



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 302/2012

In the matter between:

THE NEW MALL (PTY) LTD

Applicant

And

TRICOR INTERNATIONAL (PTY) LTD

Respondent

Neutral Citation: The New Mall (Pty) Ltd v Tricor International (Pty) Ltd 302/2012
[2012] SZHC 212 (14th September 2012)

Coram: M. Dlamini J.

Heard: 15th August, 2012

Delivered: 14th September 2012

Contract of agency – circumstances warranting cancellation – procedure thereof

Summary: The applicant and respondent entered into a contract of agency. The issue is whether the said contract was duly cancelled following certain events which are highlighted in the body of this judgment.

The Contract

[1] The contractual relationship between applicant and respondent dates way back in 1993. In terms of annexure “TMN1”, the respondent, conducting business under the name of Plaza Park (Pty) Ltd, a company duly registered, agreed with the applicant that respondent would register a new company under the management and directorship of Robert Colin Foster and that Plaza Park would cede all the rights and interest flowing from the terms of the contract to the new company. Similarly obligations were also to be assumed by the new company from the Plaza Park. Respondent was subsequently formed in compliance with this term. On the day of signature of contract being 21st September 1993, applicant was also yet to be formed under the style New Mall in the said contract.

[2] The respondent under the contract was obligated to manage the affairs of applicant. For instance, the recruitment of tenants, conclusion and cancellation of contracts between applicant and tenants were totally left to the discretion of respondent. Respondent was also to manage the shopping complex in terms of ensuring its maintenance and cleanliness. It was also an express term of the contract that respondent would keep and maintain proper records of accounting. These records were to be made available to the applicant and its auditors whenever called upon. In the day to day running of the affairs, respondent was to open a current account where all rentals collected were to be deposited.

- [3] Expenses and disbursement reasonably incurred were to be paid from the said account. Signatories to the said bank account were to be appointed by respondent subject to approval by applicant. It appears from annexure “TNM3” under paragraph 6.15 that Mr. Robert Colin Foster and Mrs. L. Foster referred to as the Foster family were signatories of this account. It further appears that the Foster family at inception of applicant held 50% shares in applicant. These shares were later sold by respondent to a company which applicant has now engaged to manage applicant. This company is Interneuron. However, respondent continues to manage applicant under the same contract.
- [4] When this contract was concluded, Robert Colin Foster represented applicant in his capacity as trustee of applicant. It not stated as to who represented respondent.
- [5] The terms of the contract reflected further that any surplus were to be deposited into a separate account but kept for purposes of maintaining applicant. It is not clear whether this account was ever opened and if it was, who were the signatories thereof. Applicant, as per the express term of the contract, was to provide sufficient funds to respondent for purposes of managing applicant. Further respondent was to be remunerated at 5% of the rentals.
- [6] The terms of the contract as expressed are not in issue and I need not say much therefore. I will refer to the terms of this contract in relation to termination later in my judgment as they have a direct bearing on the issues before court.

Common cause

[7] It is common cause between the parties that respondent reported suspicious transaction in its operation to applicant. Applicant decided to solicit the services of an auditor, one Kobla Quashie and Associates, to launch a forensic investigation.

[8] This auditor so elected was an internal auditor for respondent.

[9] Following the findings of the forensic investigation which recommended *inter alia*, a refund of the sum of E195,061.60 by respondent to applicant as a result of fraudulent activities by respondent's employees, respondent paid the sum of E195,061.60 to applicant. This sum was paid on the following condition as stated by respondent at page 109 of the book of pleadings:

“5.2 However, entirely without prejudice to our rights, all of which are reserved without admitting liability in any way whatsoever and merely for the sake of continuing the cordial relationship which we have enjoyed with yourselves for many years, we will forthwith make payment of the sum concerned (naturally less our commission in the sum of 5% as provided for in the agreement), into the account of the company.”

[10] I therefore need not say much on the payment of the sum of E195,061.60.

The report

[11] The forensic investigation revealed as follows:

The tenants receipt books are printed in triplicates, however each of the three (3) copies have the same colour and outlook. It was therefore impossible for the tenants and or independent parties to clearly distinguish an original copy from a duplicate or a triplicate copy.

