IN THE HIGH COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE CASE NO. 99/2012

In the matter between:

SUNLA INVESTMENTS (PTY) LIMITED **PLAINTIFF**

and

INYATSI CONSTRUCTION LIMITED **DEFENDANT**

Neutral Citation : Sunla Investments (Pty) Limited and Inyatsi Construction Limited (99/2012) [2019] SZHC 185 (10th December 2019)

Coram : MABUZA – PJ

Heard : 2016, 2017, 2018

Delivered : 10th December 2019

SUMMARY

Law – The Plaintiff sued the Defendant for payment of the sum of E4, 966,517.00; interest at the rate of 9%, and costs – Defendant denied being indebted to the Plaintiff as alleged - Defendant further filed a counterclaim for payment of E738, 650.00; interest at 9% and costs – Plaintiff denies being indebted to the Defendant as alleged.

MABUZA -PJ

[1] The Plaintiff is Sunla Investments (Pty) Ltd, a company with limited liability duly registered and incorporated in accordance with the company laws of the Kingdom of ESwatini, formerly carrying on the business of a Supermarket at Shop No. 1, Inyatsi House, Lot 760, Dr. Hynd Street, Trelawney Park, Manzini, having as its registered office at the above address.

[2] The Defendant is Inyatsi Construction Limited, a company with limited liability duly registered and incorporated under the laws of the Kingdom of ESwatini with its principal place of business situate at Inyatsi House, Lot 760, Dr. Hynd Street, Trelawney Park, Manzini.

[3] The Plaintiff sued the Defendant for:

(a) Payment of the sum of E4, 966,517.00 (Four million nine hundred and sixty six thousand five hundred and seventeen Emalangeni.

(b) Interest thereon at the rate of 9% from date of summons to date of payment

(c) Costs of suit

(d) Further and/or alternative relief

(e)
(f)

[4] The amount claimed is made up of:

a) Loss of profit in the amount of E4, 646,517.00 (Four Million, Six Hundred and Forty Six, Five Hundred and Seventeen Emalangeni) calculated as follows:

	Business Loss
2009	75283
2010	558769
2011	688177
2012	792000
2013	871200
2014	958320
2015	702768
Total	4646517

b) The sum of E320, 000.00 (Three Hundred and Twenty Thousand Emalangeni) being the value of equivalent, fixtures and fittings purchased from the Plaintiff landlord at a price of E120, 000.00 = or plus E200, 000.00

[5] The Defendant denies being liable to the Plaintiff for the amount (s) claimed and prays that the Plaintiff's claim be dismissed with costs.

[6] The Defendant filed a counterclaim which it alleged was conditional upon a finding of the validity of the lease agreement. In it the Defendant claimed the following:

(a) Payment of the sum of E738 650.00 (Seven Hundred and Thirty Eight Thousand Six Hundred and Fifty Emalangeni);
(b) Interest on the sum of E738 650.00 at the rate of 9% per annum a *termpore morae* to date of final payment;

(c) Costs of suit;

(d) Further and/or alternative relief.

[7] The Defendant's claim arises from clauses 1.20 to 1.20.11 and 1.2014 of the agreement of lease between Oxford Leasing Company (Eswatini) and Save and Smile Supermarket.

[8] I set out herein under the moneys alleged to be owing by the Defendant per respective clause:

a) The Defendant's proportionate costs at the rate of 95 square meters over a period of 55 (fifty five months) commencing from the date of occupation amounting to E94, 050.00 (Ninety Four Thousand and Fifty Emalangeni) (clause 1.20);

b) Cleaning expenses for the building amounting to E7, 500.00 (Seven Thousand Five Hundred Emalangeni) per month. The Plaintiff's proportionate share from the commencement of the lease amounting to E2, 750.00 (Two Thousand Seven Hundred and Fifty Emalangeni) (clause 1.20.1);

c) Security expenses the Plaintiff's proportionate share being E747.00 (Seven Hundred and Forty Seven Emalangeni) per month over a 55(fifty five) month period amounting to E41, 085.00 (Forty One Thousand and Eighty Five Emalangeni) (clause 1.20.2);

d) The Plaintiff's proportionate share for lift maintenance amounts to E214.00 (Two Hundred and Fourteen Emalangeni) per month over

a period of 55 (fifty five) months period amounting to E11 700.00 (Eleven Thousand Seven Hundred Emalangeni) (clause 1.20.3);

e) The Plaintiff's proportionate share of water and electricity at the rate of E3, 000.00 (Three Thousand Emalangeni) per month over a period of 55 months amounting to E165, 000.00 (One Hundred and Sixty Five Thousand Emalangeni) (clause 1.20.5);

f) The Plaintiff's proportionate share of the amenities at the rate of E144.00 (One Hundred and Forty Four Emalangeni) per month over a 55 (fifty five) months amounting to E7 920.00 (Seven Thousand Nine Hundred and Twenty Emalangeni) (clause 1.20.6);

g) The Plaintiff's proportionate share of the cost of repairs general maintenance painting and salaries being E300.00 (Three Hundred Emalangeni) over a 55 month period amounting to E16 500.00 (Sixteen Thousand Five Hundred Emalangeni) (clause 1.20.8);

h) The Plaintiff's proportionate share of the air conditioning maintenance and running costs in respect of the common areas at a rate of E333.00 (Three Hundred and Thirty Three Emalangeni) over a (fifty five) month period amounting to E18 315.00 (Eighteen Thousand Three Hundred and Fifteen Emalangeni) (clause 1.20.9 and 1.20.10);

i) The Plaintiff's proportionate share of the administrative costs being E234.00 (Two Hundred and Thirty Four Emalangeni) over a fifty five (55) month period amounting to E12 780.00 (Twelve Thousand Seven Hundred and Eighty Emalangeni).

j) The Plaintiff's proportionate share of the accounting and secretarial fees amounting to E187.00 (One Hundred and Eighty Seven Emalangeni) over a 55 (Fifty Five) month period amounting to E9 985.00 (Nine Thousand Nine Hundred and Eighty Five Emalangeni) (1.20.11);

k) The Plaintiff's proportionate share of the sewage and removal costs amounting to E147.00 (One Hundred and Forty Seven Emalangeni) per month over a (55) fifty five month period equating to E8 085.00 (Eight Thousand and Eighty Five Emalangeni) (clause 1.20.14);

l) The Plaintiff's proportionate share of regional services levy at the rate of E134.00 (One Hundred and Thirty Four Emalangeni) per month over a 55 (fifty five) month period equating to E7 370.00 (Seven Thousand Three Hundred and Seventy Emalangeni).

m) The Plaintiff occupied seven parking bays two of which were free and five chargeable at the rate of E1 250.00 (One Thousand Two Hundred and Fifty Emalangeni) per month over a 55 (fifty five) month period amounting to E343, 750.00 (Three Hundred and Forty Three Thousand Seven Hundred and Fifty Emalangeni).

[9] The total sum that the Defendant claims against the Plaintiff for the said Administrative security maintenance water and electricity amounts to E783 650.00 (Seven Hundred and Eighty Three Thousand Six Hundred and Fifty Emalangeni).

[10] The Plaintiff denies being indebted to the Defendant and to that end prays for the dismissal of the Defendant's claim with costs.

[11] At the trial of the matter the Plaintiff led the evidence of Michael de Souza (PW1). He testified that he was the owner and director of the Plaintiff. That Plaintiff operated a supermarket, bakery, restaurant and grocery shop at Shop No. 1 at Tiger City Building, Manzini. The shop was on the ground floor. He started the business by purchasing equipment from Ron Smith and his son through Oxford Leasing. He paid E120, 000.00 (One hundred and twenty thousand) for the equipment. He filed the Deed of Sale (Exhibit A) which was signed on the 5th August 2005. Due to the equipment not being in good condition, the Plaintiff repaired it and spent E200, 000.00 (Two hundred thousand Emalangeni)

repairing it, making a total of E320, 000.00 (Three hundred and twenty thousand Emalangeni).

