IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Held in Mbabane

Appeal Case No. 11/2014

In the matter between

PRESIDENT STREET PROPERTIES (PTY) LTD		**Applicant**
and		
MAXWELL UCHECHUKWU	**1st**	**Respondent**
THE DEPUTY SHERIFF FOR THE DISTRICT OF MANZINI	**2nd**	**Respondent**
HIS LORDSHIP JUSTICE E. M. EBRAHIM J.A N.O.	**3rd**	**Respondent**
HER LADYSHIP JUSTICE E. A. OTA JA N.O.	**4th**	**Respondent**
HIS LORDSHIP JUSTICE DR. B. J. ODOKI N.O.	**5th**	**Respondent**

IN RE:

PRESIDENT STREET PROPERTIES (PTY) LTD		**Applicant**
and		
MAXWELL UCHECHUKWU	**1st**	**Respondent**
THE DEPUTY SHERIFF FOR THE DISTRICT OF MANZINI	**2nd**	**Respondent**

Neutral Citation: ***President Street Properties (Pty) Ltd v Maxwell Uchechukwu & 4 Others (11/2014) [2015] SZSC 11 (29th July 2015)***

Coram: **M.C.B. MAPHALALA ACJ, ANNANDALE, AJA, MAMBA AJA, DLAMINI AJA and CLOETE AJA**

Heard: **15th July, 2015**

Delivered: **29th July. 2015**

SUMMARY; **Civil Procedure: Service on a company in terms of Rule 4 (2) of the High Court Rules; Default judgment – Rescission refused – Review - Section 148 of Constitution – grounds for**

DLAMINI AJA

Background

[1] This application arises from a decision of the Supreme Court handed down on the 3rd December 2014, in which it dismissed an appeal against the decision of the High Court (per **M.S. Simelane** J) of 9th April 2014, in which the High Court dismissed the Applicant's application to rescind a default judgment granted by the High Court (per **Maphalala PJ**) on the 12th July 2013. After evidence in proof of damages was heard, the High Court by default judgment granted 1st Respondent (the Respondent) a total sum of E528,331.07, being damages for the unlawful eviction of the Respondent from certain business premises, to wit Portions 10 and 15, Farm 125 Manzini District, damage or loss to goods confiscated from the said premises as well as interest and costs.

[2] I am grateful for the submission of Counsel in this case, even as they did not want to argue "out of the box". Yet without such enterprise, the boundaries of jurisprudence will never be pushed back for the benefit of all. I should, however, express my gratitude in particular to the staff of the Attorney-General's Office who, on being requested, graciously assisted in making accessible the material from West Africa from which we have so liberally cited. Even though some counsel had a notion that the constitutional provision central to this review might have its source in Ghana, none reached out to Ghana for any useful precedents we might have benefited from.

[3] This is an important matter. It is an application brought in terms of section 148(2) of the Constitution (2005). By force of this section, the Applicant wants the Supreme Court to back track and review its own earlier judgment, against all the well settled and tested principles of ***functus officio*** and ***res iudicata***. Section 148 reads as follows:

> ***"Supervisory and review jurisdiction***
>
> *148 (1) The Supreme Court has supervisory jurisdiction over all courts of judicature and over any adjudicating authority and may, in the discharge of that jurisdiction, issue orders and directions for the purposes of enforcing or securing enforcement of its supervisory powers.*
>
> ***(2) The Supreme Court may review any decision made or given by it on such grounds and subject to such conditions as may be prescribed by an Act of Parliament or rule of court.***
>
> *(3) In the exercise of its review jurisdiction,* ***the Supreme Court shall sit as a full bench.*** *"*

[4] In this matter the Court is not relying on any so-called inherent jurisdiction as a court of final appeal. The Court is called upon to exercise the Constitution-endowed jurisdiction or power to review its own decisions. In the result the Court is not obliged to mull over issues of ***res iudicata*** or ***functus officio*** or

similar rules. The Constitution does not do away with these rules: they remain in the background as a constant reminder to the Court not to be too complacent with itself and over indulge this new authority.

[5] Even though the Court has disavowed any power to reopen an appeal it had disposed of and change the substance of a judgment it had already handed down, there is no doubt in my mind that even without section 148(2), this Court would still have some inherent or vestigial power to entertain cases in situations - rare as they must no doubt be – where not to intervene and relax the rules governing finality in litigation would itself bring disrepute to the administration of justice. I am not here merely referring to the generally accepted power of courts to correct their judgments and orders for consistency and clarity. That is not in dispute. I am saying the Supreme Court should not countenance a situation whereby the general public, the very beneficiaries of the due administration of justice, would be disenchanted that the very principles of ***res judicata, functus officio,*** etc., have become a curse rather than a blessing. So the barrier of ***res judicata*** is not impenetrable. Theron AJ in the recent South African Constitutional Court case of **Molaudzi v The State** [2015] ZACC 20, says:

> *"[16] The underlying rationale of **res judicata** is to give effect to the finality of judgments. Where a cause has been litigated to finality between the same parties on a previous occasion, a subsequent attempt by one party to proceed against the other party on the same cause of action should not be permitted. It is an attempt to limit needless litigation and ensure certainty on matters that have been decided by the court".*

[6] Section 146(5) of the Constitution allows this Court to depart from its earlier decision if it should consider it wrong. It is sensible then that there should also

be this complementary power in the Court to review its own decisions with the possibility to set same aside. This is certainly in line with developments elsewhere in the Commonwealth. In the **Molaudzi** case the issue of ***res judicata*** and the power of the Court to relax such doctrine in *exceptional circumstances* is raised. After viewing developments in other countries, Theron AJ, for the court, said:

> *"[44] Mr Molaudzi's second application, as indicated earlier, raises issues that are in fact* ***res judicata****, despite different grounds of appeal having been raised in the first application. To find otherwise would place too great a burden on the administration of justice as an appeal court would then have to consider each new ground brought on appeal (particularly in criminal convictions) to be a fresh appeal. This would jeopardise legal certainty to an unacceptable degree.*
>
> *"[45] Where significant or manifest injustice would result should the order be allowed to stand, the doctrine ought to be relaxed in terms of sections 173 and 39(2) of the Constitution in a manner that* permits *this Court to go beyond the strictures of rule 29 to revisit its past decisions. This requires rare and exceptional circumstances, where there is no alternative effective remedy. This accords with international approaches to* ***res judicata****. The present case demonstrates exceptional circumstances and cry out for flexibility on the part of this Court in fashioning a remedy to protect the rights of an applicant in the position of Mr Molaudzi".*

[7] Notwithstanding the express letter of the provision, however, neither Act of Parliament nor Rules of court have been promulgated to guide and give direction on how section 148 (2) is to operate. This raises the further question whether the provision must operate as it is and not await at least the rules of court. The

question may well be late now since the provision has been invoked before without anything being said about the absence of rules or Act of Parliament. There is no doubt that the enactment of rules of the Supreme Court would go a long way in pointing the way ahead and assisting Judges to have a feel of the new jurisdiction and parties to know what to do if they are not to be accused of and even ridiculed for reopening an appeal, already heard and concluded, and possibly opening themselves to punitive costs if their application is dismissed. The evident need for the legislation or rules arises from the wording of the provision enjoining the court to exercise the jurisdiction "*on such grounds and subject to such conditions as may be prescribed.*" As it is, neither "*grounds*" nor "*conditions*" have been prescribed at date of hearing.

[8] Section 148(3) provides that the Supreme Court panel hearing the application for review should be a '**full bench**'. But it is not clear whether this bench should be the same judges who heard the matter on appeal or that the review panel should be differently constituted. Or for that matter, whether the review panel should be a mix of judges who sat on appeal and some who did not sit, and so on.

[9] This consideration about the composition of the '**full bench**' naturally arises because of the concern by the Lawmaker that the review panel should be a 'full bench'. In so prescribing the Lawmaker must have had in mind that the review bench be somehow, wholly or partly, composed differently from the appeal bench. But the 'full bench' requirement has problems of its own. What it means is that, in the first instance, when the appeal bench was made up of three judges the review panel should be five. But what if the appeal bench was composed of five judges? How is the full bench of the review to be composed? I have no doubt in my mind that provision should be made to enhance the review bench in the event the appeal bench was composed of five Supreme Court justices. In this regard provision should be made to add two judges so that the 'full bench' on review be a panel of

seven justices of the Supreme Court. But whether the review bench should be entirely different or not, I make no opinion.

[10] It may be helpful even at this early stage of the judgment to obviate one other issue which keeps arising in proceedings such as ***in casu.*** This issue is built around the question whether there is a distinction between appeal and review. We raise this issue because there is often confusion between the two, that litigants should be careful in presenting their cases for review. There is, of course, a distinction between '*appeal*' and '*review*', so that '*a review jurisdiction is not an appeal*', and is '*not meant to be resorted to as an emotional reaction to an unfavourable judgment*', it has been said. Herbstein and Van Winsen, **The Civil Practice of the Superior Courts in South Africa, 3rd Ed.** at p 750 write:

> "*The reason for bringing proceedings under review or appeal is usually the same, namely, to have the judgment set aside. Where the reason for wanting to have the judgment set aside is that the court came to a* ***wrong conclusion*** *on the facts or the law, the appropriate remedy is by way of appeal. Where, however, the real grievance is against the* ***method*** *of the trial, it is proper to bring the case on review. The first distinction depends therefore on whether it is the* ***result*** *only or the* ***method*** *of trial which is to be attacked... The second main distinction between procedure on appeal and on review is that in the first case the matter is generally a question of argument on the record alone, whereas in a review the irregularity generally does not appear on the record. In an appeal the parties are absolutely bound by the four corners of the record, whereas in review it is competent for the parties to travel outside the record, and to bring extrinsic evidence to prove the irregularity or illegality". (Emphasis added).*

However in terms of s 148 (2) the Supreme Court is not concerned with the ordinary appeal versus review debate. The Court is concerned with a special form of review which is not limited by rules of ***res judicata or functus officio.*** The review power is specifically to overcome these limitations in the wider interest of justice.

[11] **Yebisi** [1](p48) has ruefully commented: "*The idea of a society without **res judicata** or finality in litigation is unthinkable*". But another could rebut: "*More is the pity of a society that cannot relieve itself of situations of manifest injustice because of **res judicata.***" Finality in litigation is important and desirable, but justice to litigants is even more important and more desirable. There is need to strike a balance between the two values without throwing away the baby with the bath water. This is the greater public interest. Section 148 (2) is superimposed on all these time tested doctrines – *res judicata, functus officio,* finality in litigation, *stare decisis, etc.* The section does not abolish these values but says, notwithstanding, let the Court look again at what has happened to see if there is nothing unusual that should be considered favourably to an aggrieved party. The process is not so much as finding fault with the appellate and trial courts but to see if even in their correctness the window must be closed and closed firmly against a party knocking with some genuine concern.