- *The tenant receipts were occasionally and intentionally co-mingled and issued to other tenants leasing other shopping complexes owned by the Forster Family, such as the Mall in Mbabane, The Hub Mall in Manzini and the Arcade Mall in Manzini. This therefore made it easier for the Tricor employees to issue fictitious receipts and void them at a latter date under the pretext that the wrong booklet was used for the shopping mall in question.*
- *The tenant receipts book were not properly safeguarded and secured to ensure that they were only available for use by the officials entrusted with the responsibility of issuing receipts.*
- *Proper segregation of duties were not enforced, and as a result individuals could issue a receipt, deposit the funds into the New Mall's bank account, update the tenants register and records and also dispatch monthly statements to the tenants.*
- *Apparently there was over reliance on trust and integrity of the employees, this therefore compromised the effectiveness of supervision by management and*

those charged with governance responsibilities. This condition provided an opportunity and possible windows for fraud to be perpetuated and go undetected for a long time.

- *Tenants were not issued with receipts regularly after payments. However, there is no evidence to suggest that any serious attempt was made by Tricor's management to match the tenants' receipts against The New Mall's banking records, prior to the discovery of the fraud.*
- *There are indications of shortcomings in Tricor's management and systems which, if they were more robust, would have enabled the fraudulent practices to have been either prevented or detected timely.*
- *It could be argued that the fraudulent practices could also be partially attributed to the relationship that existed between The New Mall and Tricor, which dates back to 1993 when the Forster Family owned shares in both companies. During that period most of the oversight procedures usually required under similar agency conditions were not strictly enforced.*
- *Though the Forster Family relinquished its shareholding in The New Mall several years ago, Tricor has continued to manage the shopping complex under the same terms and conditions. Unfortunately, the old business practices alluded to in the immediate*

preceding paragraph were not refined but rolled forward to the date when these fraudulent transactions under investigation took place. By way of example, the independent bank confirmation received from the First National Bank Limited suggest that the authorized signatories to The New Mall's bank account numbers 57711185184 and 62050276940 are Mr. C. R. Forster and Mrs. L. Forster. From an audit perspective, we consider this as irregular in view of the fact that Mr. and Mrs. Foster are neither shareholders nor directors in The New Mall.

The above weakness in the internal control system was cunningly exploited by Tricor's office staff who carefully selected their targets. In cases where the receipts were manipulated, the victims have the following common characteristics, which is a strong indication that the fraudsters targeted the victims.

- *The owners are mainly Asians. (Kaikai, TJTJ, C and L Investment, H W Chinese Herbal, Duvan Cellphone, etc;*
- *The owners were usually out of the country;*
- *The owners usually paid cash;*
- *The businesses are mainly retail outlets.*

[12] At its paragraph labeled 7.0, the forensic report informs that although substantial amounts in rentals were collected, such were not deposited into

the bank. In some instances where money was banked, it was less than what was collected.

[13] The report concludes at page 42 of the book of pleadings:

“It should be pointed out that we could not quantify the extent of the potential loss suffered by The New Mall with absolute certainty. This is mainly due to the missing receipts as well as the lack of cooperation from Phumi Nhlengethwa, one of the key suspects in the fraudulent transaction. Nonetheless, on the basis of the available information, the potential loss that has been suffered by The New Mall has been estimated to be in the region of E195,061.60 as detailed in table 2 on Section 6.6.”

[14] On the above basis, it recommended, *inter alia*, that the matter be referred to the Anti Corruption Commission for further investigation.

[15] In its final recommendation, the forensic report highlights:

- *“The existing signing arrangement regarding The New Mall’s bank accounts with The First National Bank Limited should be reviewed.*
- *The New Mall should demand a refund of the amount of E195,061.60 from Tricor. This is the estimated misappropriated funds by Tricor’s employee determined in Section 6.6;*
- *The New Mall should compel her external auditors to send debtors circularization letters to the tenants during the audit*

of the year ending 30th June 2011. Any disputed amount there from should be investigated, any additional fraud uncovered and attributable to the ex-employees of Tricor on the basis of the questionable reports in Section 6.7 (Table 3) should be refunded by Tricor to The New Mall.”

