IN THE COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE

Appeal Case No. 23/2006

In the matter between

SHELL OIL SWAZILAND (PTY) LTD Appellant

And

MOTOR WORLD (PTY) LTD T/A
SIR MOTORS Respondent

Coram: BROWDE, AJP

TEBBUTT, JA

RAMODIBEDI, JA

For Appellant: Advocate P. Flynn, Instructed by Mr. Motsa

For Respondent: Mr. S.A. Nkosi

JUDGMENT

TEBBUTT, JA

[1] The subject of the dispute between the appellant and the respondent, which has culminated in this appeal, is a petrol filling station situated in central Mbabane.

[2] The appellant is the franchisor and the respondent the franchisee of the filling station in terms of a written franchise agreement. The appellant claims that it is entitled to cancel or terminate the agreement and have the respondent vacate the

premises of the filling station; the respondent contends that the appellant is not entitled to either of those claims. That, in the very briefest terms, is what the dispute is about. I shall elaborate on it in the course hereof.

[3] Before doing so, it is, however, necessary to deal with one aspect of the matter which requires prior consideration.

[4] The appellant brought an application in the High Court by way of Notice of Motion for the enforcement of its claims, which I shall set out in more detail in due course, as a matter of urgency on 6 January 2006, asking for condonation of its non-compliance with the Rules of Court relating to service and form. The respondent contested this on the basis that the matter was not one of urgency, filing its notice of intention to oppose on 9 January 2006. The matter was set down for hearing on 18 January 2006 but was postponed, on certain conditions as to the filing of the respondent's answering affidavits and the appellant's replying affidavits, to Friday 27 January 2006. The matter was heard by Ebersohn J on that day when he upheld two points *in limine* raised by the respondent and dismissed the appellant's application in a written judgment dated 28 April 2006, hence this appeal. I shall deal with that judgment in due course.

[5] The appeal was duly noted and the appellant sought to have it argued in this Court during this Court's session in May of this year. The respondent opposed this on certain grounds which are not germane to this judgment. However, as it appeared to this Court that the matter was *prima facie* one of urgency, this Court agreed that it would constitute a court which would return to

Swaziland specifically to hear the appeal on 9 June 2006. Dates were set for the filing of heads of argument prior to that date. It is this Court which is seized of this appeal, having heard argument on 9 June 2006.

[6] The question of urgency still remained as a contentious issue between the parties, particularly as Ebersohn J. found that the matter was not urgent. It is therefore necessary, firstly, to state this Court's views in regard thereto. It is an accepted fact that as a result of the dispute between the parties, there have been no sales since 28 November 2005 of petrol at the filling station, which has been standing idle since that date. Whatever the cause of this - and I shall return to it in due course -it stands to reason that this state of affairs can only cause harm to both parties.

[7] The appellant says that the fact of the filling station standing idle is well-known to the public and it has filed with its papers a newspaper article about it. As a result, which in my view is obvious, customers are being lost to competitor petrol suppliers. This would no doubt be detrimental to both parties and would also undoubtedly affect the goodwill attaching to the filling station and may also affect the appellant's reputation and intellectual property.

[8] This Court accordingly finds that it should seek to remedy a clearly unsatisfactory situation involving, as it no doubt does, financial loss, as soon as possible. It therefore, confirmed its *prima facie* view that the matter is one of urgency, the contrary opinion of the learned Judge *a quo* notwithstanding, and accordingly proceeded to hear argument on the appeal.

[9] Despite having heard full argument this Court was, however, unable to complete a full and comprehensive judgment in the short time available to it at the conclusion of argument but in view of the urgency of the matter proceeded to make an order which it delivered on 12 June 2006, intimating that full reasons for its order would follow in due course. These are those reasons. The Court's order of 12 June 2006 is repeated at the end of them.

[10] I turn then to the salient facts. The respondent has been the franchisee of the filling station from 1 January 2003, under a written franchise agreement between the parties. In terms of that agreement it was obliged to purchase its stocks of petrol from the appellant as the franchisor and to maintain at all times adequate stocks of Shell products (i.e. those of the appellant) and to maximise sales of them. For the stocks purchased from the appellant, the respondent was obliged to pay for them timeously and it was provided that upon failure by the respondent to pay timeously, the appellant was entitled to cancel the agreement on written notice to the respondent. The appellant was also entitled to do so if the respondent should permit the filling station to run out of Shell petrol.

[11] The filling station is situated on property owned by a company, Santo Motors (Pty) Ltd. The appellant has a notarial lease of the property from the latter, which it entered into on 20 February 2001. The appellant has a sub-lease agreement of the property with the respondent. This agreement, which is a schedule to the franchise agreement (Schedule 4 thereof) is described in the appellant's founding affidavit in its application

as "the property lease agreement." It was for an initial period of three years from 1 January 2003. The appellant was entitled in terms of Schedule 4, Clause 3.2 to the lease agreement to give three months notice, prior to the end of the initial three-year period, that it did not intend to extend the lease beyond such initial period, whereupon both the property lease agreement and the franchise agreement would be terminated. Clause 14.1.8 of the franchise agreement reads as follows:-

> "*Should*
>
> > *14.2.8. any of the schedules to this agreement terminate by effluxion of time... then Shell shall immediately be entitled to any or all of the following remedies, without prejudice to its other rights in terms of this agreement.*
> >
> > *14(l)(b) to cancel this agreement on written notice to the franchisee...*"

[12] The appellant alleges that the respondent as at 18 March 2005 owed it E655 283,78 for petrol and oil and that on that date the respondent's managing director, Lindsay Anthony Veloso, on behalf of respondent, signed an acknowledgement of debt in favour of appellant in that amount, due and payable on 30 April 2005. Respondent failed to pay the full amount by that date, having paid only E200 000 of it. Further supplies of petrol were delivered thereafter to respondent and the amounts due in respect of these, together with the outstanding amount on the acknowledgement of debt and certain arrear amounts in respect of rental of the premises, equipment, advertising and so-called

card fees, totalled as at the end of November 2005 an amount of E l 361 434.42. Appellant alleges that respondent had failed to pay this amount, and that, furthermore, on 28 November, 2005 the respondent had allowed the filling station to run out of Shell petrol. It accordingly gave written notice to respondent of cancellation of the franchise agreement on 7 December 2005.

