IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 1129/16

In the matter between:

KMP MEDIA (PROPRIETY) Ltd **Applicant**

VS

SWAZILAND TELEVISION AUTHORITY **Respondent**

Neutral citation: KMP Media *v Swaziland Television Authority () [2016] SZHC 124 (20th July 2016)*

Coram: FAKUDZE, J

Heard: 8th July 2016

Delivered: 20th July 2016

For Applicant: Advocate M. Vander Walt Instructed by Henwood and Company

For Respondent: Z. Jele

Summary: *Civil Procedure – Repudiation of contract by one party – where one party repudiates a contract, other party has two choices: can elect to keep the contract in being or cancel it – where party elects to keep contract in being specific performance remedy available so as to keep or allow the contract to run its course – Allegations that contact violates legislative enactments considered – Issue of fraud so as to vitiate contract, impossibility of performance, joinder of parties. The Turquand Rule, Estoppel – where no proof of delegated authority by a Public Enterprise in terms of the contracting power of its Chief Executive Officer by means of evidence before court, court entitled to assume that such does not exist – Issue for determination whether Air time agreement between parties void for want of statutory compliance and the validity of provisions of the air time agreement;*

Held

(a) Provisions of contract are valid and enforceable;

(b) No purported breach of the various legislative enactments governing operations of Respondent.

(c) The need for suspended Chief Executive Officer of Respondent to be joined as a party to the proceedings should have been effected by the Respondent, although joinder is not the main issue for consideration.

(d) Turquand Rule and Estoppel favours Applicant.

(e) Sufficient case for an Interim Interdict established and interim Interdict is in the alternative

(f) Specific performance ordered;

(g) *Applicant's application upheld with costs at ordinary scale, and including costs of counsel in terms of Rule 68 of the High Court Rules*.

JUDGEMENT

INTRODUCTION

[1] This an application brought on a certificate of urgency to compel the Respondent to honour its contractual obligations to the Applicant. The application seeks the enforcement of the Authority's contractual obligations under a written airtime sales agreement ("the sales agreement") that was concluded during July 2015 and in terms of which the Applicant procured and purchased certain volumes of broadcaster airtime adverting slots from the Authority. In terms of the sales agreement the airtime/slots would in turn be utilised by the Applicant for the airing of the content on behalf of it's own clients who pay the Applicant for the right to have their advertisements shown on Swazi T.V. A copy of the sales agreement was attached to the Founding Affidavit and marked "PSI."

[2] The Respondent has or is in breach of the Sales Agreement and has effectively repudiated its obligations under it. The Applicant does not accept the Respondent's repudiation and therefore seeks specific performance of the Respondent's obligations thereunder. The Respondent has also breached and repudiated a Licence Agreement executed between the Respondent and the subsidiary of the Applicant, namely Kohinoor Promotions CC ("Kohinoor"). It must be noted that although the Licence Agreement does not from of the current

proceedings, the Licence Agreement issue is relevant to current proceedings in as far as the same having also been cancelled by the Respondent.

APPLICATION

[3] Following the repudiation alluded to in the introduction, the Applicant filed an Urgent Application to be heard on the 30th June, 2016 or soon thereafter as counsel may be heard for an order in the following terms:

(1) The Applicant's non-compliance with the Rules of the above Honourable Court in regard to service and time limits is condoned and this application is permitted to be heard as one of urgency in terms of Rule 6 (25);

(2) The Respondent is hereby directed to forthwith comply with its obligations to the Applicant under the Airtime Sales Agreement between the parties dated the 3rd July, 2015 annexed to the Founding Affidavit herein by-

2.1 Immediately making available airtime advertising spots for the flighting of advertisements in accordance with the formulae stipulated in clause 2 of the aforesaid Agreement;

2.2 Without further delay, flighting all advertisements of the Applicant's clients in accordance with the aforesaid Agreement;

2.3 Complying with the balance of its obligations to the Applicant under the aforesaid Agreement;

(3) The Respondent is hereby interdicted and restrained from cancelling or threatening the cancellation of the Airtime Sales Agreement;

In the alternative to prayers 2 to 3 above,

(4) It is ordered that pending final relief to be granted on the same papers, alternatively, pending the determination of the issues that may be referred to oral evidence, the relief sought in prayers 2 to 3 shall stand as an Interim Interdict;

(5) Ordering the Respondent to pay the costs of this Application on the Attorney – and client scale inclusive of the costs of counsel as certified in accordance with the High Court Rule 68 (2)

[4] The Respondent has filed the Notice to Oppose which was later followed by an Answering Affidavit, in which the Respondent has raised two points of law pertaining urgency and the non joinder of the suspended Respondent's Chief Executive Officer, Bongani Dlamini. When the matter appeared before me on the 8th July, 2016, I enquired from the parties if they would want the court to first deal with the points of law. The Respondent's Counsel indicated that the points will be dealt with together with the merits of the Application. During arguments on the merits, emphasis was placed on the issue of non joinder and I take it that the issue of urgency had lost value and therefore not worth pursuing. The issue of non joinder will be dealt with when this Application is considered on the merits.