[12] Before we take a closer look at Section 148, it may be helpful to visit other jurisdictions on the subject of express or implied review of finally decided cases. In **Taylor v Lawrence** [2003] QB 528 (CA) Lord Woolf, the Lord Chief Justice of England and Wales says:

> "5. *It is a firm rule of practice that the Court of Appeal will not allow fresh evidence to be adduced in support of an appeal if that evidence was reasonably accessible at the time of the original hearing: **Ladd v Marshal** [1954] 1 WLR 1489. ...*
>
> "25. *In contrast, there are dicta which suggest that, in **exceptional circumstances** the Court of Appeal might have jurisdiction to reopen an appeal, for instance, the observations of Cotton LJ **in Birmingham and District Land Company v London and North Western Railways Co.** [1886] 34 CH.D 261 at p.277, and in **Ex parte Banco de Portugal** [1880] 14 CH.D 1 at p. 6. ...*

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1 Yebisi ET: "The Constitutional power of the Supreme Court of Ghana: Lesson for Nigeria" (April 2014)

> *"37. **Fraud** has always been treated as an **exceptional case** and dicta in these cases do not provide a foundation for answering the issue of jurisdiction which is before us. If, however, it is arguable that the court of appeal is able to reopen a decision where it has been obtained by fraud, this opens the door to the argument that **there is jurisdiction to reopen an appeal in other exceptional cases**.* (My emphasis)
>
> *"54. Earlier judgments referring to limits on the jurisdiction of this court must be read subject to this qualification. It is very easy to confuse questions as to what is the jurisdiction of a court and how that jurisdiction should be exercised. The residual jurisdiction which we are satisfied is vested in a court of appeal to **avoid real injustice in exceptional circumstances** is linked to a discretion which enables the court to confirm the use of that jurisdiction to the cases in which it is appropriate for it to be exercised. There is a tension between a court having a residual jurisdiction of the type to which we are here referring and the need to have finality in litigation. The ability to reopen proceedings after the ordinary appeal process has been concluded can also create injustice. **There, therefore, needs to be a procedure which will ensure that proceedings will be reopened when there is a real requirement** for this to happen."* **(My emphasis)**

[13] **Lord Woolf CJ** goes on to make the example where bias is subsequently established as having affected proceedings in breach of natural justice, and says:

> *"55....The need to maintain confidence in the administration of justice makes it imperative that there should be a remedy. The need for an effective remedy in such a case may justify this court in taking the exceptional course of reopening proceedings which it has already heard and determined. What will be of the greatest importance is that it should be clearly established that a **significant injustice** has probably occurred and that there is **no alternative effective remedy**. The effect of reopening the appeal on others and the extent to which the **complaining party is the***

> ***author of his own misfortune*** *will also be important considerations"* **(My emphasis)**

[14] It is my considered view that the *'procedure'* referred to by **Lord Woolf** above is precisely what Parliament and the Learned Chief Justice are called upon to do by the very section 148 (2). And I am confident that the Rules of court in terms of the provision could be in place and functional in a reasonably short time, ahead of any Act of Parliament. The rules can never be exhaustive but they could help identify the central purpose of the provision even if its boundaries and outer limits may not be easily discernible. A narrow but principled, circumscribed area of operation must be adumbrated. It may be difficult to spell out what constitutes "*exceptional circumstance,*" for instance, but when that circumstance does crop-up informed eyes shall see it. Indeed, consistently with the prevailing principles ensuring finality in litigation, it cannot be said that section 148 (2) throws caution to the wind and unleashes a floodgate of matter-of-course reviews. Hence the urgent need for the '*grounds*' and '*conditions*' to be laid down as envisaged by the enabling provision.

[15] From the above authorities some of the situations already identified as calling for *supra* judicial intervention are an exceptional circumstance, fraud, patent error, bias, presence of some most unusual element, new facts, significant injustice or absence of alternative effective remedy. Even the English Court of Appeal does not have originating inherent jurisdiction to intervene and reopen concluded cases, but it does rise to the occasion when the right circumstance presents itself as Lord Wilberforce points out in **Ampthill Peerage** case [1976] 2 All ER 411 (HL) at page 417 J – 418C:

> ***"English law, and it is safe to say, all comparable legal systems, place high in the category of essential principles that which requires that limits be placed upon the right of citizens to open or reopen disputes...*** *Any determination of*

disputable fact may, the law recognizes, be imperfect: the law aims at providing the best and safest solution compatible with human fallibility and having reached that solution it closes the book. The law knows, and we all know, that sometimes fresh material may be found, which may lead to a different result, but, in the interest of peace, certainty and security it prevents further inquiry. ***It is said that in doing this, the law is preferring justice to truth.*** *That may be so: these values cannot always coincide. The law does its best to reduce the gap. But there are cases where the certainty of justice prevails over the possibility of truth (.....) and these are cases where the law insists on finality.* ***For a policy of closure to be compatible with justice it must be attended with safeguards, so the law allows appeals; so the law, exceptionally, allows appeals out of time; so the law still more exceptionally allows judgments to be attacked on the ground of fraud; so limitation periods may, exceptionally be extended.*** *But these are exceptions to a general rule of high public importance, and as all the cases show, they are reserved for rare and limited cases, where the facts justifying them can be strictly proved.*" (My emphasis)

[16] To me these English *dicta* point the way forward as to how far this Court can go in giving effect to the review jurisdiction in the absence of applicable court rules. A great deal of caution would naturally have to be exercised, in dealing with such an unchartered area of the law. The Court must be alive to the words of Lord Woolf CJ in **Taylor v Lawrence** (*supra)* where his Lordship points out that:

> *"54. ...It is very easy to confuse questions as to what is the jurisdiction of a court and how that jurisdiction should be exercised."*

This is one exercise which this Court will have to embark on very early in time in order to be prepared for any eventuality regarding review applications.

