



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case No: 749/2020

In the matter between:

EDWIN HUBERT VAN DER MERWE

APPELLANT

and

BONNIEVALE PIGGERY (PTY) LTD

RESPONDENT

Neutral citation: *Van der Merwe v Bonnievale Piggery (Pty) Ltd* (749/2020)
[2021] ZASCA 162 (1 December 2021)

Coram: SALDULKER ADP and SCHIPPERS, NICHOLLS,
MBATHA and HUGHES JJA

Heard: 4 November 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 09h45 on 1 December 2021.

Summary: Contract – interlinked contracts for sale of pork products – prices in sale contract market related – parties unable to reach agreement on price – no consensus – contractual arrangement ended – counterclaim for breach of contract – party allegedly failing to adjust prices – not giving written notice of inability to do so – not proved – delict – unlawful competition – use of confidential information to poach customers – not established – appeal dismissed.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Binns-Ward, Steyn and Sher JJ, sitting as court of appeal):

The appeal is dismissed with costs, including the costs of only senior counsel.

JUDGMENT

Schippers JA (Saldulker ADP and Nicholls, Mbatha and Hughes JJA concurring)

[1] The appellant, Mr Edwin van der Merwe (the defendant), is a former seller of slaughtered pig carcasses (carcasses), supplied by the respondent, Bonnievale Piggery (Pty) Ltd (the plaintiff), which keeps and rears pigs for slaughter, under a series of interlinked agreements. In 2013 the plaintiff instituted action against the defendant for payment of R1 196 868,84, which was the outstanding balance due in respect of carcasses supplied to the defendant, interest and short payment of purchases.

[2] Part of the defendant's initial defence to the action was that he had been overcharged for carcasses purchased, and that the plaintiff had not complied with the requirements of the National Credit Act 34 of 2005 (the NCA) by granting him credit without being registered as a credit provider. The defendant also alleged that he had a claim against the plaintiff for breach of contract, alternatively delict, for unlawful competition, that exceeded the amount of the plaintiff's claim.

[3] The case was tried before Parker J in the Western Cape Division of the High Court, Cape Town. The parties agreed to a separation of the issues in terms of rule 33(4) of the Uniform Rules of Court (the Rules) as follows:

‘The issue of quantum and causation of the defendant’s counterclaim (in the event of liability being established) is stayed until the other issues in dispute between the parties are disposed of.’

It is plain that causation, an essential element of a delictual claim, should not have been separated from the defendant’s claim for unlawful competition. To do so was misconceived. This Court has repeatedly stated that a trial court must be satisfied that it is proper to make an order under rule 33(4), which should be made only after ‘careful thought has been given to the anticipated course of the litigation as a whole that it will be possible properly to determine whether it is convenient to try an issue separately’.¹

[4] Aside from this, the trial judge made an order that the defendant had ‘successfully established liability by the plaintiff and . . . [was] entitled to claim such damages as may be proved in due course’, apparently on the basis of breach of contract. This order however was made in circumstances where the defendant had invoked rule 22(4) of the Rules, which required the judgments on the plaintiff’s claim and the claim in reconvention to be given *pari passu*.²

[5] In the trial court the defendant’s counsel conceded that the defendant had received and was obliged to pay for the carcasses referred to in the invoices that formed the subject of the particulars of claim. The trial judge however dismissed

¹ *Denel (Edms) Bpk v Vorster* 2004 (4) SA 481 (SCA) para 3; *Government of the Western Cape: Department of Social Development v C B and Others* [2018] ZASCA 166; 2019 (3) SA 235 (SCA) paras 19-21.

² Rule 22(4) in relevant part reads:

‘If by reason of any claim in reconvention, the defendant claims that on the giving of judgment on such claim, the plaintiff’s claim will be extinguished either in whole or in part, the defendant may in his plea refer to the fact of such claim in reconvention and request that judgment in respect of the claim or any portion thereof which would be extinguished by such claim in reconvention, be postponed until judgment upon the claim in reconvention. Judgment on the claim shall, either in whole or in part, thereupon be so postponed’

the plaintiff's claim with costs. The plaintiff was granted leave to appeal to a full bench of the high court.