[5] Further to the filing of the Answering Affidavit by the Respondent, the Applicant has filed a Replying Affidavit. When the matter first appeared before my **Learned Brother Mamba J,** He recused himself and postponed same to the 4th July, 2016. He granted leave to the Respondent to file a Supplementary Affidavit and also allowed the Applicant to Reply thereto. The reason why I am pointing this out is to explain the voluminousness of the papers filed herein. Comprehensive Heads and the Bundle of Authorities were filed and this court is

grateful for the diligence and speed in which all the court processes were availed before the hearing of the matter.

CONTENTION

[6] In order to fully comprehend and to simplify the matter(s) between the Applicant and the Respondent, it is very important to understand the basis or issues upon which the Respondent cancelled and/or repudiated the contract and how the Applicant responds to those issues. This is particularly so with respect to the Sales Agreement and the issue of the Agreement not being be in accordance with national laws thus rendering same a nullity. At the end of each issue I will pronounce this court's position on it.

THE CONTRACT

[7] The Respondent's first punch or blow is that there is an irregularity *exfacie* the Agreement in that it has been initialled by Mr. Bongani Dlamini, the Respondent's employee, but same has not be initialled by the Applicant. The Respondent further submits that the fact that same has not been initialled may not be a ground for repudiation of same, but it does create some doubt in the mind of the Respondent if indeed the same is genuine. The Respondent goes further to argue that the Agreement was purportedly signed by the Respondent's employee, Bongani Dlamini on the 3rd July, 2015 and same was forwarded to the Applicant on that day. On the 7th July, 2015 an email message was sent to the Respondent's employee making a counter offer. The Respondent's argument is that the sequence of these events amounts to a reasonable conclusion that there was no meeting of the minds between the parties.

[8] The point the Respondent is making is that much as the Respondent's employee sent the Agreement to the Applicant, there is suspicion that the Agreement was not entered into on the 3rd July, 2016, considering that the Applicant counter offered on the 7th July, 2016. The Respondent's counsel contends that the Agreement might have been entered into later than the 7th July, 2016 but the date of signature of the Agreement was entered with retrospective effect.

[9] The Applicant's response to the issue of the Agreement not manifesting that there was a meeting of the minds is, according to the Applicant, neither here nor there. The Applicant's Counsel drew the attention of the court to the email message of the 7th July, 2015 which is on page 116 of the Book of Pleadings. At the bottom left of the email, it is clear that the Agreement was sent to the Applicant on the 3rd July, 2015 at 11.13 A.M. The Applicant's contention is that the Applicant's representative signed the Agreement on the very same day, that being the 3rd July, 2015 and sent it back to the Respondent. The email dated 7th July, 2015 was an acknowledgement of receipt of the contract and it thereafter made a counter proposal. The opening words "Thank you very much for the agreement," says it all. This shows that the Agreement had been concluded and signed because if it were otherwise, Applicant's opening words in the email would have been "Thank you very much for the draft agreement."

[10] To further buttress his point, the Applicant says that after concluding the agreement, he then made a counter offer as per the email, which counter offer was refused by the Respondent.

[11] This court is inclined to agree with the contention by the Applicant that there was a meeting of the minds between the Applicant's representative and the Respondent's employee. The reading of the email of the 7th July, 2015 especially the part acknowledging receipt of the Agreement sounds convincing. After all, the Respondent makes it clear that the basis for attacking the provisions of the agreement is suspicion that there was some fraud in its conclusion. The court cannot act on suspicion; it can only act on what has been proven. Therefore I find in favour of the Applicant on this point. On the issue of whether an Agreement that has not been initialled can be declared invalid, the Respondent provided the answer when he said that the fact that a document has been initialled by one party before same is signed cannot be a strong basis for its cancellation and/or repudiation.

[12] The second issue raised by the Respondent is that the Agreement provides that the Applicant should pay the sum of E5,00,000.00 upon receipt of a signed Agreement. The Respondent contends that since the Applicant did not honor its part when the Agreement was purportedly signed on the 3rd July, 2015 by effecting a down payment of the aforesaid amount, it is a clear indication that the minds of the parties had not yet met. That is further confirmed by the email address of the 7th July, 2015.

[13] The Applicant responds to the allegation by drawing the attention of the court to paragraph 6 of the Agreement which is captioned "KMP MEDIAS OBLIGATION."

The opening words say "KMP shall discharge her obligation herein in the following manner:

a. Upon receipt <u>of a signed copy of the Agreement together with a valid invoice</u>, KMP shall make an up front cash payment of E5,00,000." It is therefore Applicant's argument that a signed copy of the agreement was received but a valid invoice was not attached thereto. The Applicant further states that as at the time this Application was before this court, no invoice had been sent. Out of good faith, the Applicant argues, decided to deposit with the Respondent a sum total of E8,00,000 as it appears in "Annexure PS3" at page 42 of the Book of Pleadings.

[14] This court holds the view that there is merit in the Applicant's argument. The Respondent has not proven or establish in its papers if the Agreement was received together with the invoice so as to enable the Applicant to effect payment. As said earlier in this judgment the point that there was the meeting of the minds has been ably argued by the Applicant. During the stage when the matter was being argued, the Respondent's Counsel did mention that some of the documents that may have been availed to the court to further establish its case might be with the Audit that has been established by the Respondent to look into the operations of the Respondent's business activities. This is a very unfortunate scenario because the court can only deliberate and rule on what is before it. It is a well known legal principle that a party stands or falls by its papers. This position was clearly stated in the case of **<u>Swaziland National Housing Board V Dumsile P. Dube Civil Trial 301/09 where the Learned Justice M.C.B. Maphalala J,</u>** as He then was, when He said that --

> ***"The general rule which has been laid down repeatedly is that the applicant must stand and fall by his Founding Affidavit and the facts alleged in it, and that although sometimes it is permissible to supplement allegations contained in that affidavit still the main***

foundation of the Application is the allegation of facts stated there, because those are the facts, that the Respondent is called upon either to affirm or to deny."