[12] After purchasing the equipment the Plaintiff was given a lease for the occupation of Shop No. 1. The duration of the lease was 9 years and 11 months. The long lease was designed for the Plaintiff to recoup the amount of E320, 000.00 plus make some profit from the business. PW1 referred the Court to the Deed of Sale (Exhibit B) pertaining to the purchase of the equipment as well as the Lease Agreement in respect of the Shop No. 1. The lease agreement was signed on the 25th October 2005.

[13] PW1 was unable to produce any proof for the amounts he spent repairing the equipment. He stated that this was due to the flooding of the premises which caused all the receipts to be destroyed.

[14] He stated that at first the business was slow but later it picked up and business was good after the Plaintiff had added the bakery and restaurant due to the fact that there was no competition nearby. He said that the business made between E260, 000.00 to E300, 000.00 per month. He referred the Court to a table on page 14 of the Book of Pleadings (Exhibit C). It is reproduced hereunder:

Nov-08	312219.00
Dec-08	334672.00
Jan-09	288689.34
Feb-09	239957.86
Mar-09	251992.85

Apr-09	246914.53
May-09	230973.20
June-09	217697.93
July-09	226445.82
Aug-09	218816.00
Sept-09	224886.00
Oct-09	137830.00
Nov-09	132804.92
Dec-09	178247.87
Jan-10	70631.36
Feb-10	61900.93
Mar-10	66886.84
Apr-10	47407.64
May-10	41410.39
June-10	34602.10
July-10	40218.82
Aug-10	39201.45
Sept-10	38451.67
Oct-10	41945.63

Nov-10	35339.27
Dec-10	30886.87
Jan-11	33362.19
Feb-11	30721.01
Mar-11	42007.24
Apr-11	33127.45
May-11	35126.00
June-11	12946.17

[15] According to him from November 2008 to September 2009 the Plaintiff mad E253, 000.00 gross per month, making a profit of E25, 000.00 per month (or 25% profit). He says that during the stated period, the business did well and then the takings began to drop from October 2009 to July 2011 when the Plaintiff had to close shop. He was able to indicate to the Court sales slips from the till from No.s 164 to 332 at Book 2 pages 163/164 (Exhibits D1 – 168).

[16] PW1 testified that the Defendant purchased the Tiger City Building during August 2009 and took over during October 2009. From October 2009 the Plaintiff's business began going down and the takings dropped as can be seen from the diagram in paragraph 14 above, except for December 2009 when Christmas shopping added a boost to the takings.

[17] He says that when the Defendant took over the building, it gave notices to vacate to all tenants of Tiger City Building. By January 2010, all the tenants who were customers to the Plaintiff's business had left. Another thing that affected the Plaintiff's sales was that the Defendant began parking its cars directly in front of

the Plaintiff's business premises thus blocking would be customers.

[18] He says that the Plaintiff also received a notice to vacate the premises. The Plaintiff resisted the notice to vacate and by letter dated 16 December 2009 (Exhibit D) advised the Defendant that its lease was valid until its expiry date on the 31st August 2015. By letter dated 27th April 2010 (Exhibit F) the Defendant gave the Plaintiff notice to vacate the premises by 28th October 2010. The Defendant in that letter informed the Plaintiff that due to major structural alterations that they wanted to carry out, they needed access to the building. Exhibit F gave the Plaintiff 6 months to vacate.

[19] Relying on Exhibit B, the Defendant in Exhibit F stated as follows:

> **"4. In view of this you are hereby given 6 (six) months formal notice in terms of Clause 32.2 of the abovementioned lease agreement that the lease agreement will be cancelled on the 28th October 2010 and that you will be require to vacate the premises on or before that date".**
>
> **"5. Furthermore, in terms of Clause 32.2 of the Agreement our client is entitled, inter alia, to enter the premises and to effect any repairs, alterations, improvements or additions to the premises and our client and it contractors, sub-contractors, architect, engineers, artisans and other workmen will be requiring access to the premises for this purpose with effect from the 1st April 2010 (sic) and trust that they will be granted the necessary access to attend to the alternations to the premises."**

[20] The Defendant obviously meant from the 1st May, 2010. The response by the Plaintiff to Exhibit F is found in a letter dated 17th May 2010 (Exhibit G) states as follows:

> **"4. Our client is in lawful occupation of the premises by virtue of the lease agreement it entered into with the original landlord, which lease terminates in the year 2015."**
>
> **"7. In the premise, it is our considered advice that your client is not entitled to terminate the lease agreement subsisting between the parties and that ours is entitled to occupation of the premises for the reminder of the period of the lease."**

[21] PW1 says that the Defendant went ahead and closed off one entrance to the supermarket from inside the Tiger City Building. The witness directed the Court to pages 385 and 386 (Book 2). These pictures show a closed glass door (entrance) of the supermarket and two men working in front of the door, mixing cement, effectively blocking the door. He stated that the Defendant also blocked the second outside entrance. This entrance is from the road. The picture at page 387 shows two heaps of river sand and plaster sand and other construction material. The entrance is clearly visible next to a green car, which is next to a truck. PW1 said that the green car belonged to him and the truck belonged to the Defendant. The picture at page 382 shows the construction material and a truck clearly blocking the supermarket. PW1 stated that the top picture at page 383 showed construction material and the bottom picture showed rubble from the construction as the pictures on page 384. These he says were dumped in front of his business. PW1 further showed the Court pages 372 and 373 which show construction material blocking the front and sides of his business premises. (The pictures were entered in as Exhibit H).

[22] PW1 stated that in addition to the obstruction to his business, the Defendant put a chain at the main entrance which chain prevented cars and customers from entering the premises in order to purchase from his business. He lamented that this affected the Plaintiff's takings adversely.

[23] He informed the Court that the tenants who operated the filling station at Tiger City Building were so affected that they mounted a court action against the Defendant for blocking the access.

[24] PW1 further testified that the Defendant removed the Plaintiffs signboard without recourse to it and that after threatening to remove the compressor for Plaintiff's fridges at the basement of the premises the Defendant started building around the compressor so everything stopped working and the compressor was burnt. He directed the Court to the photographs at pages 374 and 376. The photographs show a hole next to a grid (or iron bars). PW1 stated that the compressor was behind the grid while rubble was dumped in front of the grid. He stated that the compressor normally runs on clean air but with the rubble next to it, it sucked in rubble and this caused the compressor to burn and it stopped working causing the fridges and cold room to stop working.

[25] PW1 stated that the Defendant did not notify the Plaintiff to stop operating the compressor for purposes of digging the holes.

[26] Even though the Defendant did not respond to the Plaintiff's concerns, it addressed a letter to the Plaintiff through its lawyers dated 8 June 2010 (Exhibit J at page 71 – 73 of Book 2). In that letter the Defendant referred to the lease agreement entered into between Oxford Leasing Company (Swaziland) and the Plaintiff dated May 2005. That in terms of lease agreement, the Plaintiff was obliged to pay certain additional costs over and above the rental. They set out the details of the costs incurred from the time the Plaintiff had taken occupation of the premises in October 2005 and other clauses they alleged that the Plaintiff had not compiled with. These are set out in paragraph 8 hereinabove.

[27] PW1 further testified that by letter dated 1/7/2010 (Exhibit K) the Defendant advised that it would disconnect electricity on the ground and first floor from Friday 2 July 2010, in order to proceed with the renovations for the new Mkhiwa Clinic. PW1 stated that the Plaintiff's attorneys responded to the Defendant's letter by letter dated 1/7/2010 (Exhibit L) which stated that the proposed disconnection was unlawful and not permissible in terms of the lease agreement and if the Defendant went ahead the Plaintiff would approach the Court to seek redress.

[28] PW1 says that notwithstanding Exhibit L, the Defendant went ahead and switched off the power on Friday, Saturday and Sunday. The lack of electricity during a weekend affected the Plaintiff's business adversely as business was normally good during weekends.