[13] However, by that time and, indeed, on 30 September 2005, the appellant had given written notice to respondent that it would not extend the property lease agreement beyond the initial three-year period and the lease therefore terminated on 31 December 2005.

[14] The responses of the respondent to these allegations may be summarised, as follows. They appear from the answering affidavit on behalf of the respondent of its managing director, the said Veloso. He says that respondent had been operating the filling station from 1999 having bought the business from a firm known as Sir Motors. In due course the franchise agreement was signed in February 2003, operative from 1 January 2003; this included Schedule 4 thereto i.e. the property lease agreement. Veloso avers that the franchise agreement, and hence also the property lease agreement, were void *ab initio* in that Clause 20.2 of the franchise agreement provided that it would be of no force and effect unless it be signed by every shareholder of the franchisee and although it was signed by him, it was not signed by the one other shareholder in the respondent company, one Fernando Costa. Thus while admitting that it had received the non-renewal notice timeously, respondent contends that such notice is invalid as the franchise agreement was invalid *ab initio.* It also contends, for reasons to

which I shall refer in detail later, that the franchise agreement is void as being *contra bonos mores.*

[15] Veloso further avers that he signed the franchise agreement under duress, thereby causing it to be void *ab initio* on this ground as well. I shall deal with all these aspects relating to the validity of the franchise agreement in due course.

[16] Veloso says that the appellant showed no interest in enhancing the site of the filling station or promoting the sales of petrol there. Respondent, he says, did so by developing a marketing strategy, building storage facilities and establishing a convenience store on the site, all of which led to increased fuel sales. He said that the amount of petrol sold rose from 100 000 litres per month in 1999 to 600 000 litres per month by the end of 2004. Only in 2002 did the appellant start to show an interest in the franchise by installing new pumps to meet the increased demand for sales. It "renovated" the convenience store to convert it into Shell's own branded food store. The appellant, he averred, was tyrannical, respondent receiving no compensation for the improvements it had brought about, and that it adopted a draconian approach in its dealings with the respondent as the franchisee.

[17] Veloso said that the appellant had, moreover, failed to deliver fuel supplies timeously and there was no supervision to ensure that such deliveries were correct. This resulted in a loss to respondent, the appellant frequently supplying less than respondent paid for. He and his co-director, Costa, in consequence of all the aforegoing, decided in December 2004 to sell the business.

[18] Veloso said that the fuel shortages gave rise to cash flow problems and resultant debts. This caused him to sign the acknowledgement of debt which, he said, he was obliged to sign as the appellant said that unless he did so, it would cut off all fuel supplies to respondent.

[19] Veloso said he then sought the consent of appellant to sell the business as respondent was obliged to do in terms of the Franchise Agreement. He found a number of potential buyers all of which were rejected by the appellant. However, the latter approved of one potential buyer, a company known as BBX (Pty) Ltd, but the appellant wanted the price at which the respondent was prepared to sell, viz E2.5 million, lowered and raised further difficulties in respect of the proposed sale. Veloso avers that the appellant is not really willing to allow the respondent to sell the business and that it wants to take it over for itself, it now being a flourishing one, without having to pay for it. He said that the respondent wished to file a counter-claim that it be allowed to sell the business to a willing buyer at an agreed price, alternatively for E2.5 million.

[20] The aforegoing constitutes, in essence, the respondent's opposition on the merits to the appellant's claims. As mentioned earlier, however, it raised three points *in limine* to those claims, certain of which were upheld by the Court *a quo* which, in consequence, dismissed the appellant's application, with costs. I shall now deal with those points.

The appellant's claims, briefly stated, were for orders

(i) declaring that the franchise agreement had been validly cancelled, alternatively had been terminated, on 31 December 2005.

(ii) Declaring that the respondent vacate the property forthwith and deliver up the keys to the property to the appellant.

There were also alternative claims that if the matter was not held to be urgent, a caretaker be appointed in the interim to run the business. In the light of this Court's finding that the matter is one of urgency these alternative claims fall away.

[22] The founding affidavit to the application was made by the chairman of the appellant company in Swaziland, one Solomon Nkabinde,. He swore to and signed his affidavit on 5 January 2006, stating therein that he was duly authorised to do so and he annexed to his affidavit a resolution of the appellant's board of directors which resolution was dated the day following i.e 6 January 2006. The respondent's first point *in limine* was that the affidavit, by reason of this, was procedurally incompetent and should be struck out thus rendering the application invalid. Indeed, it averred that Nkabinde had perjured himself on 5 January 2006 by stating on oath that he was authorised when the formal resolution was passed only on the day following. Moreover, so the respondent averred, one of the persons alleged to have been one of the directors who passed the board's resolution, one Mavuso, was not a director at the time.

[23] The second point *in limine* was that the Court had no jurisdiction to entertain the application as the franchise agreement was void *ab initio* it having not been signed by all

the shareholders of the respondent. I have referred to this allegation earlier herein.

[24] I turn then to the reasons of the learned Judge *a quo* in upholding both these points.