[6] Before the full court it was conceded by the defendant's counsel that the point based on the NCA had no merit. He informed the full court that the point had been abandoned at the trial, but that did not appear from the record or the judgment of the trial judge. The defendant also abandoned his claim for payment of the amounts overcharged by the plaintiff. That left the nature of the parties' business relationship and whether the defendant had established his claim in reconvention, namely that he had suffered damages because of the plaintiff's alleged breach of contract and unlawful competition.

[7] The full court (Binns-Ward, Steyn and Sher JJ) upheld the appeal. It held that the business relationship between the parties had come to an end in July 2012 when they could not agree on a price for carcasses, and that the defendant's counterclaim based on breach of contract and unlawful competition could not be sustained on the evidence. The full court set aside the trial court's order and granted judgment against the defendant in favour of the plaintiff for payment of the sum of R1 196 868,84, together with interest and costs. It dismissed the claim in reconvention with costs. The appeal is before us with the leave of this Court.

[8] Before us the parties accepted that the defendant's claim of unlawful competition should be decided, despite the fact that the element of causation had been excluded from the issues for decision under rule 33(4). It was also accepted that on the evidence, the full court had been in a position to decide both the claims in convention and reconvention.

[9] The basic facts were largely common ground. In 2005 the parties orally entered into a business relationship which included: (i) contracts for the sale of

carcasses concluded on the basis of periodically agreed prices; (ii) an exclusive supply agreement; and (iii) a sole distributorship agreement. The business relationship, and with it the interlinked contracts, were of indefinite duration and terminable at the instance of either party.

[10] The plaintiff granted the defendant a credit facility in terms of which he agreed to pay amounts due for carcasses within 14 days of the date of invoice, and interest at 2% above the prime rate in the event that he failed to do so. The defendant concluded a written cession of his book debts to the plaintiff as security for his obligations under the credit facility (the cession of book debts). In terms of the cession of book debts, the defendant undertook to furnish the plaintiff at regular intervals with particulars of all his debtors, the amount of their indebtedness and details of securities held for those debts.

[11] In terms of the supply agreement, the plaintiff agreed to supply carcasses to the defendant at reasonable, market related wholesale prices that would follow market fluctuations. From the outset it was agreed that the plaintiff would also supply pigs to Winelands Pork, a pig-slaughtering abattoir and wholesale business involved in a joint venture with the plaintiff, as the defendant did not buy all the plaintiff's pigs and they had to be sold elsewhere. Under the distributorship agreement the defendant exclusively sold carcasses to the retail market for his own account and under his own brand to customers in the Western Cape. He agreed not to sell carcasses in the area in which Winelands Pork sold its products. The parties agreed not to compete in their respective areas of distribution.

[12] The prices at which carcasses were sold to the defendant in the various contracts of sale were negotiated and changed at least four times a year, and depending on what happened in the market in the Western or Southern Cape,

would move either up or down. Prices were determined according to the size of carcasses and the season. Broadly, smaller carcasses fetched higher prices than ones in the heavyweight category. The prime marketing period for pork generally was from October to December each year. During the winter months the turnover of carcasses was lower because the pigs remained longer in the plaintiff's pens and grew in size and weight. This was a recurrent situation which resulted in an oversupply of pigs, which the defendant referred to as a 'bottleneck'.

[13] Throughout their relationship and despite constant arguments about prices, the parties were able to address the problem of oversupply of pigs by reaching agreement on prices in the numerous sale agreements between 2005 and 2012. The defendant had often complained that the prices were too high, but ultimately accepted them. However, in July 2012 the parties were unable to reach agreement on the price for some 1300 pigs in the heavyweight category that needed to be taken out of the plaintiff's piggery. Consequently, the parties' business relationship came to an end.

[14] The plaintiff's claim was for payment of carcasses delivered to the defendant in January and February 2013. As stated, the defendant conceded that he had obtained the benefit of those carcasses and had to pay for them. He asserted that the amount counterclaimed for loss of profits should be set off against any amount granted in judgment by the trial court. In his evidence the defendant confirmed receipt of the carcasses forming the subject of the plaintiff's claim and that he had intended to pay the amount demanded. He said that he started withholding payments from the plaintiff because he realised that he would have to close his business, he had no money and there were 14 families dependent on the work which he provided.

[15] The plaintiff had thus established its claim and it should not have been dismissed by the trial court at the end of the first stage hearing. That this was a misdirection was conceded by the defendant's counsel before the full court. The alleged breach of what the defendant called a 'Supplier/Distribution Agreement' and a 'sole and exclusive distributorship', that formed the basis of the counterclaim, did not detract from the plaintiff's entitlement to payment of carcasses sold and delivered to the defendant under the sale agreements, for on-sale by the defendant.