The converse applies with respect to the case at hand. The Respondent stands and falls by its papers.

[15] The third issue raised by the Respondent on why there are misgivings about the Agreement is that the Applicant was obliged to make timeous payment and it failed to do so. What makes matters worse is that the schedule of payment indicates that a lump sum payment of E5,00,000.00 should have been paid by the Applicant after the signing of the Agreement and the schedule indicates that a payment of E250,000.00 should have been effected in October 2015, followed by that of February 2016 which amounted to E250,000.00 that of June 2016 which amounted to E150,000.00and that of August, 2016 which amounted to E100,000.00. What worsens the situation is that the contract comes to an end in February, 2017 and it is not clear how the remaining months between August 2016 and February, 2016 will be catered for in terms of payment.

[16] The Applicant's response is that since no invoice accompanied the Agreement when same was signed on the 3rd July, 2015, there was no obligation on the part of the Applicant to start honouring its obligations in terms of Clause 6 of the Agreement notwithstanding the non availability of the invoice. The Applicant in good faith went ahead and effected payments of E8 00 000.00 as shown in Annexure PS 2" of the Book of Pleadings. The court's position on this point is not different from the one it made with respect to the second issue of the Respondent's allegations. I must also add that a simple computation of the money schedule (if there was strict compliance) proves that after the August, 2016 payment, the

Applicant would not be obliged to pay anything because it would have settled the E1.250,000 which is the value of the airtime that was bought by the Applicant in terms of the Sales Agreement.

[17] The fourth issue the Respondent is raising regarding the contract is that the person who signed the Agreement on behalf of the Applicant should have been a certain Errol Norman Pretorius. The Respondent's Acting Chief Executive Officer, who has deposed to the Answering Affidavit on behalf of the Respondent, alleges that he has dealt with Errol Norman Pretorius and although the Acting Chief Executive officer is not a handwriting expert, he can faithfully declare that the signature on the agreement is not that of Errol. The court was then invited to compare the signature of Errol as seen in page 118 of the Book of Pleadings and one at page 41. The court noted that the signature in the Agreement is not that of Errol. The Respondent therefore argues that one's signature carries a high value and where same is appended, it can cause the Respondent's Acting Chief Executive Officer to suspect some fraud or some foul play. If somebody had signed on behalf of the Applicant's Errol, the words "PP" should have been used.

[18] The Applicant clarifies this purported anomaly in paragraphs 45 of the Replying Affidavit when it says in the latter part of that paragraph -

"45.1 While it was intended that Mr. Errol Pretorius would sign the Sales Agreement he was unable to do so as he had to attend to a family emergency.

45.2 As the managing director, I then did so in his place albeit that the Sales Agreement was not redrafted to cater for my signature. This does not detract from its validity. A confirmatory Affidavit deposed to by Mr. Pretorius is annexed hereto marked "RA6."

[19] What is apparent from paragraphs 45.1 and 45.2 of the Replying Affidavit is that the Applicant does acknowledge that it signed on behalf of Mr. Pretorius. It goes further to explain why Mr Pretorius could not sign. The court takes the view that the contracting parties were the Applicant KMP Media (Pty) Ltd and the Swaziland Television Authority who was the Respondent. It would be amiss of this court to conclude that just because Mr. Errol did not sign and the Managing Director signed without the p.p. words, then the contract is invalid. I think the *deminimis* rule should apply in this instance. The non p.p. appellation to the signature should not be read as an indication that the Applicant had a fraudulent intent when its Managing Director so signed. The important thing is that the Applicant (KMP Media) entered into an agreement with the Respondent not withstanding some petty errors by its representative. I therefore come to the conclusion that there is no merit in the Respondent's argument on this point.

[20] The fifth point that is raised by the Respondent regarding the apparent irregularities in the Sales Agreement pertains to the Agreement being onerous on the part of the Respondent. It being onerous leads to an impossibility of performance. The following instances are mentioned by the Respondent to prove that the Agreement is onerous on its part. The Applicant will produce an advert, and deliver it to the Respondent to air. The Respondent will air the advert and be paid a certain percentage during prime time and another percentage during non prime time. The Respondent alleges that now the Applicant has the monopoly to have its adverts aired during the prime time to the exclusion of other air time buyers. There is also a provision in the Agreement that failure to honour the Applicant's advert in them being aired during the prime time will lead to a penalty

being imposed on the Respondent as shown in the formulae at page 39 of the Book of Pleadings.

[21] The net effect of the Agreement is that -

(i) Only the Applicant's adverts are going to dominate the Respondent's prime time;

(ii) The Applicant will get adverts at a discounted rate of 80% since the Respondent also sells airtime to some of the clients of the Applicant (and they do so at the rate stipulated at page 115 of the Book of Pleadings), the clients will prefer the discounted rates offered by the Applicant. This will greatly disadvantage the Respondent;

(iii) The Agreement creates a dependency syndrome on the part of the Respondent and other users of its airtime.