[25] As to the first of these points, Nkabinde stated in his founding affidavit in paragraphs 3.1.1 and 3.1..2 thereof that

> "*3.1.1. I am duly authorised to launch this application and to represent the applicant herein, to dispose to this affidavit on its behalf and take all other steps that may be necessary.....*
>
> *3.1.2. I attach a copy of the resolution authorising me so to act on behalf of the applicant, marked annexure 'A'*"

The affidavit having been signed and sworn to on 5 January 2006 but the resolution having been passed on 6 January 2006, the respondent challenged the authority of Nkabinde and denied that he had the necessary authority to bring the application when he did.

In the light of that challenge and denial, Nkabinde set out in a replying affidavit, the factual position in regard to his authorisation. He repeated that he was duly authorised to represent the appellant and was similarly authorised on 5 January 2006. He said that on that date "it was agreed that the application be launched and that I be authorised to depose to the affidavit on applicant's behalf." He said that on that date "it

had been agreed" -obviously by the directors in view of what followed - "on the terms of the resolution later adopted" and added that the unanimous consent of the board of directors is as effective as if a formal resolution had been adopted. So that it was the directors who had agreed on 5 January 2006 that the application be launched and that he should depose to the founding affidavit.

It is highly probable that this occurred. It is extremely unlikely that Nkabinde would have embarked upon a frolic of his own to launch a High Court application, with its attendant costs, without the approval of the Board. The matter was, however, taken even further by Nkabinde. In another paragraph of his replying affidavit he said:

> "*In order to place the matter beyond scrutiny, I state that in any event as at even date all the directors of the applicant, V. Mavuso, O.B. Machwele, A. Nodada and J. Lopy hereby and by virtue of their confirmatory affidavits hereby ratify the decision to launch the application on the applicant's behalf and that I be authorised to depose to the affidavit... to give effect thereto.*"

In separate individual affidavits all the directors confirmed Nkabinde's statement. And to make the position doubly secure, Nkabinde, in a supplementary affidavit, annexed a fresh resolution dated 27 January 2006 passed by the board ratifying, authorising and empowering Nkabinde to depose to the founding and replying affidavits.

[28] Although he admitted into the papers the replying and supplementary affidavits, the learned Judge refused to give effect to their contents. He stated that an applicant must stand or fall by the founding affidavit, citing in this regard the case of POUNTA'S TRUSTEE v LAHANAS 1924 WLD 67 and other cases following it. He found that Nkabinde's statement as to his authority in the founding affidavit was not supported by an appropriate resolution. He added:

> "*The applicant belatedly and too late tried to meet this aspect in the replying and a supplementary affidavit but did not cure the defect and more doubt as to the structure of the applicant was created rather than resolved.*"

It is now well established that when a factual issue which appears in the founding affidavit is challenged or denied by the respondent in the answering affidavit, the courts will allow the applicant to clarify or rectify the issue in a replying affidavit. In BAECK AND CO (SA) (PTY) LTD v VAN ZUMMEREN AND ANOTHER 1982(2) SA 112(W) the headnote to the report of that case reads:

> "*Where in an application the applicant does not state in his founding affidavit all the facts within his knowledge but seeks to do so in his replying affidavit the approach of the Court should nevertheless always be to attempt to consider substance rather than form in the absence of prejudice to the other party.*"

Goldstone J who gave the judgment in the Baeck case was following a long line of cases in which the courts of South Africa

have allowed applicants to supplement their founding affidavits in replying affidavits. In SHEPARD vs

TUCKERS LAND AND DEVELOPMENT CORPORATION (PTY) LTD 1978(1) SA 173(W) AT 177G - 178A, Nestadt J, as he then was, was dealing with the requirement that the applicant is obliged to include in his founding affidavit all the pertinent facts on which he relies. The learned Judge said:

> 'This is *not, however, an absolute rule. It is not a law of the Medes and Persians: The Court has a discretion to allow new matter to remain in replying affidavits, giving the respondent the opportunity to deal with it in a set of answering affidavits.*"

[31] In Shepard's case and other more recent cases on the topic, including Baeck's case, supra, the decision in POUNTA'S TRUSTEE vs LAHAMAS has been referred to but the courts have declined to slavishly adhere to it.

[32] The learned Judge *a quo* also referred to the decision in SOUTH AFRICAN MILLING CO LTD vs REDDY 1980(3) SA 431 (SEC) for the proposition that the founding affidavit must contain all essential averments and that these cannot be supplemented in a replying affidavit. That decision has been criticised in a number of subsequent cases where it has either been distinguished or not followed, including one of the most recent cases on the subject viz SMITH vs KWANONQUBELA TOWN COUNCIL 1999(4) SA 947 (SCA). In that case the Supreme Court of Appeal in South Africa (per Harms JA) held that a party to

> litigation does not have the right to prevent the other party from rectifying a procedural defect. Referring to the South African Milling Case, supra, the Court stated that there the Court had approached the matter from a procedural point of view viz that a party is not entitled to make out a case in reply and that a ratification relied upon in reply infringes that rule. The Appeal Court held that this was not a correct approach. It again stated that the rule against new matter in reply is not absolute but "should be applied with a fair measure of common sense." As Ebersohn J stated, the law in Swaziland is the same as that in South Africa. The court in this country should therefore also follow that approach.

The approach in any event commends itself to me as being in accordance with sound commonsense. An allegation by a deponent that he is duly authorised to depose to an affidavit on behalf of a corporate body is generally not expected to be challenged and accordingly the source of his authorisation is not usually set out by the deponent. If, however, as occurred *in casu* his authority is challenged or denied in the answering affidavit, it would obviously be grossly unfair not to allow the deponent to set out the source of his authority. Fairness to the parties dictates this (see per Holmes J, as he then was, in MILNE N.O. vs FABRIC HOUSE (PTY) LTD 1957(3) SA 63(N) at 65A).