[16] The remaining issue then is whether the defendant had proved breach of contract and unlawful competition as alleged in his counterclaim. As to the former, he asserted that in terms of a supplier/distribution agreement, the plaintiff had agreed to supply him with carcasses 'at reasonable and market wholesale prices'; that it would reduce those prices if there were negative market price fluctuations; and that the plaintiff would furnish him with written reasons if it was unable to adjust its prices. He alleged that in the course of the agreement the parties would become privy to confidential information and operational secrets. They had agreed, so it was alleged, that they would not utilise this information for their own advantage, and specifically that they would not solicit or accept business from each other's customers.

[17] The defendant averred that in terms of the sole and exclusive distributorship, the prices of products sold to him 'would be market related and follow market trends up or down' and be linked to those charged to Winelands Pork, with a premium of 40c per kilogram excluding a slaughtering fee of R1 per kilogram. During the existence of the agreement or thereafter, the plaintiff would not canvass or sell pork products to the defendant's customers or compete with him in any way.

[18] The defendant alleged that the plaintiff had breached the distributorship agreement in the following respects. It refused to adjust its pork prices downwards in accordance with prevailing market trends. Between July 2011 and February 2013 the plaintiff increased the margin of prices charged to the defendant but not to Winelands Pork. From July 2012 it refused to deliver sufficient product for the defendant to service his market, as a result of which the defendant was forced to purchase pork products from Hunters Vlei, a competitor of the plaintiff. From June 2012 to February 2013, and with a view to putting him out of business, the plaintiff had unlawfully competed with the defendant by selling pork products directly to his customers at lower prices.

[19] As a result of the plaintiff's alleged breach of contract and unlawful competition, the defendant had been overcharged in the amount of R851 900,12 over a period of 20 months, totalling some R2.5 million. The defendant asserted that he had suffered a loss of profits in the sum of R12 467 307,73 in respect of his category A clients (those exclusively supplied by the defendant). He inferred that he had suffered a loss in the same amount in relation to his category B clients (whom the defendant did not exclusively supply).

[20] In its plea to the counterclaim the plaintiff admitted that it would have obtained confidential information by virtue of the cession of book debts, but denied that it had unlawfully competed with the defendant. The plaintiff also denied the defendant's allegations regarding breach of contract and pleaded that the sales agreement could in any event not continue because the parties could not reach agreement on the selling price of pork products.

[21] The question of what would happen to their business relationship and the interlinking agreements if the parties could not agree on a price for carcasses was at the heart of the dispute between them. In July 2012 the dispute about the price

of some 1300 pigs that had to be cleared out of the plaintiff's pens had reached an impasse, as neither side would compromise. Around 17 July 2012 there was a meeting at a coffee shop in Bonnievale to resolve the impasse. Mr Johan Broodryk, the owner of Bonnievale Abattoir, agreed to reduce the slaughtering fee charged to the defendant. Mr Burger, on behalf of the plaintiff, was willing to reduce the price of carcasses. The defendant was asked to sell the oversupply at lower profit margins. The parties however could not reach agreement on the price which, the full court held, resulted in the failure of the entire contractual scheme through no fault of either of them.

[22] However, before us counsel for the defendant submitted that the parties could not reach agreement on the purchase price because the plaintiff had failed to adjust its prices downwards. This, it was argued, was borne out by the objective facts and evidence. After the July 2012 meeting the defendant had written to the plaintiff informing it of the prices at which it could sell the 1300 carcasses, to which it never received a reply. The next thing the defendant knew, so it was submitted, was that the plaintiff had delivered a large amount of carcasses to the defendant's main customer and excluded him as the middleman, which was 'a planned strategy'.

[23] These submissions are unsound. There is no evidence that the plaintiff breached the sales or supply agreement because it failed to adjust prices downwards. That much is clear from the defendant's own evidence. He conceded that in all the years until July 2012, he had accepted the prices of carcasses, even when there was no downward adjustment that he wished for. On those occasions he had made a loss or a very small profit. As the defendant put it: 'So there were times when I did not agree and then I just tried to deal with it' (My translation).³

³ 'So daar is tye wat ek nie saamgestem het nie en dan het ek dit maar probeer verwerk.'

