store that a Competing Third Party's prepaid airtime was sold but (the applicant) states categorically that:

1.1 Our Mr Olivier was totally unaware of the fact that the Cellair vending terminal which was installed on a trial basis was not deactivated in as much as Competing Third Party prepaid airtime could be purchased through the said installation;

1.2 Our client (the applicant) at all times when installing the Cellair vending terminal requested that the buttons relating to the other Competing Third Parties be de-activated. In this regard we attach hereto a copy of a letter dated 28 instant, which our client (the applicant) has received from Mr AP Jansen at Cell Remote CC trading as Cellair;

1.3 Our client (the applicant) has immediately taken steps to rectify the situation;

1.4 From our (the applicant's) records it would be very clear that our client (the applicant) meets all targets and he is on a fulltime basis busy with promoting all MTN products as required in his agreement.

1.5 Our client (the applicant) disputes that fact that he is in violation of core term of his Dealer Agreement dated 15

September 2010 or that the alleged violation (of which he still repeats he was unaware) is not remediable.

1.6 Our client (the applicant) categorically denies that he had been selling prepaid airtime of Competing Third Parties from his dealer stores referred to in your contract dated the 15th September 2010.

1.7 The Balfour dealer is a new dealership and has only been in operation for two months. Our client (the applicant) regrets any inconvenience which may have been caused by the failure of Cell Remote CC to de-activate the buttons relating to competing third parties;

1.8 Our client (the applicant) trading as Brilliant Cellular CC in Heidelberg, Nigel and Sharonpark does not and has not been selling prepaid airtime of Competing Third Parties;

1.9 The manager at Balfour was previously employed by Vodacom and disciplinary action has been taken to prevent recurrence.

Our client (the applicant) is certain that this matter can be settled on an amicable basis."

[10] Annexed thereto as "FA4" to the founding affidavit, was a letter received from Cellair dated 28 September 2011, confirming that a Cellair vending terminal had been installed in a MTN outlet on a trial basis. Their Technology had been designed to deactivate certain buttons on the touchpad to enable the outlet "to sell only certain vouchers", but due to human error, certain buttons were not deactivated. They apologised for the inconvenience and stated that a new terminal cover branded specifically for MTN was in progress.

[11] The respondent responded thereto in a letter on 6 October 2011, a copy of which, despite also being marked "without prejudice" is annexed to the papers as "FA5". *Inter alia*, the following appears from this letter:-

1. "… While your client (the applicant) has made every effort to deny knowledge of the sale of competing products from his stores, he has failed to deny that this has in fact occurred.

2. Numerous correspondence had been communicated to the Dealers advising of the seriousness with which the sale of competitor and non approved products is viewed,

3. Your client (the applicant) believes that the matter has been remedied by the deactivation of the competitor product button on the Cellair Vending Machine. What is alarming is that your client (the applicant) fails to recognise that the presence of the

vending machine as a whole contravenes the very fibre of the Dealer Agreement in that all products are sourced by MTN SP and the Dealer is required to obtain prior approval for the sourcing of any alternative product. MTN SP had expressly provided the Logical airtime solution to be sold through the MTN SP point of sale terminals, which makes the proof of concept with an external supplier's product and equipment redundant and illegal.

4. Furthermore, a significant role of a Dealer Principal is the fact that his staff are made aware of all terms of trade with MTN SP and as per the Dealer Agreement, a Dealer is entirely responsible for the acts of his staff at all times. It is not plausible that an employee is not inducted into the MTN SP way before being permitted to work within a Dealer's store and thus the attempt to pass responsibility for the contravention onto his staff member is not acceptable.

5. Your client (the applicant) has failed to acknowledge and recognise that such an act is unremediable. The trust with which MTN SP views your client (the applicant) has been irreparably broken.

6 Accordingly, MTN SP (the respondent) had no alternative other than to terminate the Dealer relationship. In order to

accommodate your clients (the applicant's) staff notice requirement, your client (the applicant) is hereby given a month's notice of termination, that is, closure of the stores will take place on the 5th November 2011.

7 The procedure to be followed upon termination has been recorded in clause 39.4 of the Dealer Agreement (which was then set out).

8 In addition MTN SP (the respondent) shall exercise its rights with regards to all lease agreements.

9 Finally all fixtures, fittings and equipment which are the property of MTN SP (the respondent) may not be removed or tampered with in any way prior to closure.

[12] In response thereto, the applicant's Mr Olivier claimed that the vending machine had been adapted so as to only dispense MTN airtime vouchers. Consequently, he maintained that its presence and use in its adopted form could not constitute a breach or a material breach of the agreement as contended by the respondent. However, upon receipt of annexure "FA5", he had removed the Cellair vending machine from applicant's Balfour outlet. He further stated that Cellair was a customer of the applicant and bought data-cards (respondent's product) from the applicant. They had approximately

2000 contracts with the respondent, all of which were managed by the applicant.

[13] The applicant further contended that the agreement could not be cancelled without prior written notice in terms of clause 37.1 thereof, affording applicant 7 (seven) days within which to remedy the alleged breach.

[14] On 14 October 2011, the applicant's attorney addressed a letter to respondent, a copy of which is annexed to the papers as "FA6" informing the respondent that the applicant disputed the respondent's right to cancel the agreement and the validity of its purported termination. Furthermore the provisions of clause 38 were invoked in order to resolve the dispute between the parties and a meeting was requested in terms of clause 38.1 of the agreement. Respondent was furthermore requested to give an undertaking by no later than 16h30 on Tuesday 18 October 2011, that it would not proceed with the termination of the agreement pending the finalization of the dispute and/or any litigation which may follow, should such dispute not be resolved, failing which the applicant would have no alternative but to apply to this Court on an urgent basis for an interdict restraining the respondent from terminating the agreement pending the resolution of the dispute.