[29] The Defendant responded to Exhibit L by letter dated 1/7/2010 (Exhibit M). In that letter the Defendant cited clause 3.2 of the lease agreement which states:
"The Lessee shall have no claim against the Lessor for compensation, damages or otherwise by reason of any interference with its tenancy or its beneficial occupation of the premises occasioned by any such repairs or build works as are hereinbefore contemplated, or arising from any failure or interruption in the supply of water and/or electricity …"

[30] The Plaintiff responded to this letter by letter dated 14/7/2010 (Exhibit D). In that letter the Plaintiff challenged the ruling of the Municipal Council as being irregular and subject to review. It also challenged the invocation and reliance of the Defendant on clauses 32.1 and 32.2 at the same time. This is what they had to say:

"Your client may not invoke clause 32.1 and 32.2 at the same time. Your client must elect whether it relies on either clause 32.1.or 32.2 since a proper interpretation of the agreement reveals that when the landlord serves

notice in terms of clause 32.2 then it must allow the tenant an undisturbed and uninterrupted occupation and or beneficial occupation of the premises for the period of notice."

[31] PW1 stated that he understood clause 32.1 to refer to minor renovations whereupon the Defendant would have to notify the tenant that they would need to access the premises to carry out the minor job. Whereas clause 32.2 referred to major restructuring changes in which case they would have to give the Plaintiff 6 months' notice to vacate.

[32] To support his view that there was no rebuilding or major structural alterations, PW1 directed the Court to the judgment in the case of Inyatsi Construction Ltd and Riviera Investments Pty Ltd, case no. 3555/10 (unreported) delivered on the 14/7/2010 (Exhibit O). The Court held that:

> **"Clause 32.2 is only applicable to major structural alterations which result in the premises being destroyed or deprived of reasonable access. Even the application to the Manzini City Council refers to a conversion of the building as opposed to the rebuilding or major structural alterations."**

Having stated that, the Court dismissed with costs the application by the Defendant.

[33] PW1 says that there was no response to the letter to the Defendant dated 14/7/2010. Instead the Defendant launched eviction proceedings against the Plaintiff in High Court civil case No. 2805/2010. The application by the Defendant was dismissed in both the High Court and Supreme Court (Exhibit Q; pages 39 to 73 of book 3). The lease agreement (Exhibit B) was held to be valid.

[34] Asked to tell the Court why the Plaintiff was refusing to leave the premises, PW1 stated that it was because of all the equipment for the business that the Plaintiff had purchased and which was in the

shop. There were pipes that the Plaintiff had installed from the first floor to the ground floor and underground and other investment at great expense and could not readily vacate the premises. And also the fact that clause 32.2 provided for vacation of the premises if there was rebuilding or structural alterations and there was none of that.

[35] PW1 told the Court that while all the above was happening the Plaintiff was paying rent to the Defendant. At some point the Defendant refused to accept the rent saying that the Plaintiff needed to vacate the premises but the Plaintiff deposited it into their bank account. PW1 furnished proof of rental payments and these appear from pages 50 to 54 of Book 2 of the pleadings entered into evidence as Exhibit R1 and the bank deposit slips at pages 55 -58 as Exhibit R2.

[36] According to PW1, while all the above was taking place, the Plaintiff's business suffered as shown in Exhibit C and the graph (Exhibits) at page 47 of Book 1 of pleadings. And that in spite of the Plaintiff's lawyers' interventions and the Court judgment (Exhibit Q) the situation did not improve as seen in correspondence between the parties filed at pages 80 to 138 in Book 2 of the pleadings (marked as one bundle as Exhibit V).

[37] PW1 directed the court to a letter from the Defendant dated 24 January 2011 (Exhibit T) which reads:

> **"Save and Smile Supermarket**
> **P.O. Box 1565**
> **MANZINI**
> **Swaziland**
>
> **Attention: Anita D'Souza**
>
> **Dear Madam**
>
> **Re: Access to Supermarket for Maintenance works at Inyatsi House**
>
> **The Contractor we have engaged to do remedial work at Inyatsi House requires access to the Supermarket to**

conduct some remedial/maintenance works from the 24th January 2011 to 27th January 2011.

The operation requires the contractor drilling through the concrete slab above the supermarket, in order to connect sewer piping to the ring main.

We trust that you will find the above in order."

[38] PW1 testified that even before that letter the Defendant had already drilled the hole on the slab on top of the shop and sewerage water from the toilets upstairs was pouring from that side near the bakery and restaurant where they prepared food. He took video recording of this malady which he showed to the Court. It showed people that he said were from Mkhiwa Clinic who were examining the dripping water. He stated that the Defendant sent people to clean up the floor. He showed further footage of people cleaning and mopping up the floor. In further footage he showed someone removing a carpet from the floor and mopping up water into a bucket. The date on the footage was 21 January 2011. There were three frames, altogether they were entered in as Exhibit U.

[39] The Court was directed to a letter from the Defendant dated 11 March 2011 (at page 110 of Book 2 part of Bundle V). It reads:

"Save and Smile Supermarket
P.O. Box 1565
MANZINI
Swaziland

Attention: Anita D'Souza

Dear Madam

<u>Re: Access to Supermarket for Maintenance works at Inyatsi House</u>

The Contractor we have engaged to do remedial work at Inyatsi House requires access to the Supermarket to conduct some remedial/maintenance works on the 14th

March 2011 and the duration of the operation will be for the full day.

The operation requires the contractor drilling through the concrete slab above the supermarket, in order to connect sewer piping for the functionality of the drainage system within the building.

The networking team also requires access to run cabling to enable the security and network system to be functional.

We trust that you will find the above in order."

PW1 says that he allowed the Defendant's workmen access into the supermarket.

[40] The Defendant's defence in its amended plea was put to PW1. The essence thereof of being that the Defendant denies any liability PW1 has complained of but that it was Construction Associates, a separate company that was contracted to do the construction works. His response was that the Plaintiff dealt with the Defendant and the correspondence between the parties was between the Plaintiff and Defendant. He told the Court that he was never approached by any personnel from Construction Associates nor were there any requests from Construction Associates to access the Plaintiff's premises for construction works.

[41] It was put to PW1 that in terms of paragraph 7.2 and 7.3 of the Defendant's amended plea, they deny that they switched off the electricity and that all of that was done by Construction Associates. His response was that whoever switched the electricity on and off was controlled by the Defendant.

[42] The contents of paragraph 8.2 of the amended plea was put to PW1, that the inconveniences that the Plaintiff was complaining of were experienced by all the tenants in the building. His response

was that there were no other people left except the Plaintiff and the people operating the filling station.

[43] It was put to PW1 that at paragraph 8.2 of the amended plea, the Defendant averred that they did not deliberately dump filth into the Plaintiff's food preparation area and stock. His response was that whether it was deliberate or not deliberate, the Plaintiff's stock was damaged as water from the sewerage and waste was filling up the shop.

[44] It was put to PW1 that at paragraph 9.1 of the amended plea the Defendant stated that the inconvenience to the Plaintiff was necessary and foreseeable as a result of the building renovations. His response was that there were no signs indicating diversions to customers who accessed the shop.

[45] The contents of paragraph 10.3 of the amended plea were put to PW1, namely that clause 8.7 of the lease precluded the Plaintiff from claiming damages against the Defendant. His response was that how could the Defendant cause so much damage and then plead that clause 8.7 precludes any claims against them.

[46] It was put to PW1 that the Defendant in paragraph 7.3 of its amended plea says that the inconvenience was occasioned as a result of the construction works was kept to the minimum. His response was that it was not minimum but maximum.

[47] Asked if there was any alternative access to the Plaintiff's business or supermarket that was created during the construction phase, his reply was that there was none.

[48] PW1 was asked to explain the claim in respect of loss of business by the Plaintiff. He directed the Court to the figures set out on page 11 paragraph 8.2 of the Book of pleadings. I set these out hereunder:

"

Year	**Business**

	loss
2009	75283
2010	558769
2011	688177
2012	792000
2013	871200
2014	958320
2015	702768
Total	**4646517**

”

[49] The total loss is the sum of E4, 646,517.00 (Four million six hundred and forty six thousand five hundred and seventeen Emalangeni). He stated that from November 2008 to September 2009 (11 months) he added total sales and divided the amount by 11 months = E253,000.00 (Two hundred and fifty three thousand Emalangeni) per month. This figure represents the gross business per month. The average profit per month at 25% of average sales came to E60, 000.00 (Sixty thousand Emalangeni) profit per month.