[16] At page 53 the report shows:

“6.17 Very few of the interviewees who spoke with the investigating team referred to lack of any overall guidance in providing receipts to the tenants. Since receipts were issued at the whim of the Tricor’s employees. The investigating team however noted the existence of remarkable improvements in the receipting cycle.

6.18 Detailed below are some of the control lapses that existed at Tricor at the time the fraudulent activities took place. The investigating team noted that extra control measures have since been put in place to either eliminate or mitigate against the risks posed by these internal control weaknesses.”

[17] At page 82 is reflected of a further recommendation:

“Tricor should revamp its personnel policies and practices to ensure that each staff has a clear and outlined job descriptions, operating procedures and check and balances.”

Issues

[18] Following the findings of the auditor, applicant by correspondence, annexure “TNM4” advised respondent of the anomalies unearthed by the forensic investigation as highlighted in paragraph 11 herein and tabulated a number of instances indicating breach of the contract as follows:

“2.1 *You have failed to exercise due care in the performance of your duties as Manager, as required in terms of Clause 9.1 of the Agreement;*

2.2 *You failed to comply with your obligation to implement and administer financial control systems and techniques appropriate for the running of a shopping centre as required in terms of Clause 4.4 of the Agreement;*

2.3 *You failed to maintain financial records for the shopping centre in accordance with generally accepted principles and to the satisfaction of auditors as required in terms of Clause 4.5 of the Agreement.”*

[19] The correspondence continue to read:

“5. *As a result of your failure to exercise due care in the execution of your functions and to implement and administer sound financial control systems, some of your staff members misappropriated a sum of E195,061.60.”*

6. *Additionally and more importantly, you have breached obligations that are so vital or material to the performance of the Agreement that the foundation of the contract has been completely destroyed.*
7. *The breach of the agreement has resulted in the irretrievable breakdown of trust and confidence. The New Mall Board of Directors no longer have confidence in you as Managers.*
8. *You are liable to reimburse the New Mall for the loss of the sum of E195,061.60 which arose as a result of your failure to comply with your obligations in terms of the Agreement.*
9. *We demand as we hereby do, that you remedy the above stated breaches of the agreement, and you make payment of the sum of E195,061.60 within 14 day from the date of receipt of this notice, falling which, we will forthwith cancel the Management Agreement with you.*
10. *All our rights remain expressly reserved.”*

[20] In response to applicant’s correspondence, respondent stated by letter dated 9th September 2011 as follows:

- “3. *We categorically deny that we are in breach of any provision of the Management Agreement. On the contrary, we are satisfied that we are in full compliance with all of the provisions of the Management Agreement and have, in the performance of our obligations, fully exercised the standard*

of care and skill fairly and reasonably expected of experienced shopping centre managers, which we are.

6. *We are satisfied that our systems are more than adequate and in compliance with our obligations and as such that you have no purported right or reason to cancel the Management Agreement and we trust that we will continue to enjoy a mutually beneficial relationship going forward during the remainder of the contract period and beyond.”*

[21] On 10th February 2012 applicant launched the present application, claiming for orders:

“7. *...compelling the respondent to deliver to the applicant, all lease agreements for tenants, rental collection receipt books, schedule of rents outstanding, service level agreements for service providers, cheque books, bank statements together with other relevant documentation and information relating to The New Mall Shopping Centre for the period wherein respondent acted as managers of The New Mall Shopping Centre at the applicant’s instance.*

8. *...to stop the respondent from carrying out the function of manager of The New Mall Shopping Centre and that the respondent should desist from conducting itself as though it were manager of the Shopping Complex since its mandate was terminated by the applicant on the 23rd September 2011.”*

[22] In support of the above prayers, applicant avers that as material terms of the contract:

“12.2 The implementation and administration of financial control systems and techniques most appropriate for the running of the Shopping Centre;

12.3 Maintaining financial records for the Shopping Centre in accordance with generally accepted accounting principles;

12.4 Furnishing The New Mall with all such information in relation to the affairs of the Shopping Centre as it may reasonably require as and when asked to do so from time to time;

12.5 It was another material term of the Agreement that the respondent in performance of its obligations under the Agreement should exercise the standard of care and skill which would fairly and reasonable be expected of experienced Shopping Centre Managers, acting in what it reasonably believes to be The New Mall’s best interest.