[15] The respondent responded thereto in a letter on 17 October 2011, a copy of which is annexed to the papers as "FA7", in terms of which it denied that there was a dispute between the parties. The respondent further advised that the applicant's conduct constituted a violation of clause 5.6 of the Dealer

Agreement. Respondent agreed to meet to discuss any concerns that the applicant may have on 20 October 2011, but refused to withdraw its notice of termination of the agreement.

[16] On 20 October 2011, the meeting took place, the parties stuck to their respective views and the respondent refused to accept an offer of payment by the applicant for any damages allegedly suffered by the respondent due to the applicant's alleged breach of the agreement. The applicant contended that only R268.00 worth of competing third party prepaid airtime vouchers had been sold over the period of 2 (two) months.

[17] The applicant contended that the respondent's decision to terminate the agreement was premature and unlawful and that it did not comply with the terms of the agreement between the parties relating to the cancellation thereof. This resulted in the application being launched on an urgent basis.

[18] The applicant filed a notice of opposition on 31 October 2011 and thereafter filed an answering affidavit.

[19] By way of background, the respondent's General Manager, Eleanor Mitrovich stated *inter alia*, as follows:

> 18.1 The respondent is part of the MTN group of companies. The respondent has a dedicated exclusive MTN franchise network that operates nationally throughout the Republic of

South Africa. The product which the respondent deals in exclusively is the MTN product. In South Africa there are three service providers (the other two being Vodacom and Cell C). Both Vodacom and Cell C are direct competitors to MTN and to the respondent in particular. The market in which MTN, Vodacom and Cell C compete involves literally hundreds of millions of rands (in fact billions of rands) annually and extends over a wide variety of telephony products and service.

18.2 MTN has invested literally billions of rands in building up the MTN brand in its various respects. This includes the infra-structure which is necessary to provide the MTN services throughout the Republic of South Africa, the MTN store builds, the various electronic systems and infrastructures which are available, the stock which is available and the various aspects which go up to build the MTN brand as a whole.

18.3 Since approximately the middle of 2010, the respondent has revised its dealer commission structures (applicant is one of 26 such dealers) as a result of which dealers (of whom, the applicant is one) have enjoyed substantially enhanced and extremely lucrative commissions from the business which they had exclusive rights to.

18.4 The respondent has approximately 26 dealers which it has contracted with throughout the Republic of South Africa. Respondent has invested literally millions of rands in building up its dealer network and it is vitally important to the respondent's business that the parties (both individuals and entities) whom the respondent appoints as dealers (such as the applicant) are persons of impeccable trust and integrity, that they do not undermine the MTN brand.

18.5 The reason for this is that the respondent essentially entrusts its various dealers with the MTN brand as a whole. The dealers are the face of MTN. There are very strict provisions which have been incorporated in the Dealer Agreement which the respondent enters into with these various dealers (of whom the applicant is one). In order to protect various aspects of the respondent's business, including aspects pertaining to (for example) the fact that the dealer has to operate within the framework which the respondent has established over the years, the fact that the dealer has to make use of the systems which are employed within the respondent's business, the obvious fact that the dealer must only sell MTN products (this is absolutely fundamental to the appointment of the dealer) and various other important provisions and controls which are included in the agreement

to ensure that the standards and procedures which the respondent has built up over many years, at great cost and effort to itself, are adhered to.

18.6 It is naturally absolutely fundamental to the relationship between the respondent and a dealer, which is appointed by the respondent (such as the applicant) that the dealer (i.e. the applicant) does not sell or offer for sale competitive brands, i.e. telephony or mobile services which are offered for sale, either by Vodacom or by Cell C. Both are a Competing Third Party, as defined in the Dealer Agreement. Both Vodacom and Cell C are direct competitors of MTN. This extends also to airtime as a stock item. Basically, airtime is a product which can be purchased by a cellular telephone user which gives access to a certain amount of airtime using a mobile telephone. Airtime is available from MTN, the same applies for Vodacom and Cell C. The fundamental difference, however, is that if airtime is purchased which is made available by Vodacom or Cell C, then the purchaser of that airtime utilises the network of Vodacom or Cell C as the case may be. By the same token, if MTN airtime is purchased, then the purchaser of the airtime is only able to utilise that airtime to make use of the network of MTN.

18.7 It need hardly be stated that it is entirely at odds with the relationship of trust which exists between the respondent and any of its dealers (including the applicant) for one of its dealers (such as the applicant) to offer for sale or to sell in one of the branded dealers stores (or indeed elsewhere) either Vodacom or Cell C stock, whether stock be airtime or any product made available by Vodacom or Cell C or on their behalf; and

18.8 The applicant has been less than candid (and, in certain respects, dishonest, underhand and untruthful) in respect of not only various material facts in this matter but also Olivier's personal knowledge of those facts. At all material times Olivier represented the applicant. The relationship of trust has, as a result, completely broken down. The respondent was quite simply not prepared to continue with the applicant in a relationship as an MTN dealer where the applicant has not only been selling Vodacom products from its MTN stores, but has also lied to and sought to mislead the respondent about this matter.