[50] PW1 testified that despite writing to the Defendant about the damages to Plaintiff’s business, there was no response by the Defendant. Ultimately the Plaintiff had to close business during July 2011 because it could no longer afford to pay rent, workers’ salaries and general expenses because of making losses in the business. PW1 stated that he blamed the Defendant for the loss of profit and seeks the amount of E4, 966,517.00 (Four million nine hundred and sixty six thousand five hundred and seventeen Emalangeni) from the Defendants. PW1 stated that this amount included the sum of E320, 000.00 being the value of the equipment and its repair which he could no longer use. That is all.

[51] The Plaintiff was cross-examined by Defence Counsel.

[52] PW1 stated that Plaintiff's shop was not the only one that remained on the premises. The filling station which belonged to Riviera Investments also remained and it sold small chips, biscuits, cigarettes and small things and cold drinks which products the Plaintiff also sold. And if customers could not get these items from the Plaintiff they did not have to go kilometres away to a spar they could get them next door at the filling station.

[53] PW1 was referred to the High Court judgment at page 134 of the Book of Pleadings between the Defendant and Riviera Investments (Pty) Ltd. He was asked why the Plaintiff had attached it to its pleadings and he responded that it was so that this Court could see that Riviera the Defendant had the same problem with the Defendant as the Plaintiff had with the Defendant. Probed further as to whether or not PW1 accepted the findings of fact and law made by the Court in that matter.

[54] PW1 stated that he thought that the judgment was included because of paragraph 59 therein. That paragraph reads as follows:

> **"59. Clause 32.2 of the lease envisages a cancellation of the lease "to rebuild the building the building containing the premises, or, to make any major structural alteration thereto which will result in the premises being destroyed or deprived of reasonable access." The evidence shows that the Applicant is not rebuilding the building or making major structural alterations that will result in the premises being destroyed or deprived of reasonable access. The evidence shows that the Applicant is converting the building to suit the specific needs of its proposed new tenant Mkhiwa Clinic (Pty) Ltd, such a conversion does not confer a right of cancellation of the lease in terms of clause 32.2. It amounts to a breach of the lease agreement with the Respondent."**

[55] Learned Counsel for the Defendant advised PW1 that this matter and that of Riviera were similar however, the difference was between a cancellation of a lease and defending a claim of damages. And that the Riviera judgment dealt with Clause 32.2.

[56] PW1 was directed to paragraph 9 of the judgment which referred to the Defendant having concluded a building contract with Construction Associates. PW1 responded that he did not recall the Defendant dealing with Construction Associate and conceded that if so, it was an internal matter and had nothing to do with the Plaintiff who was suing the Defendant and not Construction Associates.

[57] PW1 was directed to a portion of the Supreme Court judgment (Exhibit Q page 71 of Book 3) paragraph 20, from line 5 which was that:

> **"the Appellant therefore treated the situation, not as the continuation of an existing lease… but as a new lease, albeit a temporary one. The terms of the new lease were mutatis mutandis the same as those of the 2005 lease …" He was informed that the Court said that there was a new agreement between the Plaintiff and the Defendant on the same terms and conditions. He agreed.**

[58] He agreed that the lease agreement annexed to the Plaintiff's pleadings at page 15 of Book 1 set out the terms and conditions between the Plaintiff and Defendant.

[59] Having agreed to the above, PW1 was directed to page 26 of Book 1, paragraph 8.7, which reads thus:

> **"The lessor shall be entitled at any all times during the currency of this lease to effect any such repairs, alterations, improvements and/or additions to the premises or the building embracing them and for any such purpose to erect scaffolding, boarding and/or other building equipment in, at, near or in front of the premises,**

as also such devices as may be required by law or which the Lessor's Architect may certify to be reasonably necessary for the works aforesaid".

He stated that he understood.

[60] He was informed that because of this paragraph, Construction Associates altered the premises, changed things, broke walls and did all sorts of things. He agreed.

[61] The next sentence of paragraph 8.7 was read to him:

"The Lessor shall further be entitled, by itself, its contractors, sub-contracts, Architect, Quantity Surveyor and Engineers and all artisans and other workmen engaged on the works, to such rights of access to the premises as may reason ably be necessary for the purposes aforesaid."

He agreed that **"premises referred to the Plaintiff's shop."**

[62] He was told that this sentence said that Construction Associates could have entry into the shop to do things. His response was "Yes, but with reasonable access" which is included in the sentence.

[63] Asked if they did anything inside the shop, he said yes, they did wiring, cabling, piping for the aircon pipes and all these things.

[64] Asked if that was part of the alterations of the building, he agreed.

[65] Counsel then moved to the next sentence which reads:

"The Lessee shall have no claim against the Lessor for compensation, damages or otherwise by reason of any interference with its tenancy or its beneficial occupations of the premises occasioned by any such repairs or building works as are hereinbefore contemplated, "or" arising

from any failure or interruption in the supply of water and or electricity and/or steam and/or heating and/or gas and/or any other amenities to the premises, or the temporary cessation or interruption in the operation of any of the lefts, elevators and hosts in the building."

Which she labelled the first part and second part being "or arising…"

[66] PW1 stated that he understood what was being read to him namely that they could make alterations and have reasonable access to carry out the alterations and to put in the pipes, and that the Plaintiff could not have a claim.

[67] His response was that the lease did not include that the Defendant could throw rubbish in front of the shop or to throw sewerage into the shop.

[68] Counsel moved on to the issue about the parking area in front of the shop, namely the top photograph on page 373 of Book 3. Counsel was of the view that the parking lot was so vehicles could park in front of the shop. PW1 responded that the truck in that picture blocked the shop's entrance and so did the dustbin.

[69] Reference was made to the photograph on page 377 of Book 3. Counsel was of the view that the parking area between the shop and the street was not very big but PW1 responded that it was big.

[70] Learned Counsel for the Defendant with reference to the two entrances to the Plaintiff's shop was of the view that anybody could walk past the red car at page 377 Book 3 and go into the shop. PW1's response was that was not possible because there was a rail on the left side of the red car. Additionally PW1 also worried about there being no space for customers who came by car to park because there was building material and wheelbarrows. He further stated that the red car belonged to the

Defendant. The rail is on the left of the red car and the building material on the right.

[71] PW1 stated that he would arrive in the morning at about 6:00 am. and park his car but could not leave because the Defendant's workmen would arrive later and block his exit with their trucks and building materials.

[72] Asked where the workmen were expected to put the building material other than next to the shop, PW1 stated that they could have used the basement or a place further away from the front of the shop. Further, that he could no longer park underground as the Defendant had told him not to park there.

[73] Shown photo graphs at pages 374 and 376 (Book 2) he stated that the holes surrounding the poles were in the basement near his compressor under his shop otherwise there was no other construction going on in the rest of the basement and already some of Defendant's cars were parked there.

[74] Essentially PW1 was not happy that there were building materials and rubbish in front of the shop. He was not happy that the Defendant's people were breaking concrete in front of the shop resulting in rubble and dust particles which got into the food that he sold. Equally he was not happy that the electricity to the shop was interrupted. He was not happy that the sewerage pipes were cut causing leakages. He was not happy that they removed the shop's signs.

[75] Counsel put to PW1 that the Defendant did not carry out the alterations and that Construction Associates who is not before Court did the alterations. It was further put to him that the Plaintiff had signed a lease with Oxford Leasing and a lease on the same terms were entered into between Sunla and Inyatsi and that in terms of that lease Clause 8.7, the landlord was entitled to make such alterations and that the tenant would have no claim for damages.

[76] PW1's response was that the lease also provided for reasonable access (for the tenant) and that the landlord would do the job reasonably.