12.6 It was further agreed between the parties that should either party commit a material breach of any provision of the Management Agreement and fail to remedy such material breach within fourteen (14) days of receiving notice from the other party, the other party would be entitled to cancel the Agreement without prejudice to its other right in law.”

[23] Applicant contends further that following the findings of the forensic auditors, applicant notified respondent of the breach of the contract and requested it to rectify the same within 14 days as stipulated in the contract, failing which the contract would be cancelled. Applicant avers further that respondent failed to rectify the breach, rendering the contract to be cancelled forthwith. Applicant reiterated the circumstances highlighted in its annexure “TNM4” as breach of the contract.

[24] The respondent represented by Robert Colin Foster, its Managing Director, on the other hand opposes applicant’s application on the following grounds:

“12.1 The respondent denies that the purported termination of the agreement was lawful. The respondent denies that it committed any material breach of the agreement. The respondent contends that the applicant’s letter of the 23rd September 2011 and its earlier letter of the 23rd August 2011 constitute a repudiation of the agreement which repudiation the respondent does not accept.

12.2 The respondent contends that the agreement is still in force and it intends to seek specific performance of the agreement in proceedings to be instituted.

13.1 The applicant requested the respondent to hand over all the applicant’s property to Interneuron / Nicholas Balcomb who it stated would be taking over the management of the Mall. The respondent has declined to do so as the applicant’s repudiation of the agreement is not accepted. The applicant has also removed Letitia Foster and myself as signatories the

bank account which is in itself a breach of clause of clause 5.1.3 of the agreement. The respondent nevertheless continues to collect rentals and account to the applicant in respect of the rentals in compliance with the agreement.”

[25] The respondent also denies “co-mingling” of receipts books in respect of various clients, stating that receipt books are kept in a cupboard in the reception; non segregation of employees duties and over reliance to employees; that tenants were not regularly issued with receipts and explained that receipts where tenants deposited rentals direct to the bank accounts were delayed.

[26] Respondent contended further that the receipt book which was found to be in the same colour has since been attended to by inscribing the copies thereto with a stamp indicating “copy”. It rejected the findings of the auditor that it was irregular for the Foster Family to be signatories into the account. It showed that this was in line with the terms of the contract that respondent would select signatories to the account with the approval of applicant.

[27] In the final analysis respondent rejected the report of the auditor in its entirety.

[28] Respondent also revealed that having formed respondent, Swazi Plaza was sold to Interneuron under the directorship of one Balcomb. The said Balcomb persuaded the deponent herein to sell also respondent to him. He flatly refused. He therefore concluded that the application by applicant was a ploy by Balcomb to deny respondent of its rights under the contract. He further contended that Kobla Quashie and Associates has been auditing

responded over the years. The anomalies unearthed by this firm of auditors ought to have been done so prior. Kobla Quashie and Associates never complained or identified any irregularities in its management system before. This in brief, was a confirmation that the allegation in the report were nothing but fabrication.

[29] It is for these reasons therefore that he submits at paragraph 14 as follows:

“14.1 The letter dated the 23rd August 2011 purports to be a demand to remedy the breaches of the agreement. The respondent denies that it was in breach of the agreement in any respect at all.

14.2 It will however be submitted that the letter “TNM” is not a proper notice in terms of clause 11 of the agreement in that the applicant had clearly already decided that the agreement would be terminated. The notice was therefore not a notice to remedy the breaches and the letter itself repudiated the agreement. The repudiation is evident in the applicant’s statements that “the foundation of the contract has been completely destroyed” and that there was an “...irretrievable breakdown of trust and confidence”. Legal argument in this regard will be addressed to this Honourable Court at the hearing of this application.

14.3.4 The respondent implemented financial control systems and maintained proper records in accordance with accepted accounting principles. The company’s auditor, Kobla

Quashie never complained about the respondent’s accounting principles or systems.”