[22] The Applicant's response is that it is not true that it is monopolising the industry. The Applicant makes its case known in paragraphs 16 and 17 of its Replying Affidavit where it states that:-

"16 I annex hereto marked "RA1" a report for Swazi T.V. for May 2016 prepared by T.A.A.M (TRACKING ADS ON AFRICAN MEDIA) which shows that out of the 283 slots for May 2016 during prime time (17:00 hours to 22:00 hours), only four were used by KMP (Applicant) for Shoprite while the remaining 279 were allocated to the advertisers where the Authority was free to sell the airtime at any price of its choosing. It underscores the point made above that clients can achieve the same, if not more competitive enterprises. It is also telling in that it reveals that KMP Media is not dominant by any stretch.

17 While the Authority now complains that the discounts set out in the sales agreement is such magnitude to justify a cancellation thereof albeit that this does not constitute a valid legal premise to justify cancellation. It has offered Sbuko in Swaziland even more competitive rates than the E538.79 thirty second prime time and thirty second non prime time rate of E424.03 which is less than what is contemplated by the Sales Agreement. I refer the court to "RA2" hereto being an email from Ms Mhlongo to me dated 7th June, 2016 to which was annexed Swazi TV's current rate card rates. As appears therefrom, the rates currently on offer for prime time are significantly cheaper and come in at as little as E468 for thirty seconds alternatively E360."

[23] This court wishes to observe that the allegations in paragraph 16 and 17 made by the Applicant in its Replying Affidavit remain unchallenged. I went through the Respondent's Supplementary Affidavit and found nothing to suggest such challenge. This court is therefore right to conclude that it is not denied. This court wishes to further observe that it finds merit in what the Applicant is saying. It has now been settled in our jurisdiction that you cannot rely on impossibility to perform so as to avoid your obligations under a contract. Further, where impossibility of performance is raised as a defence, it must be proven that the impossibility is absolute. **In case of Malesela Technical Service (Pty) Ltd V Swaziland Electricity Board and Others, Appeal Case No 5 of 2008** , His Lordship Zietsman, AJ, made this point clear in pages 10 to 11 of His judgment when He said -

> ***"For a party to be relieved of his obligations in terms of a contract on the basis of impossibility of performance it must be shown that the impossibility is absolute. See YODAIKEN V ANGERHRN AND PEIL 1914 T.P.D. 254, at 241; HAYNES V KING***

WILLIAMSTOWN MUNICIPALITY 1950 (3) S.S 841 (E.D.L.D) at 847H."

We must also note that if the realisation that performance might not be possible was within the contemplation of the parties at the time the contract was concluded, they are generally bound by the contract. Also if the parties agree that the risk of impossibility of performance is to fall on the debtor, he cannot rely on impossibility of performance to avoid the contract. See **OERLIKEN SA (PTY) LTD V JOHANNESBURG CITY COUNCIL 1970 (3) S.A. 579 (A) at 585 B.**

[24] His Lordship has further observed in the Malesela case (supra) that -

"***In the present case, although there are statements from both parties suggesting that it would not be possible for the Appellant to reduce the losses to 10% or less it does not seem to me that an absolute impossibility of performance has been shown is that it would be difficult, and perhaps exorbitantly expensive to implement steps capable of the required reduction in the losses, but this does not, in my opinion go far enough to justify a finding of absolute impossibility of performance."***

[25] The observations by His Lordship in the **Malesela case** applies with equal force and effect with respect to the Respondent. It was the duty of the Respondent to establish that the agreement was impossible of perframnce. I accordingly find in favour of the Applicant on this point as well.

[26] The last issue raised by the Respondent relates to the under declaration of the flashdrives and the information therein for purposes of the Value Added Tax. The Respondent argues that the Applicant only declared the value of the flash drives that were carrying the information to be aired. The Respondent's case is that the contents in the flash drive should have as well been declared. The Acting Chief Executive Officer of Respondent will have to bear the Value Added Tax (VAT) resulting from the under declaration. The Respondent further argues that in pages 199 to 203 there are invoices that have been sent by the Applicant for the Respondent to honor. These invoices pertain to the Value Added Tax of what the Applicant has not declared.

[27] The Applicant's case is that the issue of the importation of the flash drives is not part of the terms of the Agreement between the parties. It is dealt with and covered in the Licencing Agreement which is at pages 43 to 47 of the Book of Pleadings. The Applicant argues that in terms of the Airtime Agreement, the Applicant pays to the Respondent and in terms of the Licencing Agreement, the Respondent pays to the copy right holder or owner. In page 47, the "owner is granting the user of the copy right (which is the Respondent in this case) the Grant of Rights, Copyright and Reserved Rights." These are rights bestowed on the ownership of the copy right and the owner must be remunerated for such use. Much as the Respondent has the user's right by virtue of the License Agreement she still has to pay the owner (which is in this not even the Applicant) but the actual producer of the programmes and some of them are from overseas. That is why the rates therein are in US Dollars. In any event the Applicant argues the Airtime Agreement has nothing to do with the Licensing Agreement. The Respondent must not confuse the two.

[28] The Applicant further submits that in Intellectual Property Law, information is never subjected to tax. It is the container that is subjected. An example is when one crosses the border with his or her laptop. All that you declare (for VAT purposes) is the laptop and not necessarily the contents in the laptop.