[20] The respondent's representative denied the applicant's version and stated further at paragraph 25, *inter alia,* as follows:

1. On 12 August 2011, Dunjsha Allers conducted a routine store visit on behalf of the respondent to the applicant's Westonaria and Belfour stores. Both stores were selling Vodacom prepaid airtime. They were doing so in a surreptitious manner in that the till points referred to in the applicant's founding affidavit as ("Cellair vending terminal") which were being used for this purpose were located in the back office so that they were not visible from the front. With regard to the purchasing, the clients requested the airtime and the applicant's employee then went to the back to fetch the purchased airtime from the unit.

2. She (this was) reported to Jody Forrester on 14 September 2011. Her email of 14 September 2011 is ANNEXURE "5" thereto.

3. Jody Forrester, the national franchise manager of the respondent arranged for an audit or mystery shop to be conducted by the respondent at the two stores of the applicant being Balfour and Westonaria.

4. This mystery shop or audit took place on 19 September 2011 and was conducted by Jaco du Plessis and Moegsien Davids and who were overseen by Ivone Avelar, who was the audit supervisor. Jaco du Plessis attended on 19 September 2011 at both the applicant's Westonaria MTN store and at the

applicant's Balfour MTN store. Jaco went along as a member of the public and claimed to be an IT Technician so as not to arouse suspicion. Jaco took video footage of the applicant's sales staff (using the camera which is on his personal mobile cellular telephone) in the applicant's Balfour MTN store ringing up and selling Vodacom airtime, i.e. from within the applicant's Balfour MTN store and utilising a till point which had not been approved by the respondent and, indeed, not been supplied by the respondent. Vodacom airtime was purchased at this MTN licensed store of the applicant, and a copy of the receipt is ANNEXURE "9". ANNEXURE "10" is a till point or device which the applicant uses to sell Vodacom prepaid airtime.

5. The footage which Jaco took from the aforementioned operation was made available to this Court.

6. At the Westonaria store, Jaco and Moegsien attended and observed the same thing happening. No video was made of this purchase, but Moegsien purchased Vodacom airtime from the Westonaria store, a copy of the Vodacom airtime receipt was annexed as ANNEXURE "11". It depicted that it was in respect of Vodacom airtime that had been purchased at the applicant's Westonaria store, using the very same type of device, that had not been supplied by the respondent or authorised by the respondent.

7. This led to the letter of 26 September 2011 (annexure “FA2”) being sent to the applicant.

[21] Furthermore, according to the respondent’s representative:

21.1 reference by Jody Forrester to the “core terms which are not remediable” is a reference by him to the fact that the selling by the applicant (a licensed MTN dealer) of Competing Third Party (i.e. Vodacom) prepaid airtime to customers through the applicant’s Dealer Stores is in violation of a number of the fundamental and material terms of the Dealer Agreement between the applicant and the respondent. This is expressly provided for in clause 42 of the Dealer Agreement, which deals with Exclusivity and Restraints, and is referred to in paragraph 3 of annexure “FA2” to the founding affidavit. Once the dealer has sold prepaid airtime of a Competing Third Party (as the applicant did from at least the period 12 August 2011) that dealer cannot “unsell” the prepaid airtime. Consequently, the dealer has not only breached clause 42.2.2 of the Dealer Agreement, but has also breached clause 42.2.3 thereof by promoting the services of Vodacom.

21.2 In terms of the Dealer Agreement, the applicant was appointed by the respondent specifically to market, promote and facilitate distribution of its stock (i.e. MTN stock) through its stores, and the applicant accepted such appointment. The applicant's stores are branded MTN stores, replete with MTN branding and logos.

21.3 It need hardly be stated that the applicant's conduct in offering for sale and in selling Vodacom products from its MTN branded and licensed stores goes against every basic principle of trust and integrity underlying the Dealer Agreement, which pertains exclusively to MTN products, stock and services. It is this breach of the relationship of trust which is either irremediable. The relationship of trust was clearly understood between the parties at the time of the conclusion of the agreement, and it was tacit term of the agreement that the applicant would at all times act in a trustworthy manner, honestly and with integrity in its dealings with the respondent. The applicant did not do so.

21.4 Reference is thereafter made to the provisions of clauses 5, 7 and 42 of the Dealer Agreement.

[22] Thereafter the respondent's representative submitted that the express terms of the agreement, appear therefrom. The breach was not remedied (to

the extent that it was remediable) by the applicant within the 7 (seven) day period. The breach is material and goes to the very heart or root of the agreement. The breach is absolutely fundamental. Furthermore, the breakdown in trust is irremediable.

[23] Ms Mitrovich continued as follows:

23.1 The applicant confirms that at its (MTN licensed) Balfour store, it sold a Competing Third Party's prepaid airtime;

23.2 What the applicant does not disclose, is that it was also doing so in its Westonaria store. This is blatantly dishonest, given the serious nature of the matter.

23.3 The applicant was actively selling Vodacom airtime, from both its Balfour and Westonaria stores. Furthermore the applicant utilised till points or vending machines which were not supplied by the respondent in order to do so. It is not possible to use vending machines supplied by the respondent to supply Vodacom airtime and it is necessary for a person who wishes to sell Vodacom airtime to obtain and have installed and have connected electronically to Vodacom or to one of its authorised dealers or wholesalers, a Vodacom vending machine. All of this must, of necessity, have taken place as observed both by Dunjsha Allers and

Jaco du Plessis because the staff at both of the applicant's MTN stores in Balfour and in Westonaria were selling Vodacom airtime using the Vodacom vending machines.