17.1 *The respondent denies that there has been a lawful termination of the agreement. The respondent repeats that the applicant has repudiated the agreement and that this repudiation is not accepted by the respondent. The agreement is still in force and the respondent will seek specific performance. In the circumstances the respondent is not obliged to hand over the documents.”*

[30] Two issues emerge from the above averments of both applicant and respondent: viz. is there a breach of contract by respondent and was the letter, annexure “TNM4” a proper notice for respondent to remedy the breach, if any, or was it merely a repudiation of the contract by applicant?

[31] **Coney J. in Ward v Barrett N.O. and Another 1962 (4) S.A. at 737** states:

“The question whether a power of attorney or authority of an agent howsoever conferred is irrevocable depends, it seems to me, upon an interpretation of the transaction into which the principal has entered with the agent and an application of the general principles of law to that transaction.” (my emphasis)

[32] I now seek to interrogate those *transactions* and the *principles of law* in order to ascertain whether applicant is entitled to revoke the authority granted to the respondent in the circumstances of this case.

[33] Respondent's duty in terms of the contract were as per page 24 of the book of pleadings:

“4 Plaza Park's obligation

Without prejudice to the generality of the provisions of paragraph 2, plaza Park shall be responsible for the day to day management of the shopping centre which shall include in particular.”

[34] At page 31, an excerpt of the contract reads:

“9. Duty of Care

9.1 *Plaza Park shall in performance of its obligations under this Agreement exercise the standard of care and skill which would fairly and reasonably be expected of experienced shopping centre managers, acting in what it reasonably believes to be The New Mall's best interests. ”*

[35] The transaction to be interrogated as per **Coney J.** in **Ward supra** are those highlighted by the forensic report. However, before one resorts to the findings of the forensic report, one needs to address a pertinent point raised by respondent in its opposing affidavit viz. that respondent does not accept the finding of the report.

[36] The respondent's basis for refusal to accept the findings of the forensic report are based on the main grounds. Firstly, this was an auditor who has been auditing respondent over the years. If there were any genuine

irregularities in the accounting system as practiced by respondent, the auditor ought to have spotted or detected the same prior. Secondly, respondent's adopted accounting system is in compliance with standard accounting system expected of any entity running a similar managerial business as that of respondent. That there were findings of fraudulent activities was reflective of only the fact that there was no accurate system in the world.

[37] It is common cause that the auditor so nominated by applicant was an auditor previously engaged by respondent to do annual auditing for respondent. He was, to put it directly, the auditor for respondent as respondent states so in its letter to applicant marked as annexure "RCF2" at 4.1 where it reads:

"4.1 The purported "forensic audit" was carried out by the auditor of the company."

[38] Although respondent disputes the findings of the auditor, it however admits that the findings on fraud are correct as it states at its paragraph 4.6 of its annexure "RCF2":

"The fraud was immediately brought to your attention. Further safeguards have subsequently been put in place to prevent as far as is possible bearing in mind what is set out above, further grounds being perpetrated."

[39] The forensic audit informs us of how the fraud which is admitted by respondent was perpetrated viz: that it was as a result of *inter alia*;

“tenants receipts books printed in triplicates, however each of the three (3) copies have the same colour and outlook. It was therefore impossible for the tenants and or independent parties to clearly distinguish an original copy from a duplicate or a triplicate copy.”

[40] The result of a receipt book in triplicates but in the same colour was as defined in paragraph 7.11 of the forensic report where the original receipt was issued to tenant Kai kai while the same receipts purported duplicate was issued to another tenant by the name of QA Company on the same date, that is, 23rd November 2009. It also resulted in a number of receipts and their duplicates and or triplicates missing from the receipt book, an indication as highlighted at paragraph 7.4.4 of the report that they could have been issued to other tenants.

[41] At paragraph 15.6 of its answering affidavit at page 103 of the book of pleadings, respondent avers:

“One of the “key findings” of the forensic audit was that the receipt books were printed in triplicate but all were in the same colour. This matter has since been attend to by stamping the second and third copies with the word “copy”.”

[42] From this averment, it appears that respondent accepts that its employees took advantage of the receipt book which had triplicate copies of the same colour or rather which one could not differentiate from an original and copy. It is for this reason therefore, one can safely conclude that respondent decided to remedy the situation by stamping the word “copy” in the duplicate and triplicate receipts.