[29] This court fully agrees with the Applicant's submission on this point as well. There is no way you can pay VAT for information. The case of **Waste-Tech (Pty) Ltd V Waste Refuse (Pty Ltd 1993 (1) SA (W) 836 at page 842G** settled this point**.** The Learned Judge had this to say -

> ***"What the plaintiff is claiming is that the subject matter of these contractual rights viz the confidential information in the "credit records" and not the right themselves, is incorporeal property at common law and the plaintiff is entitled to be protected against unlawful use of this property by the defendant. In my view this claim is unfounded. I do not think except in a somewhat loose sense, such information as distinct from the contractual rights can be regarded as property at common law; nor do I believe that the plaintiff can found a cause of action upon an invasion of its rights of property in such information."***

[30] The Learned Judge further established the point that information cannot even enjoy a "quasi property" right when He explained at page 844 of the judgment, why that information should have been treated as" quasi property." The Judge made it clear that when that it had long been established at common law, that in the absence of rights of patent, trade mark or copyright, information and knowledge are not property of an individual."

The Learned Judge finally observed at pages 845 that -

> ***"It appears that information or knowledge of whatever value and however confidential is not recognised as property either in South Africa or in the English Law systems. Accordingly on this ground the Applicant must fail in its attempt to establish a proprietary right to information contained in the documents which the respondent required."***

[31] In my knowledge of Intellectual Property, all I know is that tax is payable on the Royalties that are received by the owner of the copyright because this what is due to him or her. This is what we call "the fruit of the owner's labour." The Royalties in copyright law can be equated to a "dividend" in company law. The declared dividend attracts tax in the same as royalties do. A transmitter of a copy righted information (as the case is with the Applicant) cannot be taxed because he or she is not the owner and therefore not the beneficiary of the proceeds of the copyright. By the very same token if the Respondent is using the information without paying any copyright dues, she would be labelled as the user of pirated material and would therefore be infringing the owner's copyright.

The learned Authors, **TINA HART, SIMON CLARK and LINDA FAZZANI, INTELLECTUAL PROPERTY LAW**, 6th Edition, buttress the point that right copyright confers on the owner thereof, when they say this at page 152-

> ***"Copyright is an automatic right which entitles the owner to prevent others from copying their work. The works protected by copyright are original literary, dramatic, musical and artistic***

works, sound recordings, films, broadcasts and typographical arrangements of published editions."

[32] Before I close the chapter on the Parties' arguments on the contractual validity of the Airtime Agreement the Applicant and the Respondent entered into, I must re-iterate the principle that has been used as model of interpreting contracts by courts. It was made mention of in the case of the Supreme Court of **Malesela Technical Services (SUPRA) at page 9 where the learned Judge Zietsman JA** said -

"But in interpreting a contract the courts should seek to uphold the contract rather than to destroy it. See e.g ANNAMMA V MOUDLEY 1943 A.D. 531 AND GANDHI V SMP PROPERTIES (PTY) LTD 1983 (1) SA 1154 (D & CLD) at 1156 E-F."

THE INFRINGED LAWS

[33] The Malesela Technical Services Supreme Court case (Supra) has settled the legal principle that parties cannot contract out of the statutory provisions. The Respondent alleges in its papers that it repudiated the contract because it was contrary to the provisions of the Value Added Tax Act, 2011, the Public Enterprises (Control And Monitoring) Act 1989, the Procurement Act, 2011 and the Swaziland Television Authority Act, 1983. I have already dealt with what allegedly breached by the Applicant in respect to the Value Added Tax, 2011. Let me now deal with the alleged violation in respect of the remaining pieces of Legislation.

THE P.E.U ACT 1989

[34] In the **Malesela Supreme Court case, His Lordship Ramodibedi J.A**, ably explained the purpose of Section 10 of the Act when He said this :-

> ***"At the outset, it is important to recognise that by enacting Section 10, the Legislature conferred oversight functions on the Minister in order to protect public funds from misuse His consent is necessary as a mechanism to provide the requisite checks and balances. Construed in this way, it will be seen that the Section was enacted to serve public interest and not private ones."***

[35] The long and short of the Respondent's argument that very Public Enterprise must comply with Section 10 of the Act. The Respondent falls within the Act because it is a category A Enterprise. The Respondent states that a category A enterprise "shall not do any of the following without the approval in writing of the Minister responsible acting in consultation with the Standing Committee:

(a) Make any major adjustment to the level or structure of its tariffs prices, rates or other fees or charges.

(b) …….

(c) …….

(d) …….

(e) ……...."

[36] The Respondent states that the Chief Executive officer failed to comply with the provisions of Section 10 when it discounted the charges that are to be paid by the Applicant in terms of Airtime Agreement. The Respondent further advanced its

case by referring the court to page 115 of the Book of Pleadings which contains the Commercial Rate Card for 2015/16 as far as the Spots Adverts by South African Companies is concerned. The Respondent avers that if one were to advertise for 30 seconds, he or she would pay E1387 as a non prime time rate and pay E2159 as a prime time rate. In terms of the Agreement as it appears in page 38 of the Book of Pleadings, the Applicant enjoys an 80% discount for prime time which enables him/ her to pay E1856 besides the 4 additional spots that he or she enjoy.