[77] Counsel moved on to the issue of quantum and asked PW1 where in the till slips was Value Added Tax (VAT) reflected. PW1 was unable to show deductions in respect of VAT and ultimately agreed that VAT was not included or reflected because the Plaintiff did not charge it. Consequently the Plaintiff did not file any VAT returns. PW1 was not sure if VAT was operational at the time.

[78] PW1 was asked if he had copies of any Income Tax returns his response was these were damaged when the Plaintiff's premises were flooded. However, he had filed them with the office of the Commissioner General as there was no SRA then. Counsel countered by saying that PW1 did not plead damage to documentation nor did the video by PW1 show that any documentation was damaged.

[79] It was on the basis that there were no VAT deductions nor Income Tax figures deducted that the Counsel for defence stated that the Defendant disputed the quantum claimed. There was also a challenge to PW1 with regard to the till slips in the sense that they bore no business name and could have been sourced anywhere.

[80] PW1 in response to cross-examination stated that the Defendant's workmen blocked both entrances to the Plaintiff's shop namely the inside (front) and side entrance (shown on pages 385 – 386 of Book 2).

[81] PW1 was asked when all of the photographs he has shown to the court were taken, because Learned Counsel for the defence needed to establish that the construction in front of Plaintiffs shop came after Construction Associates took the job in May 2010 and yet the photographs reflected January 2011.

[82] Counsel was of the view that there was internal construction going on in respect of other floors before May 2010 which did not affect the Plaintiff and that the photographs were important to determine more or less when the challenges PW1 was complaining about took place. His response was that if the Defendant checked the Plaintiffs letters of complaint, these will indicate that the Plaintiff complained about electricity disturbance and the things that were being dumped in front of the shop.

[83] On the issue of offloading the bricks and the sand in the basement and use the lift to take it upstairs, PW1 responded that he meant that there were other better areas that these could have been placed instead of in the front of the Plaintiff's shop viz, the car park was big enough, and the area near the road including the basement.

[84] Counsel further stated that Defendants could not do it in the basement because the lorries used were too big to turn, maneuver and download things. PW1 responded that the trucks that were used were not big, that they were 6 tonners and open trucks which could go easily into the basement and come out easily. He referred the Court to the bottom photograph on page 377 of Book 2. PW1 stated further that the compressors, jack hammers and other things were loaded on these 6 tonners and taken to the basement.

[85] PW1 was referred to clauses 1.20 (common area) and 1.20 – 1.20.15 (operating costs of the lease agreement). He was also referred to page 67 of Book 1 which details costs to be paid by the Plaintiff as per the lease agreement. The items detailed there are the operation costs and common area as set out in lease agreement. His response was that it was not the Plaintiff's area because it was outside, the Defendant was responsible for cleaning it. Plaintiff's cleaners swept the area in front of the shop and Defendant cleaned the parking area. The Plaintiff paid directly for water and electricity as the meter was separate. The Plaintiff did not use the lift.

[86] PW1 was informed that the schedule of costs reflected on Annexure B (page 67) was a shared cost to everybody in that building and that this was for the period November 2005 to May 2010. That the Defendant only came about November/December 2009. His response was that there were 60 to 70 tenants during 2005. PW1 was unable to comment about the schedule, which he seemed not to know existed.

[87] It was put to him that the amounts that appear on the schedule form the counter-claim against the Plaintiff which he did not address in his evidence in chief. He did not deny his failure to address the counter-claim in his evidence in chief. He did state that he was unhappy with the counter-claim. He did agree that the lease made provisions for the charges (costs) and that the schedule was a list of such payments.

[88] PW1 thought that the rent included the costs on the schedule and stated that he used to pay the rent as well as those costs. He was informed that the costs were in addition to the rent and not included therein that covered a period of 55 months. He seemed flustered by this information.

[89] It was put to him that the convenience shop used to be stocked better than the Plaintiff's shop. He denied that and replied that whenever the convenience shop did not have stock they would take stock from the Plaintiff's shop. He denied that the Plaintiffs shop had empty shelves.

[90] He stated that the stock was reduced by sales going down after the Defendant began construction. And the sales began going down during November 2009 due to the fact that the tenants had left and the difficulty of no parking for the mobile customers.

[91] Counsel for the Defendant concluded cross-examination by firmly putting to PW1 that having signed the lease agreement, the Plaintiff owed the Defendant the money reflected in the schedule and that these moneys formed the counterclaim.

[92] Mr. Nkomondze re-examined PW1 and referred him to Plaintiffs plea to the counterclaim, paragraph 2 (b) where it stated that the Plaintiff denies the contents of sub-paragraphs 3.2, 3.4, 3.6, 3.7, 3.8 and 3.9 and avers that these clauses referred to in the lease agreement did not apply to the Plaintiff tenancy as the supermarket was situate on stand-alone premises. Asked what he meant by that, PW1 responded that the entrance to the Plaintiff's shop was separate to the rest of the building and that Plaintiff did not use any part of the building and the lift.

[93] PW1 was asked if the Plaintiff paid any VAT he responded that it did not because VAT only became applicable during 2011 and by that time the shop had closed.

[94] Asked if the Plaintiff paid income tax, he replied that it did not because it was not registered to pay income tax and also because whatever money the Plaintiff made was put back into the business for stock and to build up equipment.

[95] Asked if there was any other way to prove how much the shop was making other than the till slips, his response was that there was the evaluation report submitted with Plaintiff's documents.

[96] PW1 was directed to paragraph 59 of the judgment in Inyatsi Construction Ltd and Riviera Investments (Pty) Ltd High Court case no. 3555/10. He was asked what his understanding of that paragraph was and his response was that because there was no major structural changes so the Defendant could not use clause 32.2 and 32.3 to ask the tenant to vacate the premises. And that clause 32.2 in the Plaintiff's lease was similar to the Riveria Investments (Pty) Ltd one, therefore paragraph 59 of the aforesaid judgment applied to the Plaintiff as well.

[97] The witness re-iterated that there were other areas that Defendant's workers could have parked instead of in front of Plaintiff's shop. Also that the red car and truck featured at page 377 were not parked at the designated parking place because of this. Instead the red car was parked in the free space between the parking place and the shop.

[98] PW1 was referred to clause 8.7 at page 26 of Book 1 and to clause 32.2 at page 38 of Book 1 and he stated that the clauses were similar and that the Defendant was carrying out general repairs not to keep the Plaintiff in tenancy but was making changes for the new tenant, Mkhiwa Clinic which was to occupy the Plaintiff's shop too.

[99] Because the issue of the stand-alone of the shop being new, I allowed Counsel for the Defendant to cross-examine PW1 on it. It was established that even though the Plaintiff had its own water meter and electricity meter, the Plaintiff's shop was still part of the Defendant's building.

[100] An issue arose that PW1 did not actually run the shop but an elderly couple did. Mr. Nkomondze objected to this and Counsel for the Defendant did not pursue it. The Plaintiff closed its case, and the defence opened its case by calling Ms. Zinhle Mbuyisa (DW1).

[101] She testified that she was the property manager for the Defendant since September 2009. The Defendant purchased Tiger City Building during August 2009. She stated that the Plaintiff operated a business at Tiger City Building which was managed by PW1 and his wife Anita da Souza. When shown PW1 she said that she had never seen him.

[102] She was shown a schedule of fees on page 67 of the Book of Pleadings which is made up of figures allegedly owed by the Plaintiff to the Defendant from November 2005 to May 2010 (55 months) totaling E738,650.00 (Seven hundred and thirty eight thousand six hundred and fifty Emalangeni). She was aware of the scheduled contents even though she did not draw it up nor did she do any verifications of the figures and calculations. It passed through her office. It was in accordance with the lease agreement between the parties in regard to the occupation by the Plaintiff of Tiger City Building.

[103] She was asked about the issue of the basement such as construction lorries and trucks going into the basement. Her response was that because of the way that the basement was constructed, a lorry because of its size could not go into the basement but construction vans and small cars could go into the basement.

[104] She stated that there was a convenient shop that belonged to the filling station. The convenient shop shelves at the filling station were always full whilst the shelves at the Plaintiffs business were almost empty. She stated that the Plaintiffs were struggling.