And contrary to the defendant's assertion, there was simply no evidence that the plaintiff had undertaken to furnish him with written reasons if it was unable to adjust its prices.

[24] The facts militate against an inference of any planned strategy to exclude the defendant from the contractual arrangement with the view to taking over his customers. Rather, the evidence shows the contrary. It was never suggested, nor could it be, that the meeting at Bonnievale was not a genuine attempt to resolve the impasse on price. The defendant's own actions after that meeting are consistent with his acceptance that the parties' business relationship had come to an end.

[25] On 24 July 2012, some seven days after the Bonnievale meeting – and after the plaintiff allegedly had sold pork products to his customer, Striker Meats – the defendant wrote to the plaintiff as follows:

'Due to your action to market pigs on your own it is very important that I must know the following:

1. Availability of pigs from today until the 1st of October.
2. Availability from the 1st October forward.

I need your urgent reply because I have to secure my business and for future marketing.'

This letter does not contain a hint of any breach of contract, let alone that the plaintiff had breached the distribution agreement, by refusing to adjust its pork prices downwards and delivering insufficient product to the defendant, as alleged in the counterclaim. This, when on the defendant's version the supply and distributorship agreements were still extant. The letter also says nothing about unlawful competition.

[26] What is more, in a letter to the plaintiff dated 4 September 2012, the defendant proposed a new arrangement. He expressed his willingness to sell all

the plaintiff's pigs to customers at fixed prices to be agreed upon. He suggested that certain customers be charged a higher price than others. In evidence the defendant conceded that this was an attempt to conclude a new agreement with the plaintiff. It was the clearest indication that the defendant accepted that the parties' contractual arrangement had terminated at the end of July 2012. The full court thus correctly concluded that the cancellation question, ie whether the plaintiff had cancelled the contractual arrangement because the defendant had bought carcasses from a competitor, was immaterial.

[27] Moreover, the attempt to conclude a new agreement was directly at odds with the defendant's case that the plaintiff had from 'September 2012 onwards, in breach of the (still existing) agreement' sold products directly to his customers. And when he wrote the letter of 4 September 2012, the defendant himself was delivering pork products on behalf of the plaintiff to his former customers.

[28] It was common ground that there was never a fixed price and the standard according to which the price had to be determined, had to be market related. Although the concept 'market related price' is not a precisely defined term, it was not necessary for the parties, in order for their contract to be valid and not void for vagueness, to formulate a precise mathematical criterion for the determination of the price.⁴ The parties had to negotiate the price for each sale. They had always managed to reach agreement on price or, at the very least, the defendant accepted the price even in the absence of a downward adjustment that he sought, until 2012, when there was a deadlock: the parties could not reach consensus. There was no objectively determinable external standard or mechanism to resolve this deadlock, such as the determination of the price by a third party.⁵

⁴ *Letaba Sawmills (Edms) Bpk v Majovi (Edms) Bpk* [1993] 1 All SA 359; 1993 (1) SA 768 (A) at 775A-C.

⁵ Compare *Letaba Sawmills (Edms) Bpk v Majovi (Edms) Bpk* [1993] 1 All SA 359; 1993 (1) SA 768 (A) at 774B-C.

[29] The submission by the defendant's counsel that there was an external standard according to which the price could be determined, namely reasonable and market related wholesale prices that followed market fluctuations, is correct. But this was not a deadlock-breaking mechanism. The market related price was simply a measure according to which prices would be negotiated. It was no more than an indicator that oriented the parties to prices at which carcasses generally were sold in the industry: the relevant market would provide the framework within which the prices for carcasses in each sale would be negotiated and determined. Put differently, the parties agreed that the price of carcasses would be related or connected to pork market prices, and determined by negotiation. They did not agree that the price of carcasses would be charged at the prevailing market price in the various contracts of sale, or in the event that the parties could not themselves agree on a price.

[30] The defendant's claim for damages in contract was based on the plaintiff's alleged breach of the sole distributorship agreement. The defendant claimed that the plaintiff, utilising confidential information (obtained by virtue of the cession of book debts), had canvassed his category A customers and sold pork products to them at lower prices, between the end of June 2012 and the end of February 2013. From September 2012 onwards the plaintiff sold directly to the defendant's category B customers. It was argued that the plaintiff had wilfully created the situation in June/July 2012 so as to 'convert' itself to a wholesaler, on the back and in the place of the defendant.