[37] The Respondent therefore argues that this discounted rate amounts to a reduction of tariffs price, rate fee or other charge in contravention of Section 10 (1) (a) of the P.E.U Act, 1989. The reduction amount to a "major adjustment" for purposes of the Act and the Agreement should therefore be invalidated. The Applicant admits that there is merit in the Applicant's argument that the Minister in consultation with SCOPE should approve a major adjustment. However Applicant is not certain or even sure that a discount can be classified as a "major adjustment." The Applicant further avers that Section 10 (1) must be read together with Section 10 (2) which states that:-

> ***"(2) For purposes of sub section (1) the standing committee shall in consultation with the Public Enterprises Unit determine what is major in relation to each category A public enterprise."***

[38] The Applicant submits that the determination as to whether any major adjustments to the level or structure, of tariffs prices has been effected is not a matter within the purview of the Acting Executive Officer. Even the Board of the Respondent cannot make the determination. It is a matter for determination by the Standing Committee in consultation with the Public Enterprise Unit.

[39] The court is fully persuaded by the Applicant's argument and it is therefore in full agreement with the Appellant. During argument, I requested the Counsel for the Respondent to furnish me with a correspondence which accompanies the Commercial Rate Card for 2015/16 that is in page 115 of the Book of Pleadings. Such was never availed by the Respondent. Instead, the Respondent availed circular No. 2 of 2015 which seeks to increase the rate of "major" for tariffs, fees and prices (including property rates) by 4.67%. This circular is in no way addressing the determination "major" as argued by the Applicant.

THE PROCUREMENT ACT 2011

[40] The Respondent argues that the Agreement should be declared invalid because it is not in accordance with the Procurement Act. The Respondent is a procuring entity in terms of the said Act. The particular provision that the Agreement violates, according to the Respondent, is Section 38 which states that "All procurement shall be conducted in a manner which promotes economy, efficiency, transparency, accountability, fairness, competition and value for money." The Respondent argues that the discount on the slots does not accord with the principle stated in Section 38.

[41] The Applicant's argument is that much as the Respondent is a procuring entity, the provisions of the Procurement Act have no application to this agreement or transaction. This is because the Respondent is the provider of the slots on a willing buyer willing seller basis. The Counsel for the Applicant further argues that if one buys electricity units at the Swaziland Electricity Company (which also happens to be a category A Public Enterprise) you do not go through any procurement. This is because the Electricity Company is the provider of the

service in the form of units. The same applies to the Respondent in this case. She provides airtime in the form of slots and any entity is entitled to buy the slots.

[42] The Applicant's counsel further states that "procurement" in the Act means the acquisition, by purchase, rental lease……. or by any other contractual means, of any types of goods, works, services or assets etc." "Contract" is defined as "an agreement between a procuring entity and a supplier for the provision of goods, works or services." The Applicant is not a supplier and the Respondent did not procure any goods, works or services from it because by its nature airtime/advertising slots do not fall within the definition of procurement because there is no bidding that takes place in transactions of these sort.

[43] During the arguments, I asked the Counsel for the Respondent of other local entities that buy slots from the Respondent are bound or subjected to the tender process as contemplated by the Act. The response was that such does not happen. These entities offer to purchase the airtime at a price fixed by the Respondent. In paragraph 21 of the judgment I made a reference to the fact that the Applicant alleges receipt of discounted rates from certain Mhlongo, who happens to be in the Respondent's employ. The discounted offer was made by the Respondent to Sibuko Sesive, a local entity that buys airtime from the Respondent in the same manner as the Applicant.

[44] The court therefore comes to the conclusion that the provisions of the Procurement Act 2011 in as far as the purchase of airtime/slots has no application since there are no tenders issued by the Respondents in selling its airtime. Respondent in selling its airtime, does this on a willing buyer – willing seller basis. The business

of the Respondent is to sell airtime to those who want to advertise with it and in the process, generates money for its sustenance. I therefore find in favour of the Applicant on this point as well.

THE SWAZILAND TELEVISION AUTHORITY ACT 1983

[45] The Respondent argues that a close reading of the Swaziland Television Authority Act 1983, reveals that the powers of the Chief Executive Officer are circumscribed in Section 8. The Board of Directors has all the powers (including the power to enter into a contract). The Chief Executive Officer therefore acts on the delegated power from the Board. Accordingly, the Chief Executive Officer can only execute that which has been mandated by the Board. The Respondent argues that according to the Affidavit of Thulani Makhubu, the Board Secretary, the signing of the Agreement was not sanctioned by the Board. The Respondent further argues that a court of law cannot sanction an Agreement that goes contrary to the internal policies of the Respondent.

[46] The Applicant counters the Respondent's argument by saying that Section 8 (1) of the Act provides that the Board shall appoint a general manager (C.E.O) who is responsible for the day to day conduct of the Authority subject only to directions of the Board. The Respondent has not attached to either its Answering Affidavit or Supplementary Answering Affidavit, any documentary proof of its applicable internal policies and procedures as regards airtime, nor have same set out with any adequate degree of precision. At no stage were these policies or guidelines (to the extent that they exist, which is denied) communicated to the Applicant or even referred to during negotiations between the parties.