23.4 Furthermore, the airtime which was being offered for sale included not only Vodacom but also Cell C airtime.

23.5 Whether or not one or more buttons on a particular vending device is or should have been deactivated entirely misses the point. What was taking place in both the applicant's stores is entirely in conflict with the clear provisions of the Dealer Agreement.

23.6 The applicant did not disclose what was happening at the Westonaria store.

23.7 Not only were the buttons not deactivated, but the applicant's staff were offering Vodacom airtime for sale and in fact selling Vodacom airtime.

23.8 Airtime was bought by the applicant from Cellair which is *inter alia,* a third party distributor of Vodacom products, and onsold by the applicant.

[24] She had no doubt that:

24.1 the applicant had Cellair as its customer;

24.2 Cellair had purchased a number of SIM cards from the applicant;

24.3 Cellair is a wholesaler of not only MTN products but also Competing Third Party products including Vodacom;

24.4 the applicant had entered into an arrangement with Cellair as its customer of a number of SIM cards, that it, the applicant, would help sell Cellair's airtime in the applicant's MTN stores;

24.5 this basically increased the bullying power of a wholesaler which tried to get better margins from the respondent.

This was all in breach of the terms of the Dealer Agreement even in respect of MTN products.

[25] At the meeting on 20 October 2011:

25.1 the applicant was given the opportunity to present its case.

25.2 Its attorney had a problem with the respondent's termination of 6 October 2011 and did not believe that it was the only option. He further stated the respondent could claim damages from the applicant for the breach or could buy Mr Olivier out of his businesses and take over the staff and the store.

25.3 Mr Olivier was of the view that this was a personal attack and that the respondent wanted him out of business.

25.4 In response thereto, Jody Forrester advised that this was not the case. There had been a fundamental breakdown of trust between the applicant and the respondent as a result of the applicant's conduct.

25.5 Mr Olivier was then asked whether he was absolutely sure that the sale of competitive products was only taking place at the applicant's Balfour store.

25.6 Mr Olivier replied that he was quite sure that it was only taking place at that store.

25.7 This was demonstrably false and further served to confirm that the respondent could not trust the applicant.

25.8 It was thereafter suggested that the Balfour store should not be part of this agreement. This was not acceptable to the respondent.

25.9 Mr Olivier then told the meeting that as far as he was concerned, the relationship between the applicant and the respondent had broken down and he wanted the respondent to make him an offer to buy out his businesses.

25.10 Mr Olivier was looking for a pay-out of some sort or another.

25.11 Respondent's representatives excused themselves from the meeting, but subsequently returned to tell Mr Olivier and his attorney that the respondent stood by its notice of termination.

[26] Against this background, the applicant sought the urgent order previously mentioned from Wepener J, which order was granted, whereafter the applicant filed its replying affidavit.

[27] In its replying affidavit, the applicant did not deal with the contents of the answering affidavit *ad seriatim*.

[28] In the reply, the applicant's Mr Olivier stated, *inter alia*:-

28.1 In the 12 years that the applicant had been a dealer of the respondent, the applicant had always enjoyed an open line of communication with the respondent and its representatives. As would be expected, there had been times when there was frustration and unhappiness but that centred around service delivery levels. He had always been able to address these problems.

28.2 When the applicant opened the stores in Westonaria and Balfour it decided to use airtime terminals supplied by Cell Air for the sale of MTN prepaid airtime. The reasons for this decision were that:

28.2.1 Cell Air was an existing client of the applicant and the applicant supplied Cell Air with MTN sim cards which are installed in the terminals;

28.2.2 the system offered by Cell Air was reliable and stable. The OMS system used by the respondent was slow and the applicant had in the past experienced system failure problems which affected the service to clients;

28.2.3 the system provided by Cell Air was secure as opposed to so-called airtime vouchers or cards.

The applicant had suffered substantial losses in the past due to pilfering and theft using airtime vouchers or cards. It was never the intention of the applicant to sell any airtime of a competitor using the terminals.

28.3 When the stores were opened, Ms Dunjsha Allers and Mr Anton Kapp visited them in July and August 2011. At the time the terminals were installed and seen by both of them. He had discussed the terminals with them and explained why the applicant used those machines to sell MTN airtime. He further explained to Kapp that the supplier of the terminals, Cell Air, was making an overlay to show that only MTN airtime was sold from the terminal.

28.4 The terminals were situated in the back office for security reasons, with other administrative equipment. There was no signage or indication visible to members of the public that products other than the respondent's products could be purchased from the stores.

28.5 The terminals were meant to be modified, but unbeknown to him, Cell Air, due to an oversight on their part, failed to disenable the switches for the other service providers.

28.6 Neither Ms Allers nor Mr Kapp made any mention or gave any indication that the mere presence of these machines constituted a potential breach of the agreement. Had they done so, he would have immediately removed the machines from the premises.

28.7 This response created the impression in his mind, that it was in order for the applicant to continue to use these terminals to sell MTN airtime. In fact, Mr Kapp mentioned to him that once the overlays were made, he should present them to the respondent's management so that they could consider using similar terminals for the sale of airtime.

28.8 In September 2011 there was a dispute between the applicant and the respondent concerning service delivery. He however denied that there had been a breakdown of trust.

28.9 Ms Allers only reported the presence of the terminals to Mr Forrester after this incident and more particularly on 14 September 2011. Thereafter, and following an acrimonious meeting, the respondent conducted their investigations.