[105] She said that she had a good relationship with Anita and her husband and would see them at least once a week. The reason that she knew that the shop was not doing well was because whenever she wanted to buy some stuff like a coldrink or chips, they would be out of stock and she would go to the filling station to buy things like that.

[106] Mr. Nkomondze cross-examined her. She told the Court that the dispute between the Plaintiff and Defendant started after the Filling station had sued the Defendant and was successful. DW1 had already been in the Defendant's employ. She stated that the Filling station were also her tenants and she would see them every week. Mr. Siras Patel ran the Filling station. She stated that she together with Mrs Bulunga and Mr. Zwane were employed by the Defendant. Mrs Bulunga was the general manager.

[107] DW1 confirmed that the schedule at page 67 of Book 1 was in accordance with the Defendant's agreement with the Plaintiff. She stated that when the Defendant took over the premises they found leases already in operation. The Tenants were informed that they would have to vacate as the Defendant's plans for the premises did not involve the type of business that the tenants operated. The tenants refused to move and because of that the Defendant added the schedule of costs to the pre-existing leases until the leases expired.

[108] She was asked to look at the lease agreement featured on pages 15 to 44 to determine if that was the lease that she was talking about, she responded that it was not. That lease agreement was between Oxford Leasing and the Plaintiff. Whereas the one that she was talking about was drawn up by Mr. Motsa and was written MBI Estate Agents because Oxford Leasing was the property owner before Mr. Motsa, before MBI.

[109] She stated that when the Defendant took over the premises, it used the MBI lease. The Defendant became aware of the Oxford Leasing lease agreement when the Filling station sued the Defendant. She admitted that there were two lease agreements; one by Oxford Leasing and the other MBI Estate Agents. And the one applicable to the Plaintiff was the MBI Estate Agents one.

[110] DW1 stated that the figures on the schedule (at page 67 of Book 1) came from the MBI Estate Agents lease agreement and after the Filling station court case, wherein the Supreme Court stated that it was the Oxford Leasing lease agreement that was applicable to the tenants and not the MBI Estate Agents one, the Defendant began using the Oxford Leasing agreement.

[111] When asked which lease agreement was used when the tenants were told to vacate the premises, she responded that the Defendant used the one by MBI Estate agents.

[112] The Court adjourned at this juncture and resumed on the following day. On this day Counsel for the Defendant confirmed that the letter and MBI lease that DW1 had referred to in her evidence were part of the discovered documents. And DWI wished to correct her evidence as well as the calculations at page 67 of Book 1 were based on the Oxford lease and not the MBI Estates Agents lease. She also added that the Defendant abandoned the MBI lease in favour of the Oxford Leasing lease after the Riviera judgment which was on 14/7/2011. However, operationally they went back and forward between the two leases.

[113] It was put to her that PW1 could have been part of those that were running the business only she did not know about it. She refused to accept that and told the Court the owner of the shops that ran the shops were Anita and her husband. They were elderly and even had their ID's affixed to the back of the MBI lease. She had never met or seen PW1. But as it turned out PW1 appears as Sunil da Souza in the MBI lease which is dated December 2008.

[114] She was asked to show the Court the clause in the Oxford Leasing lease (page 15 of Book 1) upon which the claims outlined in the schedule at p 67 were based. Her response was that she could not as she was not the one that did the schedule that it was another office that did the calculations, even though it came to her offices to be taken to the tenant.

[115] Asked if she was aware of the counterclaim, her response was that she was aware that the Defendant was claiming expenses that the building incurred such as running the elevator, lighting, water, clearing and security and many others.

[116] She was told that the Plaintiff in interpreting clause 1.20 (operation costs) that it did not mean that the Plaintiff would be liable for all the expenses as listed and that proof of that was found at page 67 (Book 1) i.e. the schedule of costs. For example at the second column, under description, "insurance" there is no money chargeable for insurance, pest control, property assessment rates, tax on rental, increased premiums due to fire and yet at page 21 and 22 (Book 1) insurance premium, property assessment rates, pest control. Her response was at paragraph 1.17 page 21, the Lessee is responsible for public liability insurance cover and insurance premiums are also listed at clause 1.20.4 (page 21 Book 1) and that would be the reason that these items are not listed on the schedule of costs at page 67. She decried the fact that the lease agreement was not drawn up by the Defendant but the one Defendant found operating when it took over the premises.

[117] In respect of the pest control she said that it may be that no pest control company was hired or pest control was not used. In respect of the rates she said that it was common knowledge that the owners of the property are the ones that are responsible for rates and not the Lessee.

[118] DW1 further stated that the proof that a service had been carried out would be the contract between the service provider and the Defendant otherwise Defendant invoiced a tenant for its share of the service. Defendant provided the contract to any tenant if it was requested. She stated that the contract normally specified the monthly service as well as the fee. The service provider would sent statements over the period stipulated in the contract.

[119] She further stated that for electricity and water, the Defendant hired a company called MA Consultancy who did their tariffs and how to charge the tenants. This only related to those tenants who did not have separate meters and were feeding from the main meters. The Plaintiff's meter for electricity was separate but not the water.

[120] Asked why the Plaintiff was charged a flat rate of E3, 000.00 per month for 55 months totaling E165, 000.00 in respect of water and electricity (page 67 of Book) and yet she had stated that the amounts fluctuated. She did not know how could she furnish any documentary proof in support of these figures.

[121] Reference was made to the sewerage and removal costs at page 67 (Book 1) of E147.00 charged to the Plaintiff. According to the Plaintiff the sewerage was connected to the main line and removal of sewerage was automatic and any attendant costs thereto would be included in the water bill. Her response was that at that time sewerage removal was done by the Municipality which was separate to the water bill which was payable to Water Services Company and that today that was no longer the case.

[122] Mr. Nkomondze was of the view that it be placed on record that the Plaintiff had extended an indulgence to the Defendant to supply the documentary proof that was in the Defendant's

possession to enable the Plaintiff to effectively put to the witness the Plaintiff's defence to the counterclaim.

[123] DW1 was asked if the amounts on the schedule were the same for all the tenants and her response was yes in terms of the Oxford Leasing lease even though the charges were according to whether it was small office space or supermarket.

[124] It was pointed out to her that the Defendant was not there before 2009 and Defendant could not charge for a period before it took over the building. Yet it was charging for costs it did not incur such as security, cleaning costs, water and electricity, for amenities, administration costs, accounting and secretarial costs, waste and sewerage removal. Her response was that it was because the Plaintiff could not produce proof of having paid all these operational costs in the past.

[125] Asked what the plans were for the building when Defendant took over, she stated that the Defendant wanted to use the building as its head office and to house one anchor client being Mkhiwa Clinic. This made it necessary to notify tenants including the Plaintiff to vacate. In the case of the Plaintiff, by letter dated 14th December 2009 to which the Plaintiff responded by letter dated 16th December 2009, that they intended to remain in the premises for the full term of the lease agreement (see page 59 of Book 2). Because of the Plaintiff's response, the Defendant decided to let the Plaintiff be after they refused to move.

[126] It was stated to the witness that the Defendant tried through Court action to evict the Plaintiff but failed both in the High court and Supreme Court. This was during 2010. The Defendant had based its cause of action on the Oxford Leasing lease agreement.

[127] The amounts of money claimed from defendant by the Plaintiff under various heads were put to her namely E320, 000.00 in respect of the equipment which had been purchased for E120, 000.00 and repaired for E200, 000.00 and that as a result of the Plaintiff leaving them in the shop, the equipment remained idle because it could not be used elsewhere and they lost the value of

that equipment in the sum of E320, 000.00. She was asked if the Defendant disputed that amount and that it was liable to the Plaintiff in respect of that amount. Her response was that the Plaintiff moved out of the premises out of their free will, nobody threw them out. And that she was not in a position to say whether the Defendant disputed the claim or not.