The Ghana Connection?

[17] Without admitting or denying the source of section 148 of the Constitution (2005) let it be known that the Committee which drafted the Constitution had among the various documents and constitutions before it, the Constitution of the Republic Ghana (1992). One of the possible reasons for this may well be that the Committee had as one of its consulting experts, a high ranking Chief from Ghana. Directly or indirectly, the drafters possibly might have '*borrowed*' with some minor modification, article 133 of that Constitution. Article 132 (Ghana) provides for the "***Supervisory Jurisdiction of the Supreme Court***", while article 133 provides for the "***Power of the Supreme Court to Review its Decisions***." Section 148 (Swaziland) seemingly combined Articles 132 and 133 of the Ghana Constitution. Hence our section 148 has the title: "***Supervisory and review jurisdiction***".

[18] In 1996, Ghana promulgated the Rules of the Supreme Court as required under the article. The Rules are easy to follow on paper but one is not sure of the practice:

"1996

"Rules of the Supreme Court: Part V – Review

"*54. The Court may review any decision made or given by it on any of the following grounds:*

(a) exceptional circumstances which have resulted in miscarriage of justice;

(b) discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the decision was given.

"*55 An application for review, shall be filed at the Registry of the Court not later than one month from the date of the decision sought to be reviewed.*

'*56. (1) The application for review shall be by motion supported by an affidavit and accompanied by a statement of the*

applicant's case, clearly setting out and fully arguing all relevant grounds on which the applicant relies.

(2) The motion shall be on notice to all parties affected by the application.

"57. A respondent to the application shall, within fourteen days of the service on him of the application file a statement of his case, in answer, to the application, fully arguing his case.

"58. If the respondent fails to file his statement of case within the time limit specified in rule 57, the applicant may set down the application for hearing with notice to the respondent.

"59. (1) After receipt of the statement of case of the respondent, or after fourteen days of the service of the applicant's statement of case on the respondent, the Registrar may set the application down for hearing.

(2) The Court may, after the statement of the applicant's case and of the respondent's case and any arguments of law, decide to determine the application and give ruling in court on a fixed date without further arguments or may appoint a time at which the parties shall appear before the Court for further argument in the application.

(3) A respondent who fails to file his statement of case within the time limit specified in rule 57 shall not be heard in open court, except as to the question of costs.

"60 Any of the time limits specified in this Part may, on application, be extended or abridged by the Court."

[19] In **Nasali v Addy** [1987-88] 2 GLR 286-288 Taylor JSC of the Supreme Court of Ghana said of the object of the review power:

> *"The jurisdiction is exercisable in exceptional circumstances where the demands of justice make the exercise extremely necessary to avoid irremediable harm to an applicant. In this connection all persons who have lost a case are likely to complain of miscarriage*

> *of justice, but in my view in the absence of the exceptional circumstance such complaints are a poor foundation for the exercise of the review power, for it is only in exceptional circumstances that the interest of* ***reipublicae ut sit finis litium*** *principle yields to the greater interest of justice."* ***Yebisi*** (p45)

Lord Woolf CJ it will be recalled emphasises that as a general rule once a judgment of a court has been perfected the court's jurisdiction is exhausted and vacated. This is in the interest of finality to avoid endless litigation over the same issues between same parties. This is the reason for ***res judicata.*** But sometimes even a perfected judgment may be reopened on exceptional grounds. In *casu* judgment has not been perfected.

[20] **Yebisi** (p42) expresses the feelings and observations which could easily find support in many a Commonwealth jurisdiction:

> *"The apex court has always denied any jurisdiction whatsoever (constitutional statutory or inherent), to review a judgment it had given in that same case. The admonition of Belgore JSC (as he then was) in this regard is apposite: 'what this court is being asked to do is to review its judgment already given. This court has consistently refused to be dragged into this pitfall.* ***The purpose of this application is clear, it is an appeal cloaked in the guise of a motion.*** *From the wording of this motion and the grounds for bringing it, it is manifestly clear that the validity of the judgment of this court as given on 26th February 1993 is being challenged ... Once the Supreme Court has entered judgment in a case, that decision is final and will remain so forever."*(My emphasis).

[21] Interestingly even as the review power is vehemently denied it is at the same time often grudgingly exercised as Ogwuegbu JSC of the Supreme Court of Nigeria is reported to have said in **Igwe v Kalu** (2002) 102 LRN 2073:

> *"It must be emphasized that this is a court of final resort and under the constitution it cannot under any guise sit on appeal over its judgment or review it except under very exceptional circumstances..." (**Yebisi**, p42)*

[22] In regard to the constitutionally established review power of the Supreme Court of Ghana Wiredu, JSC has observed in **Nyamekye (No.2) v Opoku** [2002] SG GLR 567 at 570:

> *"....the review jurisdiction of the court, being special, will not and must not, be exercised merely because Counsel for the Applicant refines his appellate statement of the case, or thinks up more ingenious argument which he believes might have favoured the Applicant had they been so presented in the appeal hearing. An opportunity for a second bite at the cherry is not the purpose for which the court was given the power of review.* **(Yebisi,** p43); and *"Thus, the review jurisdiction is to be called in aid in exceptional circumstances where justice, for which the court exists, will be sacrificed if the decision is not reviewed."* **(Yebisi,** p45**).**