In Baeck's case, in an application for an interdict and other relief the respondent challenged the authority of the deponent to the founding affidavit, one Keller, to institute the proceedings on behalf of the applicant, a company. The applicant sought to cure the deficiency by ratification having a retrospective effect.

Goldstone J held as follows:

> "*In the present case Keller alleged incorrectly that he had authority to represent the applicant. If in law the deficiency in his authority can be cured by ratification having retrospective operation, I am of the opinion that he should be allowed to establish such ratification in his replying affidavit in the absence of prejudice to the first respondent. It is clear that in this case, subject to the question of ratification and retrospectivity, the first respondent would not be prejudiced by such an approach. Indeed, it is not disputed that the applicant could start again on the same basis, supplemented as needs be, to establish the authority of Keller.*
>
> *Accordingly, I am of the opinion that the fact alone that the question of ratification has been raised for the first time in reply, in the absence of prejudice to the first respondent, is not fatal to the success of the application. The Court has a discretion to come to the aid of the applicant.*"

That is precisely the position that has arisen in this case. Nkabinde averred that he was duly authorised to launch the application and depose to the founding affidavit. He annexed a resolution in support of that. His authority was challenged in the respondent's answering affidavit on the basis that the founding affidavit was signed and sworn to the day before the resolution was passed. Nkabinde was, in my view, clearly entitled in his replying affidavit to meet that challenge. Moreover, he sought to cure any defect, if indeed there was one, by having his actions

ratified retrospectively. Again I agree - and find abundant support for this in Baeck's case - that he was entitled to do so in his replying and supplementary affidavit.

Mr. Nkosi, in an able argument on behalf of the respondent, submitted that this Court should decline to follow Baeck's case but should rather follow the judgment of Corbett J, as he then was, in GRIFFITHS AND INGLES (PTY) LTD v SOUTHERN CAPE BLASTERS (PTY) LTD 1972(4) SA 249(C). In that case, the applicant also sought to remedy a defect in the founding affidavit in which the deponent averred that he was duly authorised by a company by an averment in his replying affidavit that the board of directors of the company were all aware of the application. Corbett J said that he assumed that it was proper for him to have regard to the replying affidavit and consider whether it sufficiently established authority in the applicant's favour. He found that it did not. He said:

> "*The affidavit generally leaves me with the impression that no formal resolution of the applicant's board of directors in regard to those proceedings was in fact taken. I say this because, if such a resolution was taken, then I cannot understand why this is not stated in so many words. Indeed, the very fact that the deponent tends to skirt around the issue and states that he and his fellow directors are all aware of the application, and the circumstances surrounding it, gives rise, in my view,* to *the possible inference that this is as far as matters went. If as seems possible, no formal resolution of the board of directors was taken, then in what way was this application authorised by the applicant's board? And, if the board did purport to authorise the application in some manner other*

> *than by formal resolution, was such manner of authorisation in accordance with the constitution of the applicant? These are questions which, on this affidavit, remain unanswered.*"

That case is clearly distinguishable from the present one. In this case there was indeed a proper resolution of the company (it must be remembered that a quorum for passing any resolution is one of two directors and two of them passed the resolution of 6 January 2006.) and that all the directors subsequently ratified Nkabinde's actions.

The learned Judge *a quo* also referred to the decision of Ogilvie Thompson J.A. in PRETORIA CITY COUNCIL vs MEERLUST INVESTMENTS LTD 1962(1) SA 321(A) at 325 in which a Town Clerk sought to prosecute an appeal on behalf of a City Council without filing any resolution from the latter authorising him to do so. The Court there held that such a resolution was necessary. In casu, once again, there is a resolution of the Board, albeit that such formal resolution was passed a day after Nkabinde swore his affidavit. It was, however, passed on the same day as, and obviously (because it was annexed to the papers) before the filing of the notice of motion. Nkabinde's replying affidavit makes the position abundantly clear.

The learned Judge *a quo* with respect, also appears to have overlooked the current trend in matters of this sort, which is now well-recognised and firmly established, viz not to allow technical objections to less than perfect procedural aspects to interfere in the expeditious and, if possible, inexpensive decisions of cases on their real merits (see e.g. the dicta to that

effect by Schreiner JA in TRANS-AFRICAN INSURANCE CO LTD vs MALULEKA 1956(2) SA 273(A) at 278G; FEDERATED TIMBERS LTD v BOTHA 1978(3) SA 645(A) at 645C - F; NELSON MANDELA METROPOLITAN MUNICIPALITY AND OTHERS v GREYVENOUW CC AND OTHERS 2004(2) SA 81(SE)). In the latter case the Court held that (at 95F -96A, par 40):

> "*The Court should eschew technical defects and turn its back on inflexible formalism in order to secure the expeditious decisions of matters on their real merits, so avoiding the incurrence of unnecessary delays and costs.*"

[40] The above considerations should also be applied in our courts in this Kingdom. This Court has observed a tendency among some judges to uphold technical points *in limine* in order it seems, I would dare to add, to avoid having to grapple with the real merits of a matter. It is an approach which this Court feels should be strongly discouraged.

[41] In the present case the defect, if such it was, in the applicant's papers was that he had sworn to his affidavit a day prior to the formal resolution of his company authorising him to do so. But the notice of motion, of which such affidavit was the founding document, was only served and filed on the same day that the formal resolution was passed. This is a matter obviously highly technical in nature. By refusing to allow the applicant to remedy it, and not approaching the matter "with a fair measure of common sense", the Court *a quo* afforded the respondent no material advantage as fresh papers to remedy the defect could immediately thereafter have

been prepared and filed by the appellant. It simply postponed at much cost the day of possible reckoning (cf the remarks in this regard of Harms JA in Smith's case, supra).