28.10 He was of the view that the investigation was nothing other than a poorly disguised trap to catch the applicant out.

28.11 The cancellation of the contract had nothing to do with the alleged breakdown of trust but everything to do with the fact that he had forcefully expressed his dissatisfaction of the level of service that his client and he had received from the respondent. In his view, the sale of airtime was an insignificant portion of the applicant's total business.

28.12 The respondent had not mentioned the sale of Vodacom airtime at the Westonaria branch so he was unaware of it. Subsequent to the receipt of the letter dated 26 September 2011, he requested Cell Air to make sure that only MTN airtime could be sold from the terminals.

28.13 He was further of the view that the only problem that the respondent had with the applicant was the sale of a competitor's airtime and did not regard the presence of the terminals in the stores as a problem. Once he was informed that it was problem, he had the terminals removed. Since then the applicant had sold MTN airtime using the OMS system of the respondent and the "high risk" airtime cards or vouchers.

28.14 He never foresaw that the terminals could be a problem. He also never contemplated the possibility that any competitor's

product would be sold from the premises. In particular, he never foresaw the possibility that any reasonable customer would enter a store which is branded exclusively for the products of the respondent to buy the products of a competitor.

28.15 The applicant would never have intentionally jeopardised its relationship with the respondent. He had been aware of the respondent's practice to send so-called mystery clients to shops. It would have been "foolish" of him to risk the chance of being caught out for the insignificant benefit of selling airtime of a competitor.

28.16 The applicant never actively promoted or held itself out to be a dealer or supplier of the products of any of the respondent's competitors. Apart from the sale of Vodacom airtime to the respondent's sting operators, he could not explain how it happened that the balance of the airtime sales occurred.

28.17 He had then advised that the breach complained of by the respondent was not a so-called unremediable breach. Without admitting, he was prepared to accept that the sale of a competitor's product may be a material breach. However, despite the fact that the respondent had not given the

applicant proper notice in terms of clause 37 of the agreement, the applicant had rectified such alleged breach.

28.18 He therefore denied that the respondent was entitled to summarily terminate the agreement. As far as the respondent had demanded that the applicant rectify the alleged breach, such had been rectified.

28.19 Consequently he denied that there had been a breakdown in trust and contended that it was rather a few employees who felt aggrieved by the fact that the applicant had expressed its dissatisfaction with the level of service it had received.

[29] During argument, the applicant's Counsel, Advocate JF Steyn contended *inter alia*, that:

29.1 it had been conceded that the applicant breached the terms of the agreement by:

29.1.1 selling prepaid airtime of a competitor through the terminal situated on the applicant's premises in Balfour and Westonaria; and

28.1.2 utilising the terminal which was not supplied by the respondent for the sale of prepaid airtime.

29.2 Clause 37 regulated the rights of the parties in the event of a material breach of any of the terms of the agreement.

29.3 Clause 37(1) is a forfeiture clause or *lex commissoria*. It entitles the innocent party to cancel the agreement if the breaching party fails to remedy its breach by the time fixed in the contract. (See: *Northvaal Mineral Co Limited v Lovasz* 1961 (3) SA 604; *Oatorium Properties (Pty) Limited v Maroun* 1973 (3) SA 779 (A); Buytendag Boerdery Beleggings (Edms) Bpk v Goldburg 1979 (2) SA 172; *Edengeorge (Pty) Limited v Chamonu Properties Investments (Pty) Limited & Others 1981 (3) SA 460).*

29.4 Clause 37.1 read together with clause 37.3 confers the right on the innocent party to terminate the agreement immediately on giving notice to the defaulting party:-

29.4.1 if the defaulting party commits a material breach of any of the terms;

29.4.2 fails to remedy such breach within 7 days of that party being notified in writing of the material breach;

29.4.3 only if the material breach goes to the root of the agreement and is incapable of being remedied by payment in money; and

29.4.4 if it is capable of being remedied by payment in money, the defaulting party fails to pay the amount concerned within 7 days after such amount has been finally determined.

29.5 The agreement has no provision entitling any party to summarily terminate the agreement for breach.

29.6 Before the respondent is conferred with the right to immediately terminate the agreement, it is required to give the applicant notice in writing of the material breach.

29.7 For such notice to be effective the respondent must give full details of all the breaches that it requires to be remedied.

29.8 The respondent's letter of 26 September 2011, purports to summarily terminate the agreement. It is not a notification to the applicant to remedy the breach within the required 7 day period.

29.9 The aim of clause 37.1 is not to undo what has happened in the past but to afford the defaulting party an opportunity to address its conduct and ensure compliance with the agreement in the future.

29.10 There is no evidence that the applicant continued to be in breach of the agreement after it received the letter of 27 September 2011.

29.11 The respondent claims that the breach is incapable of being remedied.

29.12 Whilst it is so that the sale of the airtime cannot be undone, the applicant has after it received the notice, despite the fact that it does not comply with the provisions of clause 37.1, addressed its conduct and removed the terminals from the Balfour and Westonaria branches.

29.13 The applicant has clearly indicated that it intended to comply with the terms of the agreement in the future and not permit the sale of a competitor's airtime from its premises or to use a terminal other than the system provided by the respondent.

29.14 For the applicant's conduct in permitting the sale of a competitor's airtime through a terminal not supplied by the

respondent to amount to a repudiation or anticipatory breach of the agreement, it must exhibit a deliberate and unequivocal intention no longer to be bound by the terms of the agreement.