[128] In respect of the amount of E4,646,517.00 she was informed that the Plaintiff had calculated their sales for 11 months from November 2008 to September 2009. Plaintiff added those sales together to get the average amount of sales and multiplied that averages amount by 25% which resembled its profit. Then it multiplied the 25% which is the profit by the number of months that were remaining for it to be in occupation of the premises. She was asked if she disputed that this was the right manner of calculating the profit or the loss that they are claiming. She replied that she was not in a position to either dispute or agree because the Plaintiff left at its own volition. No court order nor the Defendant informed it to leave.

[129] She was shown the pictures of the shop (Exhibits X 1 – 16) asked if they showed an empty shop and save for the last yellow picture she could not. She did however say that the other pictures were deceptive because she never found any of the items now reflected in the pictures when the Defendant took over and she recognized Anita standing behind a counter. The pictures were marked 1 to 16. That ended her cross-examination and she was re-examined by her Counsel.

[130] During re-examination she went through all the pictures and stated that when Defendant took over the premises, the shop was not fully stocked as reflected in the pictures. She stated that the table and chairs in picture 3 were not there and the tills were not 3 but one. There was no bakery as shown in picture 5. The staff that appear in picture 7 were no longer there, only Anita and her husband. The fridge in picture 9 was no longer there. The machines reflected in pictures 13 and 14 were not there. The fryer shown in picture 15 was no longer in use. She was shown a

calendar in the pictures and it reflected the year 2000 not 2009 when the Defendant took over the premises.

[131] As regards the calculation of profit and loss, she explained that she was at the time property administrator and had no knowledge of how the figures were calculated.

[132] DW2 Ernest Vander Walt was called next. He stated that he was the production manager of Construction Associates (Pty) Ltd and had held that position from October 2010. He further stated that being a production manager meant that he was in control of all the production work that happens during construction periods within the company. And that he had full control of all the operations. He stated that production work was any construction work or alterations to a building or new projects that take effect.

[133] He told the Court the company staff wore blue overalls clearly marked with the Construction Associates emblem at the back and on the front pocket and their motor vehicles were also marked with the Construction Associates emblem on either door or roof. And that sub-contractors wore their own identified clothing neither his company nor the sub-contractors used the Defendant's emblem.

[134] He stated that it was difficult to recall all the names of the contractors who were involved in carrying out the alterations of the building previously known as Tiger City to convert it to Mkhiwa Clinic. However, his company Construction Associates were the main contractor. There were specialist sub-contractors from Johannesburg and some smaller firms from Eswatini.

[135] He testified that the conversion started in 2010 mid-year but that he got on board in October 2010 and the work had already started. He stated that the Defendant was housed in the third and fourth floor and the ground and first floor were converted for Mkhiwa Clinic. He recalled that the Plaintiff was occupying a part of the ground floor.

[136] The particulars of claim at paragraph 7 (page 9, Book 1) were put to him viz:

> (a) **"That the Defendant continually dumped concrete rubble and builder's waste in front of the public's entrance to the Plaintiff's supermarket".**

He agreed that during the construction period there was rubble generated from the renovations that were done on the ground floor and first floor which had to be taken out of the building. This rubble was taken to the outside in front of the whole building close to the retaining wall. And as the front of the shop and fire escape had to be kept clear in case of emergencies the rubble would be moved to the side walk where it was constantly taken away on a daily basis. And that there was only one front main access point in front of the building which was next to the Plaintiff's supermarket. And that the distance from the front door of the supermarket to the side walk by the street was twenty (20) metres.

> (b) **"That the Defendant removed without just cause the Plaintiff's sign directing the public to the supermarket".**

His response was that his company did not remove the Plaintiff's board or signage as it belonged to the tenants and constructors are not allowed to interfere therewith. He did not recall seeing such a signage otherwise if they had to paint they would normally work around them or ask the tenant to remove them temporarily.

> (c) **"That the Defendant on various occasions turned off the electricity supply to the Plaintiff's premises at inopportune periods".**

His response was that he never caused the lights to be switched off. Furthermore the lights were controlled by Eswatini Electricity Company (EEC). That electricity for each shop is connected to a main distribution board in the basement which is metered by EEC which is locked with padlocks behind transformer doors whose keys are with EEC, neither the client or contractors has got those keys for safety reasons. And that for purposes of the alterations and for electrical work if anybody wanted to turn it off they could not, EEC had to come and do it.

(e) **"That the Defendant drilled holes in the support of Plaintiff's compressors thus causing breakage and adversely affecting the Plaintiff's refrigerators".**

He did not recall drilling next to the compressors that affected the Supermarket. The only area they drilled was in the centre towards the left hand side of the building which was the lift shaft basement.

(f) **"That the Defendant on various occasions embarked on breaking concrete above Plaintiff's premises resulting in rubble and dust particles ruining Plaintiff's stock in trade and adversely affecting the cleanliness of the supermarket".**

His response was that he did not recall breaking any concrete above the shop, perhaps taking off floor finishes and wall finishes and the vibration involved would not cause any damages as the ceiling over the shop would remain intact and dust would seep down through it into the shop.

(g) **"The Defendant on various occasions deliberately and**

purposefully cut sewerage pipes above Plaintiff's supermarket resulting in sewerage waste and filth flooding the kitchen and bakery area of Plaintiff's premises".

His response was that there was one sewerage pipe in the Plaintiff's ceiling void space that his company was made aware of and they had to divert all the other sewerage pipes and not make use of the Plaintiff's sewerage pipe and so did not work in the Plaintiff's ceiling space. He explained that there was a concrete slab on top where the floor is carried above and there is a void of 560 mm where all the pipes and the electrical wires and lights and everything ran in between. So any services that is in there, he could not access as a contractor because he could not access the shop. So if something went wrong with the sewerage pipes it would be probably due to a blockage or old worn out pipes but not due to the construction.

[137] DW2 was shown the top photographs on page 372 (book 2) and asked to comment on the sand shown therein. And he told the Court that was building sand used for screeds and poppings. The car between the shop and the sand reflected a distance of 6 metres clearance as they were informed to keep clear of the shop front for pedestrians. They could not put the materials on the other side because there was the filling points for the fuel tankers for the petrol garage and that the truck in the picture stood over these. That the truck was only there because it was offloading equipment to be moved by the escalators inside the ground floor or to move waste away.

[138] He said that the truck on page 373 belonged to Construction Associates hence the emblem Construction Associates on the side of the truck (top photograph). The truck and others like it were used for light deliveries of ceiling materials, carpets and any other building material. It would be parked for 10, 20 or 30 minutes. The items on the bottom photograph he explained to be old blocks and screeds that have come out of the existing building

and have been covered with some plastics. The bricks that are stacked were to be moved into the basement for building up the lift shaft.

[139] Asked to explain the concept of double handling, he stated that they drop materials for the first time out of the building to be collected at a later stage when there is not much traffic going in and out of the premises for the filling station. Then at a more convenient time the material is moved out in wheelbarrows for a second time to the outside on the sidewalk near the road to enable it to be taken away to the dump sites.

[140] Taken to page 374 (Book 2) he was asked to explain the holes next to the pillar. He did not know but assumed that they were done in order to inspect the existing column foundation structures and for the engineers to ascertain the conditions. The photographs at page 376 showed holes similar to those on page 374 and were for the same purpose.

[141] Directed to page 380 (Book 2) he was asked how long the bricks would remain in the parking area after delivery. He replied that it would take about two weeks to be worked away into the building and because it was a constant feed of bricks once one delivery was done the next delivery would come a week or so later. He stated that the bricks which were already on ground level would be carted into the building and be lowered by buckets into the basement and the wall would be built from there to the ground floor up through the first floor and into the second floor. The bricks could not be delivered directly into the basement because their 4 ton trucks could not fit into the basement for example the 4 ton truck at page 382.

[142] Shown the photograph at page 386 he was asked how far the step ladder was to escalator and he said 2.5/2.7 metres away and the escalator from the shop front was 4 to 5 metres. And that the double doors led to the Plaintiffs shop and were always locked.