[23] Adade JSC also of the same Supreme Court of Ghana has also added his own imprint on article 133 and issues a warning on the exercise of the review jurisdiction:

> *"....the mere fact that a judgment can be criticized is no ground for asking that it should be reviewed.* ***The review jurisdiction is a special jurisdiction to be exercised in exceptional circumstances. It is not an appellate jurisdiction. It is a kind of jurisdiction held in reserve, to be prayed in aid in the exceptional situation where fundamental and basic error may have inadvertently been committed by the court, which error must have occasioned a gross miscarriage of justice.*** *The review jurisdiction is not intended as a try-on by a party after losing ..., nor is it an automatic next-step...., neither is it meant to be resorted to as an emotional reaction to an unfavourable judgment."* **(Mechanical Lloyd v Narty** [1987-88] 2 GLR 598) **(Yebisi,** p43) (My emphasis).

[24] I find that we can learn a lot from the already developed and evolving jurisprudence in the Supreme Court of Ghana in appreciating this new-fangled jurisdiction created by section 148 (2). The only difficulty that seems to emerge is that we are not told how to use the power. The warning is mostly how not to exercise the jurisdiction. We are not told for instance what would constitute 'exceptional circumstance'. **Yebisi** further writes at p44:

> *"It has been held that where a party in a review application merely seeks to reiterate the arguments made during the hearing at the ordinary bench, the effect is to reopen the appeal under the guise of a review, a factor not constituting* ***exceptional circumstance****. In* ***Darbah v Ampah*** *[1989-90] 2 GLR 163, the Supreme Court unanimously dismissed the application for a review, as a mere invitation to the court to receive fresh submission on points already canvassed at the earlier hearing, so as to arrive at a different conclusion. The court thus held that rearguing matters already adjudicated upon did not constitute a* ***patent error*** *the existence of which would justify a grant of review to correct such mistakes. Opportunity for a second bite at the cherry is not the purpose for which the Supreme Court is given the power of review ...*
>
> *"Inspite of lofty illustrations gleaned from opinions of the Supreme Court Justices,* ***case law on what, when and how the jurisdiction of the Supreme Court in the matter of review is determined is still recondite****. For instance, in substance and intent, it is different to sustain the view that, review jurisdiction is different from an appellate jurisdiction properly so called. The constitution specifically provides that the bench or panel to hear and determine a case on review must be enhanced by a minimum of two justices..."* (My emphasis).

[25] Even in the case at hand, Counsel for Respondent has strongly argued that the review is in fact not a review but an appeal disguised as application under section 148. In his heads of argument Counsel for respondent argued:

> *"17. It is submitted that these allegations by the Applicant clearly indicate that what is in fact sought by the Applicant in terms of this application is*

to have the whole appeal which served before this Honourable Court reargued.

18. It is submitted that the attempt by the Applicant to allege that there was gross irregularity ... is intended to disguise the obvious fact that it is in fact seeking to reargue its appeal all over again under the guise of a review application.."

The new review jurisdiction – s 148 (2)

[26] In its appellate jurisdiction the role of this Supreme Court is to prevent injustice arising from the normal operation of the adjudicative system; and in its newly endowed review jurisdiction this court has the purpose of preventing or ameliorating injustice arising from the operation of the rules regulating finality in litigation whether or not attributable to its own adjudication as the Supreme Court. Either way, the ultimate purpose and role of this court is to avoid in practical situations gross injustice to litigants in exceptional circumstances beyond ordinary adjudicative contemplation. This exceptional jurisdiction must, when properly employed, be conducive to and productive of a higher sense and degree or quality of justice. Thus, faced with a situation of manifest injustice, irremediable by normal court processes, this court cannot sit back or rest on its laurels and disclaim all responsibility on the argument that it is *functus officio* or that the matter is *res judicata* or that finality in litigation stops it from further intervention. Surely, the quest for superior justice among fallible beings is a never ending pursuit for our courts of justice, in particular, the apex court with the advantage of being the court of the last resort.

[27] It is true that a litigant should not ordinarily have a 'second bite at the cherry', in the sense of another opportunity of appeal or hearing at the court of last resort. The review jurisdiction must therefore be narrowly defined

and be employed with due sensitivity if it is not to open a flood gate of reappraisal of cases otherwise *res judicata.* As such this review power is to be invoked in a rare and compelling or exceptional circumstance as **Yebisi** (page 45) says. It is not review in the ordinary sense.

[28] I accept that this inherent power of review, has always been with the Court of Appeal, hidden from and forgotten by all concerned. Now, the Constitution has reaffirmed it to be so. It is nothing new. The fear and hesitation to invoke it or invoke it frequently, has been a fear of the unknown. Once unleashed, how was it to be regulated or controlled and exercised only for the greater good in the administration of justice? But judges in their 'eternal' wisdom have always been able to open and shut (legal) doors and windows unless somehow stopped and controlled by superior authority. In this the courts have otherwise relied on their inherent discretionary authority.