[42] In any event, the Court a quo, again exercising its discretion in a common sense manner, should have had regard to the replying affidavit in which, the directors of the appellant clearly ratified Nkabinde's actions. In MERLIN GERIN (PTY) LTD v ALL CURRENT AND DRIVE CENTRE (PTY) LTD 1994(1) SA 659(C) at 660 I - J, Conradie J, faced with a situation similar to the present, said in a statement approved by the Court of Appeal in Smith's case:

> "*Where...the resolution of the applicant's board has only to be submitted to be accepted, there is really very little harm in allowing an applicant to put his papers in order in this way.*"

And as far back as 1944, a notice of appeal in a case by an official of a trade union was filed on 20 October ,1944 but the resolution of the union authorising him to launch appeal proceedings on its behalf was only taken on 23 October 1944. That resolution was held clearly to amount to an effective ratification by the union of the act which had been done on its behalf without prior authority (see GARMENT WORKERS UNION OF THE CAPE AND ANOTHER v GARMENT WORKERS UNION AND ANOTHER 1946 AD 370 at 378).

The learned Judge *a quo* also rejected the assertion by Nkabinde in his replying affidavit that Mavuso was indeed a director of the appellant company and was present when the resolution was

passed. Nkabinde said that one van Hagt, whose name appeared on the appellant's letterhead was no longer a director of the company and had been replaced by Mavuso although such change had not yet been registered in the appellant's records. He annexed a letter from appellant's majority shareholder dated 3 May 2005 appointing Mavuso as a director of appellant with immediate effect. In rejecting Nkabinde's assertion, apart from his refusal to recognise that assertion in the replying affidavit, the learned Judge said, in relation to the facts alleged by Nkabinde in support of his assertion -

> "*A court cannot work with and rely on such material. The referral (to the letter of 3 May 2005) as proof of the appointment of Mavuso as director is also not proof thereof that he was a director at the point in time.*"

Mr. Nkosi sought to support this finding. He said that the applicant had failed to show how Mavuso was appointed and whether he had ever accepted such appointment or had acted as a director of the appellant.

None of the company's statutory returns reflected him as such. He also criticised the letter of the major shareholder, querying whether a mere statement in a letter that he had been appointed was sufficient to create a valid appointment of a director. That letter was, however, written in May 2005 when no litigation between the parties was in contemplation and there is nothing to suggest that the majority shareholder's appointment of Mavuso was in any way invalid.

This Court is unable to uphold the learned Judge's conclusion on this aspect. What more could the appellant produce? There was

before the Court a statement on oath by Nkabinde that Mavuso was a director. That was confirmed, on oath, by Mavuso. The major shareholder said he was appointed a director. Mavuso signed the authorising resolution as a director. To find that he was not a director at the time entails a finding that Nkabinde and Mavuso both committed perjury as well as a finding that Mavuso, for what purpose one cannot fathom, signed the resolution when both he and Nkabinde knew he was not entitled to do so - clearly a fraudulent act. No evidence whatsoever exists as to these factors. It would be pure speculation of the gravest import i.e. that Mavuso committed perjury and fraud. There is no basis whatsoever for such a finding.

In the absence of evidence to the contrary the allegations made by the deponents in support of the appellant's case clearly suffice.

[46] The learned Judge's rejection of Nkabinde's assertions as to his authority to launch the application and depose to the founding affidavit was therefore incorrect and cannot be allowed to stand. The Court has merely to be satisfied that it is the applicant that is litigating and not some unauthorised person on its behalf (see MALL (CAPE) (PTY) LTD v MERINO KO-OPERASIE BPK 1957(2) SA 347(C) at 351-2. The Court *a quo* should have been so satisfied.

[47] As to the point that the franchise agreement was invalid, the learned Judge said as follows:

> "*Furthermore I have a vast problem with Clause 20.2 of the Franchise Agreement, annexure 'C to the founding affidavit. It reads as follows:-*

> '*20.2 If the franchisee is a company, close corporation or business trust, this Agreement shall be of no force or effect unless and until every shareholder or member or trustee of the Franchisee has signed the "undertaking in Schedule 18".*

As set out above, it is common cause that only one director of the respondent namely one Veloso has signed the "Undertaking" and that the respondent's other director, Costa, who is also a shareholder, did not sign it.

The learned Judge then referred to Mr. Flynn's argument that the applicant had waived its rights which arise from Clause 20.2 and held that "since there was no resolution or even a letter to this effect... counsel's assertion was not sufficient." He then stated that he was "compelled to find, on the material before me, that the Franchise Agreement accordingly did not come into operation."

Two aspects arise in regard to this issue. The first is this. The clause requiring all the respondent's shareholders to sign the agreement was obviously a requirement operating in the appellant's favour. Schedule 18 to the franchise agreement is a noncompetition undertaking and is headed as such. It provides that during the term of the franchise agreement and for certain periods thereafter, the respondent undertakes not to involve itself in any business in competition with the appellant. The undertaking is clearly designed to protect the appellant. It could therefore, if it so wished, waive the undertaking.