[143] Shown further photographs (exhibit W1- 16) and asked how he found the supermarket when he began operations in October

2010, he said that the shelves were not as fully stocked as in the photographs. His workmen complained that it was difficult to find food in the shop and the bakery was not functioning. He did not believe that the photographs were recent. His people bought food from the shop at the filling station which was operated by another tenant.

[144] He stated that Construction Associates could not do any construction work directly above the supermarket due to pipe work and services that had to run in the ceiling space (the crawling space) and also due to the permanently closed door leading to the supermarket to which they were not granted access. Construction Associates needed access in order to build some bathrooms and showers at the top on the first floor above the supermarket. Construction Associates could only continue these works after the Plaintiff had vacated the property. Construction Associates had to get inside the supermarket to get through the ceilings to do all the new work and cables, they could not do it from above.

[145] He was shown the calendar in Exhibit W8, W10 and W12 and stated that the calendar was a 2005 one. Construction Associates had begun construction works during October 2010.

[146] He told the court that Construction Associates had won a tender by Defendant and entered into a contract with the Defendant to do the construction works on the building. This particular contract had to be extended for a further 6 months due to none access to the supermarket.

[147] He was cross-examined. He told the court that in respect of renovations on an existing building such as Tiger City, the Defendant would normally insure the building and Construction Associates as the contractor would insure their own people with the Works and Labour department. Therefore Construction

Associates would not be liable for any third party claim against them, that was for the clients account.

[148] The claim against the Defendant set out in paragraph 7 of the particulars of claim (page 9 of Book 1) was read to DW2. The Defendants plea (amended) was also read to DW2.

[149] His response was that Construction Associates cannot be held liable for any claims because:

> "**we do not have any communication with the tenant or supermarket. Our contract stands between us and Inyatsi as the client and we are orchestrated by a professional team that is hired by the client, not by us. We are working under directions of a professional team. So I have got no communications whatsoever with the supermarket. So if there was complaints or damages or anything, it should have been watched through the right channels according to me and then passed down the professional team and then brought to the table if we were then to be found guilty but I cannot accept any claims against us as the project has been long overdue or long done and no claim has been lodged against us or nothing has been brought to our attention during the construction.**"

He ended by saying that Construction Associates should have been informed at that stage of the project and that as Construction Associates did not have third party liability insurance and there was a problem then Defendant should have engaged Construction Associates in talks. And that because Construction Associates had no direct relationship with the supermarket, any

queries that the supermarket had should have been made to the Defendant.

[150] He was directed to the photographs at pages 374 and 376, relating to the holes near the pillars and he stated that the holes were dug to enable them to dig a pit for the lift i.e if they were going to hit rock or not and in order to establish how deep they could go for the shaft pit before hitting the original foundation. Later the area excavated was found to be inadequate so they had to relocate the lift shaft to the other position and that is why the escalators had to be reallocated to the opposite end of the hall.

[151] DW2 was directed to page 376, which shows the steel caging that protects the Plaintiff's compressor that fed the refrigeration system in the supermarket and asked if the lift shaft was to be installed where the test pit was, this would have meant that the compressor would have been moved, he said yes. He however, did not have any drawings to show how the works were structured because he said that they did not keep any records beyond 5 years.

[152] It was put to him if he agreed that Construction Associates instructions were to renovate the building in such a way that the supermarket was done away with and replaced by the clinic. His response was yes in the initial tender but once they got on site and could not gain access to the supermarket they were able to divide the work in two phases. The area including the supermarket became phase 2 and the rest phase 1. Construction Associates worked on phase 1. He also said that at the time Construction Associates was not aware that there was a dispute between the Plaintiff and Defendant until he was summoned to become a witness.

[153] DW2 also said that even though the space to store working material in the yard and carry out renovation because of non-

access to the supermarket, was small Construction Associates was able to manage by double handling the materials even though this method was costly; it was a way of dealing with the lack of space.

[154] He further stated that the customers had access to the supermarket because there was a minimum of 6 metres kept in front of the supermarket, the fire escape and fueling points for the trucks to fill up. And that there was a walkway in front of the supermarket right around the building with a handrail protecting the walkway and this walkway gave customers access.

[155] When asked where customers to the supermarket using cars would park, his response was that page 377 (Book 2) showed parking space against the wall fence.

[156] He was referred to page 386 (Book 2) which shows two men standing in front of a mound of mixed cement and card box boxes spread out on the floor in front of the double glass door of the supermarket as well as a wheelbarrow and red drum. He was asked if dust from the cement would not seep into the supermarket. His response was that the mixture was wet so no dust could find itself into the supermarket. He told the court that the cement mixture was mixed in a stationery box so no air flow could push the dust in any particular direction.

Also there was no wind inside the building. Furthermore the glass door have rubber seals and brushes that keep the door sealed and that it was immaterial whether Construction Associates had warded off that section or not. There was also a weather bar installed on each and every shop front which Construction Associates had not tampered with. He stated that the supermarket had two entrances, the one reflected on page 386 (Book 2) and another on the other side. That the one reflected at

page 386 was on the inside where the renovations were taking place.

[157] Asked if there was at any point necessary to switch off the electricity. He replied that not with the renovations that Construction Associates was busy with. He did recall that:

> "**there was a problem with the generator down in the basement which was feeding back into the Eswatini Electricity Company system when it was starting up, so the electric meters would run backwards and Eswatini Electricity Company picked it up and they had to rectify the connections between the main lines, the generator and all the tenant meters. That is a separate landlord issue, it had nothing to do with us, and I know that it was one instance or maybe two (2) that the clients or the supermarket selectors were switched off but it had no effect from our side, it was not affected by us**"

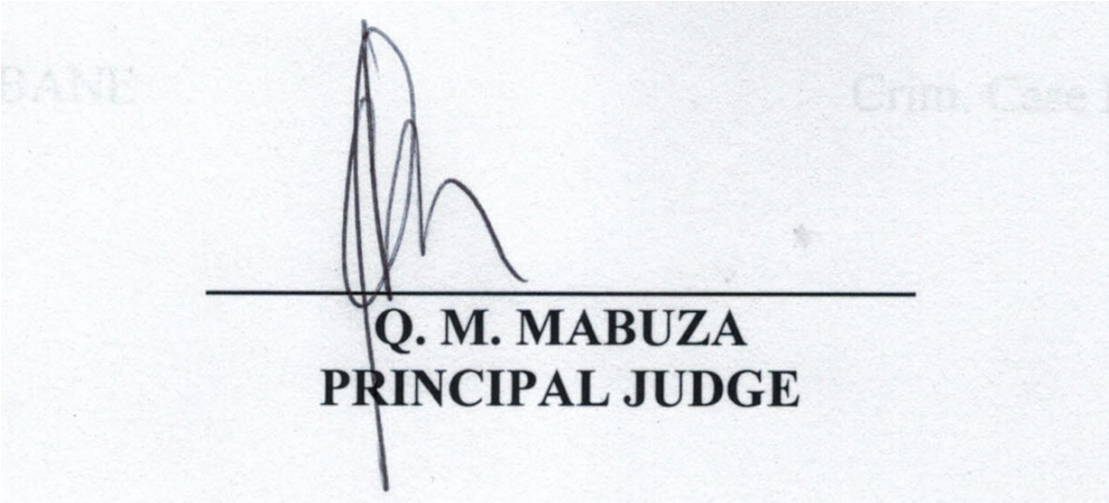
[158] Told that the Defendant had sent letters to the supermarket advising them that electricity would be switched off to allow workmen to carry out their renovation work, his response was that that could have been when the generator was changed over otherwise he had no knowledge of such letters.

[159] Asked if the Plaintiffs sign board had already been moved from the construction work, he replied that when Construction Associates got there, there was no sign board.

[160] Asked if Defendant owned a part of Construction Associates, his response was affirmative.

[161] Upon re-examination, asked why the building inspector and fire chief had indicated that certain areas of the building had to be kept clear of any rubble and from what? He responded that was because those were fire escapes which were three in total. Also the access to the supermarket had to be kept clear for the pedestrians and shoppers to move in and out.

[162] After his evidence, the defence closed its case.



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