29.15 Factors to be taken into consideration to determine whether the conduct fairly interpreted amounts to repudiation of the whole of the bargain are:

28.15.1 the character of the contract;

29.15.2 the number and weight of wrongful acts or assertions;

29.15.3 the intention indicated by the acts or words of the applicant;

29.15.4 the deliberation or otherwise with which they are committed or uttered; and

29.15.5 the general circumstances of the case.

(See: *Schlinkmann v Van der Walt* 1947 (2) SA 900; *In re Belange (Edms) Beperk v Pretorius* 1966 (2) SA 427; *Van Rooyen v Minister van Openbare Werke en*

Gemeenskapsbou 1978 (2) SA 835; and *Tuckers Land & Development Corporation (Pty) Limited v Hovis* 1980 (1) SA 645.)

29.16 The onus to prove that the applicant has repudiated the agreement is on the respondent.

29.17 Applying this test and taking into consideration the following factors, it cannot be said that the applicant through its conduct exhibited a deliberate and unequivocal intention no longer to be bound by the agreement. The factors upon which the applicant's conduct must be interpreted are:

29.17.1 the applicant has been an agent for the respondent for 12 years. It is apparently quite successful and operates 6 branches. One of the branches was established by the applicant at the request of the respondent after the previous dealer failed. The applicant employs 21 persons;

29.17.2 the applicant acquired the terminals because the respondent's system was in the experience of the applicant, unreliable;

29.17.3 the applicant requested the supplier of the terminals to deactivate the keys for the sale of airtime supplied by the respondent's competitors;

29.17.4 the respondent's representatives knew of the presence of these terminals at the applicant's premises since the opening thereof and on the respondent's own version, since 12 August 2011;

29.17.5 there was no indication or promotional material visible to the general public that airtime of a competitor could be purchased from the premises;

29.17.6 airtime by its mere definition can only be sold to an existing client of a competitor;

29.17.7 the value of the competitor's airtime sold is insignificant. At the Westonaria branch, only R39.00 worth of Vodacom airtime was sold, of which R29.00 was sold to the respondent's so-called mystery shopper. At the Balfour Branch over the two month period R260.00 worth of Vodacom airtime was sold;

29.17.8 there was no evidence that Mr Olivier, the managing member of the applicant, knew that airtime of a competitor was in fact sold. Mr Olivier in fact claims that he was unaware of the fact that the keys were not disenabled;

29.17.9 the applicant when notified of the breach immediately caused the terminals to be removed;

29.17.10 the respondent knew of the presence of the terminals since 12 August 2011. It did nothing until 19 September 2011.

29.18 The test whether the conduct of the applicant amounts to a repudiation is an objective test. The test is not whether objectively the applicant had the intention but rather whether the applicant's conduct can be perceived to be an unequivocal and deliberate declaration not to be bound by the terms of the contract. The conduct from which the inference is drawn must be clear-cut and equivocal and not consistent with any other feasible hypothesis. (See: *Datacolor International (Pty) Limited v Intamarket (Pty) Limited* 2001 (2) SA 284).

29.19 In applying this test to the applicant's conduct it cannot be said that it exhibits a deliberate and unequivocal intention no longer to be bound by the terms of the contract.

29.20 The respondent has not established the alleged repudiation of the agreement as a basis for the cancellation thereof.

[30] In response thereto, the respondent's Counsel, Advocate B Maselle, made the following submissions:

30.1 Clause 37 of the dealership agreement affords an aggrieved party the right to act in a particular manner should there be a breach of the Dealer Agreement by the other party;

30.2 The respondent relied upon the provisions of *inter alia*, clauses 37.1, 37.3, 38.5 and 38.7;

30.3 The respondent accepted that on a reading of the letter dated 26 September 2011 (annexure "FA2") the applicant was not notified that it was required to remedy the breach within 7 (seven) days, however, who did not assist the applicant inasmuch as a clear reading of clause 37.1 of the Dealer Agreement shows that:

30.3.1 the respondent was obliged to notify the applicant of the material breach;

30.3.2 the respondent was not obliged to request or seek a remedy of the material breach; and

30.3.3 once notice was given of the material breach, the applicant had the obligation to remedy the material breach within 7 (seven) days of receiving notification thereof.

30.4 The aforementioned letter clearly sets out the breach relied upon by the respondent. The notification may not have made reference to any clause of the agreement which the respondent relied upon for the breach, however, it set out the conduct of the applicant who was in breach of the following clauses:

30.4.1 clause 5.1.12;

30.4.2 clause 5.1.18;

30.4.3 clause 5.6;

30.4.4 clause 7.2;

30.4.5 clause 31.2;

30.4.6 clause 42.2; and

30.4.7 clause 42.3.

30.5 Reliance was placed on *Singh v McCarthy Retail Limited t/a Mcintosh Motors* 2000 (4) SA 795 (SCA), which dealt with the issue of when an innocent party is entitled to cancel the contract because of malperformance by the other, in the absence of a *lex commissoria*;

30.6 Although there is a *lex commissoria* in the Dealer Agreement, it was submitted that the aforementioned case was equally applicable to the facts of this matter inasmuch as a material breach was the single most important factor.

30.7 Premised on the test set out in this case, it was contended that the applicant's conduct constituted a flagrant and material breach of the Dealer Agreement, would allow the innocent party to cancel the contract and undo all of its consequences. It was absolutely fundamental that the applicant, and other dealers of the respondent, did not sell or

offer for sale competitive products because of the degree of competition in the industry in question.