[29] That the superior court judges have hitherto functioned under an umbrella of judicial self-censorship does not mean that this power of review has not been there. Other jurisdictions have in fact been exercising this power a little more robustly for a long time. For a Nigerian example, see **Johnson v Lawnson** [1971] 7NSCC 82. For us the Constitution has flung open this window of review as section 148 (2) provides. Lord Morris of Borth -Y – Gest says in **Connelly v DPP** [1964] 2 All ER 401 (HL) at p. 409E:

> *"There can be no doubt that a court which is endowed with particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and suppress any abuses of its process and to defeat any attempted thwarting of its process."*

[30] Not many cases were cited from the bar by Counsel in the effort to elucidate the correct application of section 148 (2). In fact only one relevant case was referred to us. This is the Supreme Court case of **Vilane N.O. and Another v Lipney Investment (Pty) Ltd** Civil Case No.78/2013. In that case the applicants had complained that the Supreme Court had '*misdirected*' itself on questions of fact or law "*in such a manner as to constitute a gross irregularity in the proceedings*". The orders sought by the applicants began as usual for a normal review: "R*eviewing, correcting and or setting aside ....*" Ramodibedi CJ capitalized on and singled out the use of "*misdirected*" emphasizing that the word indicated that "*Applicants are in effect seeking to reargue all over again the appeal which has already been dismissed by this court between the same parties...*" The Applicants tried unsuccessfully to persuade the learned Chief Justice that it was the result of the "*misdirection*" that had the effect of constituting a "*gross irregularity in the proceedings*". The learned Chief Justice dismissively concluded at paragraph [2]:

> *"Viewed in this way, this seems to me that the 'review' is clearly contrived. It is simply a further appeal disguised as a review".*

[31] In the **Vilane** case His Lordship Ramodibedi CJ did say that avoiding "*manifest injustice*" was the essence of the review power under section 148 (2). Considering that rules have not yet been promulgated one would have expected the Chief Justice to expand on the purpose and use of the section to indicate its proper or preferred scope of application. But His Lordship only observed that the "*review power given to the court under sub-section 148 (2) is not review in the ordinary meaning...*" but "*...it is confined to reconsidering and correcting manifest injustice caused by an earlier order" [6*]. The Chief Justice went on to refer to the House of Lords' decision in **Ex Parte Pinochet Urgate Pinochet (No.2)** [1999] 1 All ER

577 (HL) where Lord Brown-Wilkinson referred to a party in proceedings being "*subjected to an unfair procedure*" through no fault of his own and opined that in such a case the appeal could be reopened but emphasized that "*there can be no question of that decision being varied or rescinded by a later order made in the same case just because it is thought that the first order is wrong.*"

[32] Presumably, in the **Vilane** case it could not be said that it was "*through no fault*" of the Applicants who had failed to file answering affidavits to justify a reopening of the case for the requisite review. And it seems that that is how the case in hand was viewed by the court of the first instance and on appeal, that is, that Applicant willfully failed to enter appearance to defend. What is also clear from the **Vilane** case is that a "*misdirection or an error of law*" was said not to be a "*review ground. It is a ground of appeal*", so said Ramodibedi CJ at para [3]. Yet, surely, there must be situations where a "*misdirection or an error of law*" would be qualifying ground for review under section 148 (2). From the ***Pinochet*** case it is also clear that even a **wrong** decision will not necessarily be set aside for that reason only. There must be something more at stake to justify it being set aside. This review power must however remain with this Court to develop it slowly but surely, always careful not to allow itself being inundated with 'review' applications.

The Dispute

[33] This case is mainly if not wholly founded on the issue of service of the summons on the Applicant. This is the service which is said to have taken place on 12 December 2012 upon a director of the Applicant by the name of **Arshad Mansoor**, who on that day was found at a place or business called **Buy and Save Power Trade** in Manzini. In para 4 of his

confirmatory affidavit reproduced under para [38] (b) of Madame Justice Ota JA's Judgment, the deputy sheriff, Manzini, who served the application describes the location where he allegedly served **Arshad Mansoor** as "*[Mansoor's] other business*". In the absence of any other clarification as to the relationship of this **Buy and Save Power Trade** business with the Applicant or the whereabouts of the '*main*' business so that **Buy and Save Power Trade** becomes the "*other*" business, one is left to speculate whether **Buy and Save Power Trade** is a '*branch*' of Applicant's business. The information is not enough for a firm conclusion.

[34] The evidence before Court is that Applicant lost at first instance on the basis that it never appeared to defend notwithstanding service of the summons on **Arshad Mansoor** at **Buy and Save Power Trade**. That service was effected, is based on the return of service by the Deputy Sheriff of Manzini. Nevertheless ever since these proceedings began in 2012 the Applicant has consistently denied ever being served with the summons.

[35] From the various correspondence and court processes dating from the dealings between the parties in Manzini, it appears that Respondent had been informed and must have been aware of the registered office or principal place of business of the Applicant at Portions 10 and 15 of Farm 125 Manzini District. This seems to be the very place or premises where Respondent operated his business, the very cause of this dispute. Refer to para 3 of **Notice of Motion** in Case No.2689/12 **Magistrates' Court, Manzini**, dated 2nd June, 2012 replicated at page 55 **Book of Pleadings** date stamped **17th June 2015**; and p 37. These are the same premises housing the business which the Respondent bought from **Salman Investments (Pty) Ltd** – refer to para 5 of **Notice of Motion** (dated 2nd June 2012).

[36] The question that lingers in my mind is: Was, **Arshad Mansoor,** assuming he was the director and responsible person of Applicant company, properly served in terms of Rule 4(2) (e), *if served at all*? Does the service at **Buy and Save Power Trade** comply with Rule 4(2) (e), regulating service on a company or corporation? Summarized, Rule 4(2) (e) provides that service on a company or corporation **shall** be effected by delivering a copy to (i) a responsible person at its registered office, or (ii) a responsible employee (at the registered office) at its principal place of business within Swaziland or (iii) by affixing a copy to the main door of its registered office or place of business, or (iv) in any manner provided by law.