[50] The second aspect is whether there was such a waiver. In coming to his conclusion, the learned Judge obviously arrived at it without due consideration, or, for that matter any consideration, being given to the conduct of the parties. The agreement was signed by the respondent in February 2003 from which time it carried on business in terms of the franchise agreement until the purported cancellation of that agreement in December 2005. That much is not in dispute and one need only refer to the acknowledgement of debt signed by the respondent on 18 March 2005 to put this issue beyond doubt. In that acknowledgement the respondent admits liability to pay for petroleum and lubricant products sold to it by the appellant in terms of this agreement, a liability which could only have arisen from the business carried on pursuant to the franchise agreement. On the premise, therefore, that both parties treated the agreement as binding for some three years, the question arises whether the learned Judge was justified in rejecting the submission of counsel that the right to treat the agreement as being void *ab initio* had not been waived.

There is a great deal of authority for the proposition that conduct which is incompatible with an intention to rescind a contract can lead to the conclusion that the parties are bound by its terms. In the case of PQTGIETER AND ANOTHER v VAN PER MERWE 1949(1) SA 361 (A) the Appellate Division dealt with the right of a lessor to cancel a lease when he had accepted the payment of rental with knowledge of the breach by the lessee of a condition of the lease. Had the right to cancel been waived,? Centlivres JA, as he then was, said the following:-

"*It seems to me that Pollock in his Principles of Contract (8th ed.) puts the question of lapse of time in its true light. On p. 618 he says:*

> '*Omission to repudiate within a reasonable time is evidence, and may be conclusive evidence, of an election to affirm the contract; and this is in truth, the only effect of lapse of time.*'

On p. 629 he says:

> '*The contract must be rescinded within a reasonable time, that is, before the lapse of a time after the true state of things is known, so long that under the circumstances of the particular case the other party may fairly infer that the right of renunciation is waived.*'"

In casu, all the facts on which it now relies for seeking to treat the franchise agreement as void and unenforceable were known to the respondent from its inception. Its acceptance of the binding nature of the agreement, illustrated by three years of running its business as a franchisee of the appellant, is quite clear. The appellant similarly continued to implement the agreement in all its facets for three years, despite non-compliance with the requirement in Clause 20.2, and accordingly clearly waived its right to insist on it In any event, if the agreement never came into operation, the respondent is obviously in possession of the premises without any right to be so, its right to occupation being derived solely from the

franchise agreement and could now not resist the claim that it should vacate the premises forthwith. This finding of the Court *a quo* cannot be supported and must be set aside.

The learned Judge also dismissed the application on another ground. It was not one advanced by the respondent but was raised *mero motu* by the Court. It was that the Court could not deal with the matter but

that it had to be referred to arbitration. The learned Judge said this:

> "*Furthermore, on the assumption that I am wrong with regard to the Franchise Agreement not coming into operation then the applicant is faced with the provisions of paragraph 32.1 of the Franchise Agreement requiring that the matter be referred to arbitration... The applicant seems to be in the wrong forum.*"

Again, with respect to the learned Judge, that is not a correct statement of the legal position in regard to arbitration clauses in a contract. It is well-established that such a clause does not oust the jurisdiction of the court to deal with and decide disputes between the contracting parties. The position is most clearly set out by Didcott J in PAREKH v SHAH JEHAN CINEMAS (PTY) LTD AND OTHERS 1980(1) SA 301(D) at 305 E - H as follows:

> "*An arbitration agreement does not deprive the court of its ordinary jurisdiction over the disputes which it encompasses ...Arbitration itself is far from one absolute*

> *requirement, despite the contractual provision for it. If either party takes the arbitrable*
>
> *disputes straight to court and the other does not protest, the litigation follows its normal course, without a pause. To check it the objector must actively request a stay of the proceedings. Not even that interruption is decisive. The court has a discretion whether to call a halt or to tackle the dispute itself. Throughout, its jurisdiction, though somewhat latent, remains intact.*"

Didcott J cited a number of earlier cases in support of his statement and if any further authority were necessary for this well-known position, it is to be found in the judgment of Nicholas J, as he then was, in CONRESS fPTY) LTD vs GALLIC CONSTRUCTION (PTY) LTD 1981(3) SA 73(W) at 75-6. The latter case has been followed in numerous cases since then (see e.g. DELFANTE v DELTA ELECTRICAL INDUSTRY LTD 1992(2) SA 221(C) at 226 E - J.

In casu, although there is a clause in the franchise agreement providing for arbitration in the case of disputes between the parties, there was no objection by the respondent to the appellant invoking the jurisdiction of the High Court nor any application for a stay of the proceedings to allow the present dispute to go to arbitration. The respondent also does not now insist that

> the matter should go to arbitration. The appellant as the *dominus litis* was perfectly within its right to approach the High Court for the relief it sought. It was not in the wrong

forum.

[55] For the aforegoing reasons this Court finds that the Court *a quo* erred in upholding the points *in limine* taken and in dismissing the appellant's application. It should, this Court finds, have dismissed those points and have dealt with and decided the merits of the matter, which this Court proceeded to do.

[56] As far as the merits are concerned, the provisions of the property lease agreement are clear and explicit providing in Clause 3.1 thereof for an initial period of lease of three years from 1 January 2003. Clause 3.2 provides as follows:

> "*Shell shall notify the lessee in writing no later than 3 months prior to the expiry of the initial period of its intention not to extend the duration of the agreement beyond the initial period. In such event this agreement shall terminate upon the expiry of the initial period.*"

The decision not to extend the lease beyond the initial period is that of the appellant and it alone and it need give no reasons for coming to that decision.

[57] As stated above the appellant on 30 September 2005 i.e. no later than three months prior to the expiry of the initial period, wrote to the respondent notifying it that the appellant did not intend to extend the duration of the agreement beyond the initial period. The respondent admits receiving this notice on 30 September 2005. The lease therefore came to an end on 31 December 2005 and

because of this, in terms of the franchise agreement cited above, the appellant became entitled to cancel the agreement.