[47] When the matter was argued before me, I asked the Respondent's Counsel about the Internal policy document attached to the Respondent's supplementary affidavit which is in 196 to 198 of the Book of Pleadings. The question I asked was whether the payment that can be authorised by the Chief Executive Officer amounting to E250,000.00 apply as well to an airtime agreement. The response I received from Counsel was that Financial Policies and Procedures (approval and payment of invoices) only relate to the general powers of the C.E.O and the Financial Controller to transact. They have nothing to do with selling airtime. I further asked for a delegation of authority manual so as to determine how far the C.E.O can go in binding the Respondent in the exercise of his delegated authority. I was never availed with such. This leads me to conclude that there is nothing in the Respondent's internal policies that suggest any form of delegation. I do not agree that the Respondent's Board manages the affairs of the Respondent on a day to day basis. I am also convinced that there is nothing in the Respondent's internal policies and procedures that bar the Chief Executive Officer to enter into a contract of sale of airtime of whatever amount. I therefore fully agree with the Applicant that there is absolutely no merit in the Respondent's argument that the Airtime Agreement violated the Respondent's internal policy. I therefore rule in favour of the Applicant on the point.

THE TURQUAND RULE

[48] The Applicant argues that whatever these internal policies and procedures may require on the application of the Turquand rule, the Applicant is entitled to have presumed that all the necessary acts of internal management had been duly performed. The Applicant cannot be required to familiarise itself with internal documents of the parties before contracting with them. The Applicant therefore argues that the Respondent is precluded from denying compliance with such

internal policies. The Respondent responds to this by saying that it is a trite principle that any person who purports to represent a public corporation in any agreement, must of necessity have the requisite authority to contract. The authority may be gleaned from the surrounding facts in certain cases. In the present case, it is contended that the C.E.O had no authority to conclude the airtime and licence agreements without the authority of the Board.

[49] The answer to the issue at hand is found in the case of **DDM Estates (Pty) Ltd and Another V Standard Bank Swaziland Ltd and Another, High Court Case 3151/2001, SLR Volume 1, 2000 to 2005. His Lordship, Maphalala.S.B, J** had this to say at page 168-

> *"In this regard I am in total agreement with the submissions made by Mr. Motsa that second applicant represented to the first respondent that he was the Managing Director of the first respondent and he presented a resolution of the company to this effect see Annexure "A".*

The learned Judge goes on to say that:-

> ***"My considered view to that, the first Respondent on the basis of Turquand rule, there was no obligation on it to enquire that the internal formalities of first applicant had been complied with. According to the Rule, all acts of internal management or organisation on which the exercise of such authority is dependant may, in terms of same, be assumed by a bona fide third party to have been properly and duly performed."***

[50] The principle alluded to in the DDM case (Supra) on the Turquand Rule applies with the same force and effect in the present case in that the Respondent's representative was not just an ordinary officer of the Respondent, but was its Chief Executive Officer. As I have said earlier in this judgment there is nothing in the papers before court that proves any limits to the power of the Chief Executive Officer to contract in matters pertaining to the Sale of Airtime. I therefore find in favour of the Applicant on the Turquand Rule.

ESTOPPEL

[51] The Applicant argues that the extent that Mr. Dlamini, who signed the Agreement on behalf of the Respondent, did not have the requisite authority to enter into the sales agreement (which is denied), needs the requirement for the invocation of estoppel precluding the Respondent from denying Dlamini's authority, and same is satisfied in that:

(a) The Applicant believed that Mr Dlamini enjoyed the requisite authority to enter into agreements of that nature on its behalf.

(b) The Applicant accepted this representation as correct and acted thereon when the agreement in *casu* was concluded; and

(c) In so doing the Applicant acted to its detriment and made payments to the Respondent and such has been not restituted.

The Respondent is estopped from denying such lack of authority. The Applicant further states that the Respondent accepted payments from Applicant performed in terms of the Agreement by airing some advertisements until the 9th June 2016 and the Respondent's silence and inaction until about a year after the conclusion of

the Sales Agreement should all be indication that the Respondent is estoppel.

[52] The Respondent responds by arguing that since there was no authorisation by the Board which enabled the Chief Executive Officer to contract on its behalf, it is not estopped from denying the existence of such authority.

[53] As indicated above, when I was dealing with the issue of Turquand Rule, the same considerations apply with respect to Estoppel. The Respondent is therefore estopped from denying that the Chief Executive Officer had no authority to transact of behalf of the Respondent. I therefore rule in favour of the Applicant on this point.

NON JOINDER OF MR. DLAMINI

[54] The issue of non joinder of the suspended Chief Executive Officer Mr. Dlamini was raised by the Respondent. He made it clear to the court that this point will be argued together with the merits of the case. The Respondent's contention is that Mr. Dlamini should have been joined as a party in this proceedings because the outcome of the proceedings will adversely affect him. The Applicant argues that Mr. Dlamini need not be joined because he has a constitutional right to keep silent. If so joined and then reserves this right, the case will not go any further. His predicament is not like that of Mr Tsela in the Malesela case where joinder was

necessary because Mr Tsela was no longer in any contractual employer – employee relationship.

[55] This court agrees with the submissions by the Respondent that Mr. Dlamini should have been joined. In fact, Mr. Dlamini should have been the one to say that he is exercising the right to keep silent. In the case **of Siboniso Dlamini and Others V Anastacia Mboniswayini Dlamini High Court Case No. 231/2015**, the Learned Judge Dlamini J, T observed in page 8 of His judgment that:-

> ***"It has however, been held that even in those cases where the court has a discretion where the matter of joinder of the party is raised, it must at least be shown that the party is a necessary party in the sense that he is directly and substantially interested in the issues raised in the paragraphs before the court and that his rights may be affected by the judgment of the court. Where this is established the court will then proceed to determine the matter of joinder in accordance with the requirements of convenience and common cause."***

[56] Much as I hold the view that Mr. Dlamini should have been joined I wish to further observe that this case did not only rest on the issue of joinder. Other real disputed had to be considered as well. As the learned **Judge Ota J noted in the case of Savannah N. Maziya Sandanezwe V GDI Concepts and Project Management (Pty) Ltd case No. 905/2005** at page 7, that-

> *"The question that arises at this juncture is should the court throw the application into the waste bin, like a piece of unwanted meal by reason of this fact as is urged by the Respondent? I do not think so I say this because*

the Universal trend is towards substantial justice. Courts across jurisdictions have long departed from the era when justice was readily sacrificed on the altar of technicalities. <u>The rationale behind this trend is that justice can only be matter is considered. Reliance on technicalities tends to render justice grotesque and has the dangerous potentials of occasioning miscarriage of justice."</u>

[57] I align myself with the observations of Ota J. Similar thoughts were expressed by the Supreme Court in the case of **Shell Oil Swaziland Ltd V Motor World (Pty) Ltd/ta Sir Motors Case No 23/2006, Impunzi Wholesalers V Swaziland Revenue Authority Case No 6 of 2015**. Likewise the High Court pronounced itself on similar lines in the case of **Phumzile Myeza and Others V The Director of Public Prosecutions and Another Case No. 728/2009** and the recent case of **Swazi MTN Limited V The Presiding Judge of the Industrial Court and Others, Case No. 325/16.**

<u>REQUIREMENTS OF INTERDICT AND THE REMEDY OF SPECIFIC PERFORMANCE</u>

[58] I would not want to waste time on the requirements of Interdict because the Applicant has in its prayers sought an interim interdict in the alternative. The Applicant stated in its Notice of Application that in the event the court finds that oral evidence should be heard on specific aspects of the application, an Interim Order should be granted. Otherwise the main prayer by the Applicant is for the

grant of specific performance. I shall now deal with the issue of specific performance.

[59] The Applicant states that it is entitled to specific performance by virtue of the fact it did not accept the Respondents repudiation of the Sales Agreement. As far as the Applicant is concerned, the Agreement still stands and wants same to be enforced by the court. The Respondent argues that the court will not order specific performance in certain circumstances. The exercise of the power of grant specific performance is a discretionary one. The Respondent referred this court to the case of **Haynes V King Williams Town Municipality 1951 (2) 371 at 378**. The Respondent further cements his case by stating that a court will not order specific performance where undue hardship would be visited upon the party being required to perform. In the Haynes case (supra), the Respondent refers to the statement by the Judge that:-

> ***"Where it would operate unreasonably hard on the defendant, or where the agreement giving rise to the claim is unreasonable, or where the decree would produce injustice or would be inequitable under all the circumstances,"*** specific performance might not be ideal remedy.

[60] In the present case, I exercise my discretion to order specific performance. The Respondent took the first step in cancelling the Sales Agreement under the false impression that same would be void. Unfortunately, authorities are clear that where a party cancels an agreement and the innocent party elects not to accept the cancellation, the contract does not become void but voidable. The Supreme case of Malesela Electrical Services (Supra) bears testimony to this truth. Likewise the

Learned Author A.J. Kerr. The Principles of the Law of Contract, 6th Edition states clearly in page 589 that -

> "*The correct approach, as indicated above is to recognise that repudiation before the due date of performance by a party prospectively in default, constitutes an anticipatory breach of contract which gives the aggrieved party an election. The enquiry is not whether he has "accepted" the repudiation but whether he has elected to keep the contract in being or cancel it. If he keeps it in being his own obligations continue to exist and he must be willing, and able to perform them, but he may refrain from performing them as long as the repudiating party maintains his position. Thus if a seller repudiates the contract shortly before the buyer is obliged to pay, payment may be withheld until the aggrieved party decides either (1) to claim specific performance or let the contract run its course, in either of which events one must then be ready to perform his own obligation at the appropriate time; or (2) to cancel the contract and if damage has been suffered, to claim damages if he so wishes in which event he may continue to withhold performance of his own obligation."*

The principles that apply where there is anticipated breach similarly apply where cancellation has taken place and the innocent party refuses to accept the cancellation and opts for specific performance.

[61] Considering all what has been said above, I now hereby make the following order:-

(a) The Respondent is hereby ordered to forthwith comply with its obligations to the Applicant under the Airtime Sales Agreement between the parties dated the 3rd July, 2015. In so doing the Respondent shall-

(i) Immediately make available airtime/advertising spots for further flighting of advertisements in accordance with the formulae stipulated in clause 2 of the Agreement.

(ii) Without further delay, flight all advertisements of the Applicant's clients in accordance with Airtime Sales Agreement.

(iii) Comply with the balance of its obligations to the Applicant under the aforesaid Agreement.

(b) Since the issue of Attorney – Client Scale costs has not been motivated by the Applicant, I order that costs be at an ordinary scale including costs of Counsel in terms of Rule 68 of the High Court Rules.

FAKUDZE J

JUDGE OF THE HIGH COURT