[31] When the parties could not reach consensus on the price of carcasses in July 2012, the contractual arrangement, and with it the sole distributorship agreement, came to an end. On the facts, the defendant thereafter raised no complaint of breach of contract (or unlawful competition) by the plaintiff. He continued to purchase carcasses from the plaintiff on an *ad hoc* basis on credit,

but in lesser quantities, secured by the credit facility. Contrary to the conclusion of the trial court, there was nothing ‘ludicrous’ about the credit facility and the cession of book debts continuing in existence after the termination of the parties’ business relationship. The defendant accordingly had no enforceable cause of action in contract.⁶

[32] Before us counsel for the defendant fairly conceded that in the absence of direct evidence of a planned strategy by the plaintiff to exclude the defendant as the middleman (or engineering a situation so as to become a wholesaler), the Court was asked to draw such an inference from the proved facts. Given the facts stated in paragraph 24 to 26 above, and specifically the parties’ efforts to resolve the impasse on price in 2012 and the defendant’s attempt to negotiate a new contract, the inference sought is neither plausible nor readily apparent.⁷ Any suggestion that Mr Broodryk, the owner of Bonnievale Abattoir, was party to a scheme to take over the defendant’s business, is absurd.

[33] Regarding the plaintiff’s claim for contractual damages, the trial court made findings of fact that were unsupported by the evidence, and critical to its decision that the defendant had established liability on the part of the plaintiff. It found that in the cession of book debts, the plaintiff:

‘. . . actually confirmed in writing that it has access to confidential information that is of substantial value to the defendant and in respect of which the defendant is entitled to protection.’

The judge went on to say:

‘. . . I see no reason why the plaintiff should not be held liable to that which it agreed to in writing in this regard.’

⁶ *Liberty Group Ltd and Others v Mall Space Management CC t/a Mall Space Management* [2019] ZASCA 142; 2020 (1) SA 30 (SCA) para 32.

⁷ *Ocean Accident and Guarantee Corporation Ltd v Koch* 1963 (4) SA 147 (A) at 159A-D, affirmed in *Kruger v National Director of Public Prosecutions* [2019] ZACC 13; 2019 (6) BCLR 703 (CC) para 79.

[34] Aside from the defendant's credit application, the cession of book debts was the only written agreement concluded between the parties. The cession however contains no acknowledgement by the plaintiff of access to confidential information in respect of which the defendant was entitled to protection. In fact, the defendant's case was that the plaintiff had orally agreed to non-disclosure of confidential information: the counterclaim states that it 'was *understood* that in the course of the Supplier/Distributor Agreement the parties would become privy to confidential information and operational secrets'.⁸ And the defendant adduced no evidence of this so-called confidential information and operational secrets. Solely for these reasons, the trial court's order that the defendant had established liability on the part of the plaintiff was unsustainable.

[35] There are further reasons why the order cannot be sustained. The trial court stated that the facts of the matter were 'tantamount to a restraint agreement', and that 'unlawful interference in the business of the defendant' could 'occur in various forms'. It then proceeded to apply the principles relating to restraint of trade agreements to the contractual relationship between the parties and held that 'the defendant had a protectable interest in the form of confidential information that the plaintiff had access to', which the plaintiff had breached. The judge concluded:

'I thus find that the plaintiff has failed to discharge the burden of proving that the restraints are not justified on the basis of protecting confidential information or trade connections. The contractual terms in the distribution agreement for the protection of confidential information are enforceable.'

[36] There was of course no onus on the plaintiff to prove any of the claims asserted in the defendant's counterclaim. The trial court conflated unlawful interference in the defendant's business (unlawful interference with contractual

⁸ Emphasis added.

relations – a delictual claim) with agreements in restraint of trade. It then applied the principles in *Basson*⁹ concerning the reasonableness of a restraint of trade agreement and came to the conclusion that the defendant had breached the sole distributorship agreement, ie that its terms were enforceable. This was a material error of law: there was no restraint of trade agreement between the parties. The issue was whether the plaintiff had breached the sole distributorship agreement or competed unlawfully with the defendant.

[37] Furthermore, the information that the defendant furnished in the cession of book debts was not given in circumstances giving rise to an obligation of confidence. The cession of book debts was nothing more than a standard security cession concluded by a debtor buying goods from a supplier. For such cession to be effective, the cessionary must necessarily have access to details of the cedent's debtors and the prices at which it sells goods to them in order to enforce its rights under the agreement.