30.8 If regard is had to the express terms of the Dealer Agreement and the surrounding circumstances, there can be no doubt that it was a tacit term of the Dealer Agreement that the applicant would at all times act in a trustworthy manner, honestly and with integrity in its dealings with the respondent. (See*: Anglo Operations Limited v Sandhurst Estates (Pty) Limited* 2006 (1) SA 350 (T), at 374H-I)

30.9 On the facts, the applicant had not acted in a trustworthy manner, honestly and with integrity in its dealings with the respondent.

30.10 In terms of clause 37.3 of the Dealer Agreement, the respondent would only be entitled to cancel the agreement if the breach is a material breach going to the root of the contract and if it is incapable of being remedied by payment in money, or if it is capable of being remedied by payment in money, the defaulting party fails to pay the amount concerned within 7 days after such amount has been finally determined.

30.11 The material breaches relied upon by the respondent are incapable of being remedied because:

30.11.1 breach of the tacit term is incapable of being remedied. The trust cannot be restored and is irremediable;

30.11.2 respondent's breach letter complains about applicant selling competing third party prepaid airtime to customers through the applicant's dealer stores;

30.11.3 the breach has nothing to do with "payment in money". It relates to conduct of the applicant which is unlawful. Put another way, the material breach relied upon by the respondent does not relate to a clause where the applicant has failed to make a monetary payment in terms of the Dealer Agreement;

30.11.4 as a result the material breach relied upon by respondent cannot be "remedied by payment in money …";

30.11.5 the material breach can only be remedied by the applicant immediately desisting in its breach, which is in any event irremediable. However, this is irrelevant since the only issue determined is whether the material breach is capable of being "remedied by payment in money …" which it is not.

30.12 Having regard to the aforegoing, the respondent's cancellation is good in law.

30.13 In the alternative, when a party cancels an agreement based on a repudiation, such repudiation is an anticipatory breach which is different to an actual breach of the agreement. Accordingly, the respondent will not need to show that it has complied with the breach clause of the Dealer Agreement. (See *Stewart Wrightson (Pty) Limited v Thorpe* 1977 (2) SA 943 (A), at 953G).

30.14 What is clear from the facts set out in the respondent's answering affidavit, is that in addition to a material breach of the Dealer Agreement, the applicant repudiated the Dealer Agreement which entitled the respondent to cancel same. (See *Tucker's Land & Development Corporation (Pty) Limited v Hovis* 1980 (1) SA 645 (A); *Datacolor International*

(Pty) Limited v Intamarket (Pty) Limited 2001 (2) SA 284 (SCA), at 294 and 295).

30.15 The conduct of the applicant in:-

30.15.1 offering competing products contrary to the terms of the Dealer Agreement;

30.15.2 selling competing products contrary to the terms of the Dealer Agreement; and

30.15.3 acting deceitfully in relation to the aforegoing,

leads one to the ineluctable conclusion that proper performance of the Dealer Agreement by the applicant would not be forthcoming. The respondent therefore had every right to resile from the Dealer Agreement.

[31] Having had regard to the above detailed affidavits, arguments and case law, which formed the subject of debate in the argument of the matter before me, I make the following findings:

31.1 Not only did the applicant install the Cellair terminals contrary to the Dealer Agreement, which terminals were not adapted to sell only the respondent's airtime, contrary to the express

terms of the Dealer Agreement, but its staff had no reluctance or hesitation in selling airtime of the applicant's competitors to members of the public in further blatant defiance of the Dealer Agreement.

31.2 These sales lead to the logical conclusion that not only did the applicant's staff know that they could do so, but members of the public also knew that it was possible to purchase airtime of Third Party Competitors of the respondent from the applicant's stores.

31.3 This conduct is the clearest indication that the applicant exhibited a deliberate and unequivocal intention to no longer be bound by the terms of the Dealer Agreement.

31.3 In coming to this conclusion, I have taken the following factors into consideration in order to determine whether the conduct fairly interpreted amounted to a repudiation of the whole of the agreement:

31.3.1 the character of the contract;

31.3.2 the number and weight of wrongful acts or assertions;

31.3.3 the intention indicated by the acts or words of the applicant;

31.3.4 the deliberation or otherwise with which they are committed or uttered; and

31.3.5 the general circumstances of the case.

31.4 Clause 1 of the agreement under the heading “Preamble” identifies the very purpose and motivation of the agreement and explains that the respondent conducts business as an exclusive cellular telephony service provider and wishes to appoint the applicant to market, promote and facilitate distribution by the respondent of network services and stock in the territory and that the applicant wishes to accept such appointment. In turn, the respective rights and obligations of the parties are thereafter set out in accordance with this appointment.

31.5 The applicant’s sole member, Mr Olivier is contractually obliged to take responsibility for the conduct of his staff. Clause 5.1.14 provides in express terms that the Dealer undertakes, throughout the term of the Dealership Agreement to exercise full control over and take full

responsibility for its Authorised Employees, their acts and/or omissions.

31.6 In terms of clause 5.6, the applicant undertook to utilise the Point Of Sale systems/s (POS) chosen by the respondent as and when stipulated by the respondent.