[37] We are, however, not told or it has not been made clear as to which one or more of the four alternative modes of service was employed in serving on **Mr. Arshad Mansoor**. This is more particularly so where the service is denied by Applicant. In holding Applicant to its failure to appear and defend there should be no reservations about the propriety of the service or the service at all in the Judge's mind. Justice Ota's Judgment is not entirely helpful in every respect on this issue of service under the Rules of Court. Para [37] of that Judgment simply states that the summons was served on "*Mr. Mansoor, Appellent's director, at Buy and Save Power Trade Manzini...*" In this alleged service no indication is made as to which of the identified methods the service was based on. The deputy sheriff also does not say. This would ordinarily make it very difficult if not impossible for a party to challenge the service. One would like to see the deputy sheriff's Return of Service being a little more specific in its contents to show its compliance with the relevant subrule relied on.

[38] We are not told by the Respondent and it does not appear to be that **Buy and Save Power Trade** is the "*registered office*" of the Applicant or that it is the "*principal place of business*" of the Applicant in Swaziland. In

African Guarantee and Indemnity Ltd v. Mills, N. O. 1955 (2) S.A. 522 (T) summons was issued against applicant following a road accident. The summons was served on a local manager at "*applicant's place of business in Pretoria*". The manager refused to accept service pointing out that "*Pretoria was neither the registered office nor the principal place of business of the applicant*". By notice of motion applicant successfully applied to have summons set aside as "*irregular in as much as such service was neither effected in the manner prescribed by the Rules nor in any other manner prescribed by law*". See also **Prudential Assurance Co. Ltd v Swart** 1963 (2) SA 165 where summons was served at a *branch* office in Port Elizabeth instead of the *registered* office in Johannesburg. The company successfully objected to the service as irregular under the Rules of Court for not serving at "*principal office or place of business*" of the company.

[39] The court *a quo* (per Maphalala PJ) held that the service at **Buy and Save Power Trade** was "*proper service in terms of the Rules*" and that the "*Deputy Sheriff was quite entitled in law to serve any of the Directors of the [Applicant]* ***wherever*** *in these circumstances*". [14] (My emphasis). That being the case, rescission was not granted as Applicant was in willful default. This position was upheld on appeal.

[40] In para [42] Ota JA reiterates that "*...in practice service on a company or corporation is validly effected where the process is delivered to a responsible employee such as ... Director, or any other responsible employee at the registered office or principal place of business of the company or where such employee refuses to accept service by affixing the notice to the main door of the company*" (sic). One would then assume that the service impugned was in fact in accordance with the summary of paragraph [42]. But in fact it was not, unless another assumption is made,

namely, that the Director could be lawfully served **anywhere** he might be found. I say this because it does not appear and we have not been told that **Buy and Save Power Trade** is the "*principal place of business*" of the Applicant. But the "*further assumption*" we make is itself wrong as it is not in terms of Rule 4 (2) (e).

[41] Service "*in any (other) manner provided by law*" in Rule 4 (2) (e) is not as open-ended as some may read the rule. That "*(other) manner*" of service must be *as provided by a law*, such as the Constitution, a statute or Rules. In this regard Herbstein and Van Winsen (supra) at page 211 write:

> *"(c) The expression 'in any manner provided by law' is clearly meant to cover every other method of service which, **in terms of any law,** is open to a party suing a particular type of corporation or company".* (My emphasis). " ... *Special methods of service on statutory bodies are sometimes specified by specific enactment in particular instances."*

[42] As it appears in Jones and Buckle, **The Civil Practice in the Magistrates' Courts in South Africa,** 7th Ed at page 68, the expression "*or in any manner specially provided by law*" allows for yet another form of service on a company or corporation. As already observed from Herbstein and Van Winsen the other form of service must also be sanctioned by law. The older version of the Rule, Rule 9, had the word "*specially*" included, in my view, out of abundance of caution, as it did not add anything and its exclusion has taken away nothing from the Rule. Both authors give the examples of foreign companies, municipalities and insurance companies as corporate entities in terms of which there are other express statutory provisions laying down methods or places of service of process and the persons who could be served in respect of those entities. If the other special provisions, where in existence, are not used then Rule 4 (2) (e)

cannot be avoided. In **Stoner v SAR and H 1933 TPD 446, Barry J** held that the words, in a disciplinary code, "*the manner prescribed*" meant "*the manner prescribed ac*

cording to the regulations". If the Applicant had no physical address where a responsible person could be found for service, all other lawful avenues were worth exploring. If service on a company or corporation is not effected in accordance with the Rules or law or in some other "*manner provided*" by law, it is irregular and bad.