[43] From the foregoing, the nature of the receipt book used by respondent is not a matter decided by the employees but by the respondent itself. One cannot gainsay that it is not within acceptable standards of accounting that a company would use a receipt book such as one used by respondent.

[44] In the analysis therefore, respondent cannot on one hand insist that the report be rejected while on the other hand admitting its findings. The respondent cannot as it is often put in our legal parlance “*appropriate and reprobate at the same time*”. On respondent’s own showing: the forensic audit report stands to be accepted and therefore admissible.

[45] On the next question as to whether there was a breach of contract warranting applicant to demand respondent to rectify the error within fourteen days, in default thereof cancellation of the contract, the answer lies on the report. To decide on this question, another question ensues, was the fraud perpetrated by respondent’s employees as a result of lack of controls or failure by respondent to adopt acceptable standards of accounting?

[46] I have already alluded to the obligations of respondent under the contract. Its first mandate was to appoint as per clauses 4.1 page 24 of the contract of the book of pleadings:

“suitably trained, qualified and competent personnel to enable Plaza Park (now Tricor International and defendant) to fulfill its obligation.”

[47] It is difficult to decide on this point because as per the forensic report findings at page 53 of the book of pleadings that the investigation team:

“requested for the personal files and job description of all the employees, and also the company’s operating procedures manual. We were however informed that these documents were not available and were not in place.”

[48] It cannot be decided therefore whether respondent did employ qualified personnel or not. At any rate the issue of qualifications of employees was not the subject-matter of the letter marked “TNM4” written by applicant to respondent demanding rectification. However, what was a subject matter was that demarcation of duties had to be put in place and over reliance on employees be limited.

[49] Paragraph 4.4 as reflected at page 25 of the book of pleadings reads:

“the implementation and administration of financial (including accounting and costs) control systems and techniques most appropriate for the running of the shopping centre.”

while 4.5 states:

“maintaining financial records for the shopping centre in accordance with generally accepted accounting principles and to the satisfaction of the auditors and to provide the New Mall and the auditors with such financial records”

[50] On this question of receipts the report reads:

“...receipts were issued at the whim of the Tricor’s employees”

and further:

“receipt books were used for certain companies and individuals who were not tenants at the New Mall”

and again:

“Tenants were not provided with receipts after payment had been made. However, there was no evidence to suggest that any serious attempt was made to match tenant’s receipts against the New Mall’s banking records, prior to the discovery of the fraud.” [see page 53 of the book of pleadings]

[51] At page 54 the report highlights:

“Due diligent procedures were not instituted to monitor cash receipted against banking in a timely manner.”

[52] The report concludes:

“The above weakness in the internal control system was cunningly exploited by Tricor’s office staff who carefully selected their targets.” [see page 54 of book of pleadings].

and further that the above indicated:

“shortcomings in Tricor management and systems which if they were more robust, would have enabled the fraudulent practices to have been either prevented or detected timely.” [see page 41 of the book of pleadings]

[53] Could the totality of the above circumstance be said that they are in compliance with “*the implementation and administration of financial control system and techniques most appropriate for the running of the shopping centre*” or are an indication of “*maintaining financial records for the shopping centre in accordance with generally accepted accounting principles and to the satisfaction of the auditors.*” As per clauses 4.4 and 4.5 respectively of the Agreement.

[54] Certainly the answer should be in the negative. The respondent was in breach of the express terms of the contract. At any rate in a contract of this nature, that is, agent and principal, the agent is expected to:

“only do what the principal could rightly have done at the moment of action” as per the wise words of **Innes C. J. in National Bank of South Africa Ltd v Hoffman’s Trustee 1923 AD 247 at 249.**

[55] It is in respect of the above *dictum* that applicant contracted as an express term of the contract that the respondent:

“in performance of its obligations under this Agreement exercise the standard of care and skill which would fairly and reasonably be expected of experienced shopping centre managers, acting in what it reasonably believes to be the New Mall’s best interest.” [see clause 9.1 of Agreement at page 25 of pleadings]

[56] In interpreting the above express terms of the contract, this court is guided by the principles as laid down in **Worman V Hughes and Others 1948 (3) S.A. 495 at 505 (AD)** where their Lordships held:

“It must be borne in mind that in an action on a contract, the rule of interpretation is to ascertain, not what the parties’ intention was, but what the language used in the contract means, that is, what their intention was as expressed in the contract.”