31.7 A recent, very similar reported matter is that of *BP Southern Africa (Pty) Limited v Mahmood Investments (Pty) Limited* [2010] 2 All SA 295 (SCA), which similarly dealt with *inter alia*, a supply agreement that provided that a respondent was obliged to only utilise a particular property, in which that appellant had expended large sums of money to market its brand, being BP and to sell its products exclusively. Clause 10.2 in that matter provided as follows:

> "*No petroleum fuels, products and/or lubricants other than those manufactured and supplied by the seller and/or any other manufacturer/distributor approved by the seller in writing shall be stored, handled, sold or distributed or dealt with in any manner whatsoever on or from the said property, save for the prior written consent of the Transferor."*

31.8 In that matter, it was held at paragraph 11:

It is settled law that a contractual provision must be interpreted in its context, having regard to the relevant circumstances known to the parties at the time of entering into the contract. (KPMG Chartered Accounts (SA) v Securefin Limited). *It is also clear that a provision must be given a commercially sensible meaning. In this regard, see Bekker NO v Total South Africa (Pty) Ltd and Ekurhuleni Metropolitan Municipality v Germiston Municipal Pension Fund..."*

31.9 Further at paragraph 12, the following appears:

"*BP argues that the construction of the provision as imposing a positive obligation on Mahmood Investments, is consonant with the business efficacy of the agreement. That is to be viewed in the light of all the circumstances relevant to the sale of the property. These include the fact that BP had developed the property by constructing a garage and petrol filling station on it. It sold this to Mahmood Investments on the basis that a supply agreement would be entered into: indeed the sale was conditional (in the true sense) on the supply agreement being concluded. This would have made no sense had it been intended that after the agreement was concluded,*

and the property transferred to Mahmood Investments, the latter would be entitled to hold the property and not to operate a filling station on it. The contract of sale would not have made commercial sense but for the conclusion of the supply agreement and the operation of the filling station."

31.10 Analogous to the preamble of the agreement in this matter, the supply agreement in that matter had a clause 2 which was headed "fundamental underlying basis of this agreement", which provided that the dealer (Mahmood Investments in that case) was about to become the owner of the premises. Clause 2.2 recorded that BP had invested a substantial amount of capital for the purpose of optimising the operational and marketing structure of the premises including the buildings, the forecourt, the dispensing and service station equipment and the visual standards. These provisions clearly signified that the underlying basis of the sale agreement was an obligation to operate a filling station on the premises sold for the purpose of selling the products supplied by BP.

31.11 Similarly to the provision in this matter, allowing for inspections and access to the property, clause 6 in that

matter provided that BP would have rights of access to the property, to inspect and maintain the equipment.

31.12 In that matter BP alleged that Mahmood Investments had in fact breached clause 8 of that agreement which set out its obligations as a dealer to run the filling station and to stock and supply only BP Products, which conduct constituted a breach of the sale agreement that entitled BP to cancel it.

31.13 In that matter, Mahmood Investments had sold to Argyle and Argyle was stocking and selling products of other suppliers. This is even further removed than the facts that are before me in this matter.

31.14 At paragraph 32, the following was held:

> "*It was not BP that repudiated the sale and supply agreement. Mahmood Investments repudiated both contracts in refusing to perform its obligation to operate a filling station on the property. It evinced a clear intention no longer to be bound by the contracts, demanding removal of the pumps and the tanks, and stating that it had no intention of running a filling station.*"

31.15 Furthermore in that matter, it was argued that BP did not rely on a repudiation in its founding papers. In paragraph 35, the following was held:

> "*It is true that the word "repudiation" is not used. But BP does rely on breach. And the breach it alleges is a refusal to operate a filling station. That is a repudiation. The absence of the label is irrelevant."*

31.16 The breach of agreement complained of here, which comprises of the conduct by the applicant's employees in installing and utilising the Cellair terminals to sell airtime in respect of Competing Third Parties of the respondent, constitutes, in my opinion a material breach going to the root of this agreement, which is incapable of being remedied by payment in money as envisaged in clause 37.3 of the Dealership Agreement.

31.17 The change of tack by the respondent, in relying on a ground for cancellation different from the one referred to in its letter of cancellation, by itself, was not of any consequence. In the circumstances, the respondent was entitled to rely upon the breakdown in the relationship between the parties as is evidenced, not only by the conduct of the applicant's employees at its Balfour shop, but also at its Westonaria

shop. As Nienaber JA said in *Datacolor International (Pty) Limited v Intamarket (Pty) Limited* 2001 (2) SA 284 (SCA) at para 28:

> "*It is settled law that an innocent party, having purported to cancel on inadequate grounds, may afterwards rely on any adequate ground which existed at, but was only discovered after the time. (cf Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd & Other Related Cases* 1985 (4) SA 809 A at 832C-D*)",* see also *Government of RSA v Thabiso Chemicals (Pty) Limited* 2009 (1) SA 163 (SCA), at para 9.

31.18 A similar approach was followed in the decision of *Sewpersadh v Dookie* 2009 (6) SA 611 (SCA), where it was held that any defect in the letter of demand can be cured by a reliance upon a breach in a founding affidavit and that such a course of action would be sufficient both in the trial court and in the appeal court.

31.19 In this matter, the applicant evinced a clear intention no longer to be bound by the contract to exclusively stock and supply MTN's products. This constitutes a repudiation.

31.20 Taking account of the prevailing circumstances, the respondent was therefore entitled to cancel the agreement on the basis of this repudiation, even if it never referred to the term “repudiation”.

[32] It was against these facts and findings that I held that the application fell to be dismissed with costs.

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L M HODES S.C
ACTING JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG