

FIRING YOUR MANAGING AGENT AND OTHER TRUSTEE CHALLENGES

The Body Corporate of Brushwood Sectional Title Scheme vs Whitfields Property Management (Pty) Ltd (17078/2021) [2022] ZAGPJHC 358 (26 May 2022)

It is not often that a matter is reported dealing with the termination of a managing agent appointment. The circumstances giving rise to the breakdown herein aside, the Court highlighted that one must remember that the relationship between a body corporate and managing agent is one of agency and mandate. Under our common law, a mandate is in general terminable at the will of the principal and it would be against public policy to coerce a principal into retaining an agent when he no longer wishes to have him as such. Apart from this, the judgment is instructive as it highlights the powers of trustees to pass a resolution to terminate a contract with a managing agent in circumstances where the trustee appointments were not finalised at the schemes' previous AGM.

The Judgment can be viewed [here](#).

FACTS

During 2020, Whitfields Property Management (Pty) Ltd ('the MA') and the body corporate of the Brushwood Sectional Title Scheme concluded a management agreement.

On 11 November 2020, the trustees of the body corporate ('the trustees') passed and duly adopted a resolution appointing Venter and Associates Inc as attorneys for the body corporate. A day later, the body corporate issued an instruction to the MA to pay into its attorney's trust account a sum of R50,000 as a deposit for legal fees.

The MA advised that it will only do so once it has received an invoice. Further correspondence was exchanged between the attorneys and the MA wherein it was explained that a *pro forma* invoice could not be produced before the work is done. The resolution of the trustees was attached. However, the MA refused to make the payment without a *pro forma* invoice being issued.

On 23 November 2020, the trustees addressed an e-mail to the MA stating that the minutes of the Annual General Meeting held in May 2019 state that the number of the envisaged trustees was not met and notified it of the trustees that was then appointed. Two trustees resigned immediately after the meeting, which necessitated the appointment of other trustees. A meeting of the trustees was thereafter held on 10 November 2020, when the resolution was taken, and two of the trustees signed the resolution to appoint Venter & Associates and to pay them the sum of R50,000 as a deposit for legal fees. The body corporate regarded the refusal by the MA to pay the R50,000 as a breach of the contract and therefore, it cancelled the contract.

The MA refused to accept the cancellation of the contract and the trustees requested the attorney to address a letter to the MA. The letter confirmed the cancellation of the management agreement by the body corporate and afforded the MA an opportunity to save the situation by making the payment of the R50,000 failing which the management agreement will be cancelled. The MA however persisted in its refusal and the attorney then confirmed termination of the contract and demanded delivery of all the financial documents and information held by the MA relating to the management of the Brushwood sectional title scheme.

In response to this demand, the MA argued that the trustees had not been duly appointed; that they did not quorate when passing the resolution and that the resolution cancelling the management agreement was irregular and therefore not binding. That payment of the R50,000 would only be effected on production of an invoice.

The body corporate thus approached the Court for an order terminating the Management Agreement and an order

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obliging the MA to furnish all the financial documentation and other information in its possession relating to the body corporate's affairs from the inception of the contract to the date of the order.

HELD

- It is apparent that the relationship between the body corporate and the MA is that of agency and mandate. It is trite that under common law a mandate is in general terminable at the will of the principal and that it is against public policy to coerce a principal into retaining an individual as an agent when he no longer wishes to have him as such. (A remedy on the side of the agent would be, as stated by the Supreme Court of Appeal in *Liberty Group Ltd v Mall Space Management CC t/a Mall Space Management (2019)*, "a claim for damages and not in an order compelling the principal to retain him as his agent in the future.")

The MA's defences

- It should be recalled that the MA was appointed as a management agent of the body corporate in terms of an agreement concluded between the parties in 2020. The body corporate was represented by the current trustees when the agreement was concluded. It therefore was not open to the MA to argue that the trustees with whom it concluded a management agreement were not properly appointed and therefore do not have the authority to cancel the agreement. According to the provisions of the prescribed Management Rules, an elected or replacement trustee holds office until the end of the next annual general meeting.
- The fact that the body corporate had not had a proper meeting convened for the purposes of appointing new and/or additional trustees since the 2019 annual general meeting, does not deprive the current trustees the authority or preclude them from representing and acting on behalf of the body corporate: They were duly appointed in the 2019 annual general meeting when the other two trustees resigned. It is therefore not for the MA to persist to act as an agent in terms of the mandate when its principal, represented by the trustees who appointed the MA, no longer wishes to retain it as its agent.
- Rule 7 of the Prescribed Management Rules (PMR) prescribed in terms of the Sectional Titles Schemes Management Act, 8 of 2011 provides as follows:

"Nomination, election and replacement

7. (1) ...
 ...
 (5) if a trustee ceases to hold office –
 (a) the remaining trustees; or
 (b) the members in general meeting, may appoint a replacement trustee.
 (6) An elected or replacement trustee holds office until the end of the next annual general meeting and is eligible for re-election, if properly nominated."

Accordingly:

- The body corporate was entitled to terminate the agreement because the MA breached the terms of the agreement by refusing to execute its mandate to pay a creditor as instructed and directed by a member of the executive, a trustee, of the body corporate. Clause 2.8 of the management agreement provided that payments of accounts shall be made to service providers and other creditors on specific approval by a scheme executive. The body corporate was not required to furnish the MA with any notice for the termination and the resolutions passed by the trustees were valid and of force and effect as they were resolutions of the trustees of the body corporate. The trustees thus had the necessary authority to launch these proceedings against the

MA.

- Rule 10(2) of the PMR provides the following with regard to the validity of the actions on behalf of the body corporate:

“Validity of actions

10 (1)

(2) *A resolution adopted or other act performed by the trustees remains valid and effective notwithstanding the later discovery of some defect in the appointment of a trustee or the disqualification of a trustee”.*

- In any event, even if it was to be held that the current trustees were not duly appointed in the annual general meeting in 2019, when the other two trustees resigned, their actions remain valid and effective in terms of the prescripts of rule 10 (2) of the PMR. If there is any defect in the appointment of the trustees it does not mean that their actions become unlawful, but remain valid and effective unless it may be demonstrated that those actions were unfair, unreasonable and not in the best interest of the applicant. It does not afford the MA the latitude to force itself onto the body corporate as its agent when it had breached the terms of the agreement and the body corporate had terminated the agreement for that reason.

CONCLUSION

The body corporate had therefore lawfully terminated the management agreement due to the breach committed by the MA. Furthermore, the body corporate was not obliged to give any notice of the termination of the agreement.