[57] On the same subject **Solomon J.** in **Pletsen v Henning 1913 AD 82** at **99** had stated:

“The intention of the parties must be gathered from their language, not from what either of them may have had in mind.”

[58] *In casu*, the language of the contract is clear and without any ambiguity, viz. that the respondent was bound to act in the best interest of the applicant. The co-mingling of receipts, non job description for each employee, failure to reconcile receipt with bank statements on a monthly basis and the use of receipt books without distinction as to copies could not in all fairness be said to be in the best interest of the applicant. It is for this reason that on investigation, it fell far short of *“the satisfaction of the auditor”* as per the express term of the Agreement in clause 4.5.

[59] It is therefore my considered finding that the respondent was in breach of the material terms of Management Agreement.

[60] The next enquiry is whether the letter by applicant marked annexure “TNM4” was indicative of repudiation of the contract by applicant or a notice in terms of clause 11 of the Agreement which reads at page 32 of the pleadings:

“Should either party commit a material breach of any provision of this Agreement and fail to remedy such material breach within fourteen (14) days of receiving written notice from the other party requiring it to do so, or such extended period as may reasonably be necessary in the circumstances, then such other party shall be entitled, without prejudice to its other rights in law, to cancel this Agreement, or to claim specific performance, in either event without prejudice to the aggrieved party’s right to claim damages.”

[61] The term repudiation connotes as per **Rumpff J. A. in Van Heerden en Andere v Sentral Kunsmis Korporasie (Edms) Bpk 1973 (1) S.A. 17 (A)** at **30B**:

- “(i) a denial of the original existence of a contract because the parties never reached consensus ad idem;*
- (ii) a denial of the present existence of a contract which once existed but was voidable;*
- (iii) a refusal to perform, a declaration of an inability to perform or that one party is, for some reason or other, no longer bound to perform.”*

[62] The learned Judge continues to enlighten:

“Repudiation may be defined as ‘words or positive conduct indicating an unequivocal intention on the part of either of the parties not to be bound or not to be fully bound by the contract.’”

[63] Respondent has submitted that the following words as expressed in annexure “TNM4” by applicant to respondent are indicative of “*unequivocal intention*” by applicant “*not to be bound by the contract.*”

“the foundation of the contract has been completely destroyed”

and further that there was:

“...irrevocable breakdown of trust and confidence” as per paragraph 14.2 of respondent’s answering affidavit at page 100 of the book of pleadings.

[64] The above averments by respondent are in line with the *dictum* by **Lewis J.** in **Schlinkmann v Van der Walt and Others 1947 (2) S.A. 900E at 919** where he states:

“...the onus of proving that the one party has repudiated the contract is on the other party who asserts it...”

[65] The learned judge proceeds:

“In every case the question of repudiation must depend on the character of the contract, the number and weight of the wrongful acts or assertion, the intention indicated by such acts or words, the deliberation or otherwise with which they are committed or uttered, and the general circumstances of the case.”

[66] Clause 11 of the contract as already cited states that:

“Should either party commit a material breach of any provision” (my emphasis)

[67] This phrase suggest to me that it was incumbent upon the applicant to show to the respondent that the remedy so demanded was as a result of a “*material breach*” and therefore the statements “*the foundation of the contract has been completely destroyed*” and “*irretrievable breakdown of trust and confidence*” was nothing else by information tutologous to the fact that the breach complained of was material.

[68] The intention of annexure “TNM4” is expressly stated in its last paragraph where it reads:

“*We demand as we hereby do, that you remedy the above stated breaches of the agreement, and you make payment of the sum of E195,061.60 within 14 days from the date of receipt of this notice, failing which, we will forthwith cancel the Management Agreement with you.*”

[69] I reach the above conclusion based on the *dictum* by **Lewis J.** in **Schlinkmann supra** that:

“*a dispute as to one or several minor provision in an elaborate contract or a refusal to act upon what is subsequently held to be the proper interpretation of such provision should not as a rule, be deemed to amount to repudiation.*”

[70] *In casu* the words so complained of are not indicative of refusal by applicant to act on a minor provision or any term of the contract. They are merely on expression of the extent at which the terms of the contract has been violated by respondent. Respondent as already mentioned, must prove on a balance of probability an “*unequivocal intention*” [as per **Rumpff J.A.**

in **Van der Heerden** *op. cit.*] on the part of the applicant not to be bound by the contract.