[38] Apart from this, the information furnished by the defendant was not confidential in nature, having the necessary quality of confidence deserving of protection. The prices of pork products, the main participants in the industry who were fiercely competitive, who their customers were and the prices charged by them, were all matters of public knowledge. Indeed, the evidence shows that the defendant had utilised this very information, which was in the public domain, when negotiating prices with the plaintiff in the various contracts of sale.

[39] What all of this shows is that the defendant failed to prove that the plaintiff had breached the sole distributorship agreement. The full court rightly dismissed his claim on this ground.

⁹ *Basson v Chilwan and Others* [1993] 2 All SA 373 (A); 1993 (3) SA 742 (A) at 767F-H.

[40] The defendant's alternative claim of unlawful competition can be dealt with shortly. It was submitted that the plaintiff's conduct was 'the most classic case of unlawful interference with a contractual relationship', and that it wilfully created the situation in July 2012 to become a wholesaler in place of the defendant. The latter submission however has no basis in the evidence for the reasons already advanced.

[41] In *Schultz v Butt*,¹⁰ unfair competition was described thus:

'As a general rule, every person is entitled freely to carry on his trade or business in competition with his rivals. But the competition must remain within lawful bounds. If it is carried on unlawfully, in the sense that it involves a wrongful interference with another's rights as a trader, that constitutes an *injuria* for which the Aquilian action lies if it has directly resulted in loss.'

[42] Since the delict of unlawful competition is based on the Aquilian action, the defendant had to prove wrongfulness. It is only when the competition is wrongful that it becomes actionable. In *Phumelela v Gründlingh*,¹¹ the Constitutional Court formulated the test for wrongfulness as follows:

'The question is whether, according to the legal convictions of the community the competition or the infringement on the goodwill is reasonable or fair when seen through the prism of the spirit, purport and objects of the Bill of Rights. Several factors are relevant and must be taken into account and evaluated. These factors include the honesty and fairness of the conduct involved, the morals of the trade sector involved, the protection that positive law already affords, the importance of competition in our economic system, the question whether the parties are competitors, conventions with other countries and the motive of the actor.'

[43] The defendant simply failed to establish wrongfulness. The plaintiff's conduct would have been wrongful only if it had intentionally induced the

¹⁰ *Schultz v Butt* [1986] 2 All SA 403 (A); 1986 (3) SA 667 (A) at 678F-H.

¹¹ *Phumelela Gaming and Leisure Limited v Gründlingh and Others* [2006] ZACC 6; 2006 (8) BCLR 883 (CC); 2007 (6) SA 350 (CC) para 34; *Masstores (Pty) Limited v Pick 'n Pay Retailers (Pty) Ltd* [2016] ZACC 42; 2017 (1) SA 613 (CC); 2017 (2) BCLR 152 (CC) para 29.

defendant's customers to breach their contract with him.¹² There was however no evidence as to the nature and content of any contractual relationship between the defendant and any of his customers. The high watermark of his case on this score was that he had been informed by the owner of Striker Meats that the plaintiff had decided to exclude the defendant from the sale of pork products, which in any event was inadmissible hearsay evidence. In short, there was no factual or legal basis for the defendant's claim of unlawful competition.

[44] What remains is the submission on behalf of the defendant that the trial judge had made 'strong and well-reasoned credibility findings' against the plaintiff's main witness, Mr Burger, to which the full court was bound. It suffices to say that the full court was in a position to come to a clear conclusion that the trial court was plainly wrong, and little weight could be attached to its credibility findings.¹³ Regarding costs, both parties were ably represented by only senior counsel in the trial and the appeal before the full court. Consequently, the costs of two counsel in this appeal are not justified.

[45] In the result, the appeal is dismissed with costs, including the costs of only senior counsel.

A SCHIPPERS
JUDGE OF APPEAL

¹² *Masstores (Pty) Limited v Pick 'n Pay Retailers (Pty) Ltd* [2015] ZASCA 164; 2016 (2) SA 586 (SCA); [2016] 2 All SA 351 (SCA) para 22.

¹³ *Bernert v Absa Bank Ltd* [2010] ZACC 28; 2011 (4) BCLR 329 (CC); 2011 (3) SA 92 (CC) para 106.

Appearances

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