[58] The respondent, however contests that entitlement on the following grounds. It contends that the ability to give the notice of non-extension of the period of the lease was contained in the property lease agreement Schedule to the franchise agreement. It depended for its validity on the franchise agreement being valid. But, so Mr. Nkosi contends, that agreement was void *ah initio* (quite apart from the non-compliance with Clause 20.2 of it) because it is *contra bonos mores.*

In elaboration of this contention Mr. Nkosi made the following submissions. He referred to the fact that the respondent bought the business of running the filling station in 1999, paying some E500 000 for it. The appellant, Shell, only acquired the notarial lease of the property in 2001, by which time the respondent had already been in occupation of the premises for almost two years. Its right to do so, he said, arose from its owning the business which it operated in the premises. The business, under respondent, flourished, the filling station becoming one of the most successful in Swaziland. That, he said, caused the appellant to cast covetous eyes on it. It now wished to take it over by not compensating the respondent for it by either not paying a fair price for it or not paying respondent for the latter's improvements to it. This was evidenced, Mr. Nkosi submitted, by the refusal by the appellant to approve of any of the potential purchasers of the business when the respondent wished to sell it, all of whom were upright Swazi businessmen who were well able to pay the purchase price of E2.5 million that the

respondent wanted for the business. The appellant had instead frustrated the sale by insisting on BBX (Pty) Ltd being the purchaser at a lesser figure than E2.5 million.

[60] The appellant's actions, he said, were designed to delay any sale of the business by the respondent until the end of September 2005 when it could give the notice of non-extension of the lease and thereafter seek to cancel the franchise agreement, thus enabling it, the appellant, to take over the business with no compensation for it to the respondent. This was, he said, contrary to the provisions of the Constitution (Section 14(l)(c) guaranteeing "protection from deprivation of property without compensation".

[61] It was this conduct, so Mr. Nkosi contended, which rendered the agreement *contra bonos mores.* The basis for such conduct lay in the provisions of the agreement which was totally one-sided in favour of the appellant. This Court, he submitted, as the highest Court in the country, should ensure that business in Swaziland is fairly conducted and should protect small Swazi businessmen from "large, powerful conglomerates". He submitted that the matter required a proper ventilation of these issues and that it should be referred to trial to enable that to occur.

[62] Swaziland is a constitutional democracy and this Court, as the highest Court within the constitutional structure will, of course, protect the rights and interests of all the people in Swaziland in accordance with the Constitution and the appropriate duly enacted legislation, conscious of the norms and mores of the Swazi people. It will do so to ensure, as it must, that justice is done to all and with

impartiality and fairness to litigants before it.

There are, however, other considerations of which this Court must not lose sight. This Court should not, by its judgments, stultify free trade and economic development within the country. It must take care that it does not place unnecessary restraints thereon and create obstacles that may lead to the discouragement of foreign investment in the Kingdom.

One source of such investment comes in the form of franchise agreements in which foreign companies, often large in size and frequently with interests that are global in extent, seek to invest in smaller countries such as Swaziland by offering franchises to local business persons to enable the latter to make available to the public those products which enjoy world-wide recognition, for the benefit and profit of local business. One thinks immediately of the international oil companies; of food distributors such as Macdonald's; the larger pharmaceutical companies and other similar entities.

In granting to smaller businesses the ability to sell their products which have acquired international reputations and recognition, the franchisors generally require that the franchisee should ensure that in the promotion and sale of such products, the distinctive character of the products is adhered to and that the standards which have gained the product the recognition they enjoy should be maintained. These necessarily cast certain burdens on the franchisee. While these may have the effect of causing them to appear to be somewhat onesided, that is the very nature of franchise agreements. In reality, however, the provisions are not only for the protection of the franchisor but are also of benefit to the franchisee ensuring that at all times it

is providing to the public quality products of international standards.

In entering into such contract franchisees are aware of such benefits. Indeed, in the preamble to the present franchise agreement, it is recorded that the respondent "desires to obtain the benefit of the knowledge, skill and experience of Shell". It can accordingly not be suggested that the parties were contracting on an unequal basis, even though the one party is a large, international company and the other a small Swazi business concern. There was no co-ercion on the respondent to enter into the franchise agreement; it clearly did so to enjoy the benefits and profits which would ensue from it.

It has been held in South Africa - and similar considerations should, in my view, apply in Swaziland -that where parties contract on equal terms, the Court, while still looking to the interests of the public, regards the parties as the best judges of what is reasonable between themselves and looks with disfavour on one of them who seeks to escape from his bargain by saying he agreed to something unreasonable (see NEW UNITED YEAST DISTRIBUTORS (FIT) LTD v BROOKS 1935 WLD 75 at 83).

It must be observed that in the present case the respondent has only raised its complaint that the franchise agreement was *contra bonos mores* during argument before this Court. It was not raised in the Court *a quo* and nowhere in the papers is it suggested that the agreement was void *ab initio* for this or any other reason. Being raised at this very late stage suggests that it is somewhat of an afterthought on the respondent's part.

[69] In the answering affidavit Veloso averred that he had signed the franchise agreement under duress. This was because the convenience store the respondent had established had been "literally hijacked" by the appellant. He said that on 20 February 2003 he was presented by the appellant's retail manager with a bundle of documents, which he now realises was the franchise agreement, and told to sign them immediately and that the appellant would not tolerate any delay in his doing so. He said he was "not given any opportunity to read and understand what I was actually signing" but having looked at the agreement "I now doubt very much if I would have understood the contents."

[70] These allegations were denied by the appellant's retail manager. However, from the description on the first page of the document it must have been apparent to Veloso that he was signing the franchise agreement and nothing else.