71] I am afraid, that the statement cited do not show an unequivocal intention to repudiate the contract by applicant. In the result the letter annexure “TNM4” is a notice in terms of clause 11 of the Agreement.

[72] Further I hold that respondent having categorically refused to admit any irregularities as per paragraph 4.7 of its letter to applicant (annexure RCF2 which reads:

“As such we are satisfied we have not been nor are we presently in breach of our obligations in terms of the Management Agreement and that we have always acted in what we reasonably believed to be The New Mall’s best interest and we will continue to do so on the way forward” [see page 109 of the book of pleadings],

contrary to the findings of the forensic investigations the letter annexure “TNM2” by applicant which reads:

“We regret to advise that on account of your failure to remedy the material breaches of the agreement which have resulted in a total breakdown of trust and confidence, we are left with no option but to cancel the agreement.”

was in order.

[73] The averment at paragraph 15.6 of its answering affidavit that it has since remedy the situation by affixing the word “*copy*” to duplicate and triplicate

receipts cannot avail the respondent at this stage as that ought to have been communicated to applicant before the lapse of 14 days after being served with the notice as annexure “TNM4”.

[74] It would be remiss of me not to address two further grounds raised in defence by respondent in its answering affidavit viz. that the auditor who compiled the forensic report herein ought to have detected irregularities during its yearly audit of respondent. Further that the audit never complained about the receipt books being in triplicate of the same colour.

[75] The second ground is also similar in that respondent avers that having sold Swazi Plaza to Interneuron under the directorship of Nicholas Balcomb, Balcomb plotted to oust him by negotiating the agreement with applicant for his benefit.

[76] A contract has been defined by **Willie and Mullins** in **Mercantile Law of South Africa, 4 Ed, 1984** at page 1 as:

“...an agreement which the law enforces, by which the parties reciprocally promise, or one of them simply promises to the other or others, to give some particular thing or to do or abstain from doing some particular act.”

[77] The learned authors state further:

“The essence of a contract is that the law will compel a party who has seriously undertaken an obligation to perform what he has promised.”

[78] *In casu* the contract was between applicant and respondent. Any obligations flowing from the contract bound applicant and respondent only and not a third party such as the auditor. In the absence of any allegations of cession of rights and transfer of obligations to the auditor of which applicant was aware and accepted, it is not available for the respondent to hold that the auditor ought to have identified the non compliance with standards of accounting during its annual auditing. The obligation to comply was upon the respondent and no other as per the terms of the contract. Respondent cannot be held to pass the buck as it were.

[79] Alternatively the question is as propounded in **Media 24 Ltd v South African Securitisan (437/2010) [2011] ZASCA 117** although commenting on a *aquilan* action it is my view that the principle is equally applicable herein, a party who alleges:

“wrongful act or omission”

must show

“...the existence of a legal duty and the imposition is a matter for judicial determination involving criteria of public and legal policy”

[80] *In casu* respondent has not shown as per the contract under issue that there was a legal duty upon the auditors, Kobla Quashie and Associates to ensure that respondent’s accounting system was in the best interest of applicant.

[81] In relation to Mr. Nicholas Balcomb, respondent does not aver that applicant is part of the scheme to deny it of the agreement. Respondent only points to Mr. Balcomb, a person who is in the picture initially at the

instance and invitation of the respondent and not applicant. In the absence of any *mala fide* or *culpa* pointing to applicant, respondent's ground against Mr. Balcomb's tactical moves stands to be dismissed outright.

[82] In the foregoing applicant's application is upheld.

[83] Prayers 1, 1.1, 1.2, 1.3, 1.4, 1.5, 1.6, 2 and 3 of applicants Notice of Motion dated 10th February 2012 are granted.

M. DLAMINI
JUDGE

For Applicant : **Z. Shabangu**
For Respondent : **L. R. Mamba**