[71] It has been a well-recognised principle for over a century, embodied in the legal maxim "caveat subscriptor" that a man who signs a contract, whether he knew of its contents or not, is treated as having assented thereto, in the absence of special circumstances. As far back as 1903 in BURGER v CSAR 1903 TS 571 at 578, Innes CJ held that:

> "*It is a sound principle of law that a man, when he signs a contract is taken to be bound by the ordinary meaning and effect of the words that appear above his signature.*"

Veloso not only signed the agreement but inserted some of the details relating to the respondent in it.

[72] It remains on this aspect to make one further observation. In the South African Appellate Division in the case of SASFIN (PTY) LTD v BEUKES 1989(1) SA 1 at 9 B - C, Smalberger JA said this:

> "*The power to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power. One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness. In the words of Lord Atkin in TENDER v ST. JOHN - MILDMAY 1938 AC 1 (HL) at 12, (1937) All ER 402 at 407 B - C: the doctrine should only be invoked in clear cases in which the harm to the public is substantially uncontestable and does not depend upon the idiosyncratic inferences of a few judicial minds.*"
>
> Smalberger JA went on to add that -
>
> > "*...it must be borne in mind that public policy generally favours the utmost freedom of contract, and requires that commercial transactions should not be unduly trammelled by restrictions on that freedom.*"

I respectfully endorse those views and find them particularly apposite in respect of what should be the aim of this Court to encourage and promote in Swaziland the freedom of trade and development and not to discourage foreign investment in the

country. The present case is not one of such clarity that any offence to public policy rendering the agreement *contra bonos mores* can be said to be substantially uncontestable.

[73] This Court accordingly finds that it cannot find that the franchise agreement was *contra bonos mores* on the grounds advanced by Mr. Nkosi. No purpose would therefore be served by referring the matter to trial. In the light of this conclusion the Court does not have to deal witn the submission that the agreement offends against Section 14(l)(c) of the Constitution. However, it seems to this Court that that Section has no relevance to the present matter.

[74] It is furthermore unlikely in the extreme that being presented with documents for signature by the appellant's retail manager, he did not appreciate that these related to respondent's relationship with the appellant. On one particular aspect it is extremely unlikely that Veloso and his co-shareholder were not aware of the contents of the agreement. That is its duration. They are obviously astute businessmen as is evidenced by the steps they took and the way they improved the business of the filling station. I cannot conceive it as to any degree probable that they would not have known that the duration of the lease was for three years and that the appellant might not have extended it thereafter. Surely any businessman would have wanted to know for how long he was going to be able to run his business.

[75] This Court therefore finds that the respondent would have been aware that at the end of 2005 it would possibly have had to cease business under the franchise, without compensation

from the appellant. Whatever rights the respondent may feel it now has flowing from any actions of the appellant or for any improvements it may have brought about to the property, it may seek to enforce in another forum.

[76] There is furthermore in regard to this application no dispute of fact before the Court. As stated above the appellant on 30 September 2005 i.e. no later than three months prior to the expiry of the initial period, wrote to the respondent notifying it that the appellant did not intend to extend the duration of the agreement beyond the initial period. The respondent admits receiving this notice on 30 September 2005. the lease therefore came to an end on 31 December 2005. The respondent's defence to this is that the franchise agreement was invalid *ab initio.* This Court has rejected that defence. It finds that the lease lawfully expired on 31 December 2005.

[77] The consequence of the termination of the lease is that the appellant, as franchisor, was entitled to cancel the franchise agreement, which it duly did. That in turn brought into operation Clause 15.1 of the franchise agreement which reads as follows:

> "*Upon the termination of this agreement for any reason, the franchisee shall, unless otherwise notified by Shell in writing:*
>
> > *5.1.10.1.1. immediately vacate the premises, if they are leased from Shell... and hand over the keys of the premises to Shell or Shell's duly authorised representative.*"

[78] The franchise agreement having terminated, the

respondent was obliged to vacate the premises forthwith and hand over the keys to the appellant or its representative. Despite demand, it failed to do so. The appellant is therefore entitled to the order it claimed and the Court accordingly made the order which follows and which it hereby confirms.

(1) The appeal is upheld with costs including costs consequent upon the employment of counsel.

(2) The order of the Court *a quo* is set aside and substituted with the following order:-

"*(a) The application is granted as prayed in terms of prayers 2 and 3 of the Notice of Motion.*

(b)It is further hereby declared that the written Franchise Agreement concluded between the applicant and the respondent on or about 25 February 2003 in terms of annexure "C" to the applicant's founding affidavit terminated on 31 December 2005 and is of no further force or effect.

(c) The respondent together with any other person that may be in occupation of the property situated at corner of Bypass and Main Mbabane/Manzini Roads, Mbabane, under or through the respondent and/or by virtue of the respondent's occupation thereof, is hereby ordered to vacate the property within 24 hours from the date of service of this Order upon the respondent at the property and to deliver up to the applicant all the keys to the property which the respondent may have in its possession or under its control.

(d) In the event that the respondent and/ or any person(s) occupying the property through or under the respondent fails to vacate the property within a period of 24 hours from the date of service of this Order the Sheriff of the High Court is hereby authorised to evict the respondent and/or any person(s) occupying the property through or under the respondent.

(e) The respondent shall pay the costs of the application including the costs consequent upon the employment of counsel in terms of Rule 68(2) of the High Court Rules."

P.H. TEBBUTT, J.A

I AGREE

J. BROWDE, A.J.P.

I AGREE

M.M. RAMODIBEDI, J.A.

Delivered in open court at Mbabane on the ...day of 2006