[43] It is also worth noting that in his own Summons, later served on a **Mansoor** at **Buy and Save Power Trade, Manzini** (per Annexure E, page 36 of the **Book of Pleadings** stamped **17th June 2015**); Annexure E, at page 25 of **Book of Pleadings,** (*ibid),* the Respondent correctly identified the "*principal place of business*" of Applicant as "*portion 10 and 15 of Farm 125, Manzini*". But service was not effected at those premises and no clear explanation is given for choosing **Buy and Save Power Trade**, a place not contemplated under Rule 4 (2) (e). The Applicant's grievance cannot be ignored where Applicant alleges *"....the summons were (sic) never served at the principal place of business, being Portion 10 and 15 of Farm 125, Manzini nor at its registered place"*. **Book of Pleadings** (pp 60-1) stamped **7 July 2015).**

[44] On p. 56 of the **Book of Pleadings** stamped **7 July 2015** the Applicant avers *"...It is strongly denied that **Arshad Mansoor** was ever served with a copy of the summons*". Considering that Appellant has been consistent in this denial, why silence it without any hearing of evidence relevant to the factual dispute, with possible cross examination to test the veracity of both parties. In the given circumstances, what is so peculiar to justify the refusal of a hearing a party so obviously aggrieved? Aggrieved not because it was

heard and lost, but aggrieved for having lost without a hearing. And Applicant entertains the feeling – rightly or wrongly - that Respondent went behind its back to obtain the default judgment requiring Applicant to pay an amount of E528,331,67. *Vide* paras 10 and 11 of the **Book of Pleadings (7 July 2015)** pp 48-49.

[45] Even the **Writ of Attachment – Immovable Property**, being Annexure A at page 41, of the **Book of Pleadings** stamped **7 July 2015** endorsed *Nulla Bona,* reflects that it was served on the Manager, Malik Merchant, at **his** place of business. (My emphasis). On the face of the document it is not clear that the "*place of business*" was that of the Applicant as Rule 4 (2) (e) requires. Further even the location of this place of business is not identified: it is just a place "*situate in Manzini, in the District of Manzini*". The principal place of business of the Applicant is known to be at "*Portion 10 and 15 of Farm 125, Manzini*". Surely, if that is where the Writ of Execution was sought to be effected, it would be expected to have been endorsed accordingly. Where the parties are on each other's throat every mishap should be scrutinised and not just passed off as a mere technicality.

[46] Yet another document appears in the bundle of documents filed in these proceedings, and is to be found on pp 74-75 of the **Book of Pleadings,** date stamped **17 June 2015**. The document purports to be a confirmatory affidavit of Silence Gamedze the Deputy Sheriff of Manzini. In paragraph 2 of that putative and inchoate "*affidavit*", because it is unsigned by anyone and also not commissioned, though revenue stamped, Gamedze avers: *"... I further confirm that I ejected 1st Respondent from 1st Applicant's premises and I left all the items which were in the premises with him. It is incorrect that items were lost.*" Again in a case such as we are faced with here the Court cannot simply ignore what is contained in this last-mentioned document. Not that the document exonerates any of the parties but it does

raise some concerns to a reasonable person. Those concerns can best be dispelled at a hearing between the parties.

Summary

[47] We are sitting as a Court of review, concerned with whether anything grossly unjust affected the proceedings leading to one of the parties applying for **special** relief from this Court. After hearing counsel for the parties, our concern is whether the case for the Applicant who comes before us as an aggrieved person carries with it the weight of serious or manifest injustice to justify our intervention. It is only cases of serious miscarriage of justice that should come before this Supreme Court or appeal court *plus*. As a Court of review we are called upon to take a second or third look at the obtaining factual and legal scenario and reaffirm if indeed in all the surrounding and prevailing circumstances of the case Respondent should have been granted the sum of E528,331.67 and the Applicant told to go back to Manzini 'licking its own wounds'.

[48] At this stage it is pertinent to rehash the facts of the dispute before us. When the court *a quo* found that due service had occurred and that default was willful, the door was firmly shut on the face of the Applicant, and its fate ordinarily sealed. But Applicant cried foul. The Applicant appealed but lost the appeal. Applicant has come to us. We have decided to yet again look at the proceedings in the court *a quo* and the service of the summons, vis- a-vis the judgment of the Supreme Court per Ota JA.

[49] The Applicant says that the judgment obtained by Respondent in terms of which Applicant is now obliged to pay over half a million Emalangeni is grossly unfair. It was unfairly obtained by default. Applicant says when it thought the fight had its battle ground at the Magistrates' Court, Manzini, the Respondent then went behind Applicant's back to the High Court where

Respondent obtained its judgment without Applicant being afforded a chance to present its defence.

[50] The Respondent says Applicant is not telling the truth because Applicant was served with the summons through one of its directors by the name of **Arshad Mansoor** at a place or business called Buy and Save Power Trade, in Manzini on 12th December 2012. To prove this service Respondent brought the deputy sheriff, Manzini District, to present the evidence of such service. The Deputy Sheriff has done that and the High Court accepted that summons was indeed duly served on Applicant, but that Applicant ignored the summons and willfully failed to come to court and defend itself. That being the case the court was obliged to find for Respondent in the amount now pending to be paid by the Applicant to Respondent failing which immovable property of Applicant will be sold by public auction to meet the court order.

[51] Applicant says that the alleged service through Arshad Mansoor never in fact occurred. Even if that service did occur as alleged, Buy and Save Power Trade is not the principal place of business or registered office where Applicant as a company could have been served. Therefore, the said service in fact never was lawfully effected and if indeed it did take place as averred, it was irregular and a nullity. But the application for rescission was refused.

[52] I agree with the learned Justice Ota JA where she says that the "*issue of service of the company*" has become "*the axis upon which this whole [review] revolves*" para [35] of Supreme Court Judgment. To a large extent, in my opinion, this application for review must also bear on the strength and propriety of that "service". The view that the "*essence of service of the summons*" is merely to ensure a defendant is aware of any

action against it must not be accepted without any caution. Otherwise there is a danger of Rule 4 (2) (e) being negated by the courts. I understand the contention and fundamental grievance of the Applicant to be two-fold: that as a matter of **fact** service was never effected on **Arshad Mansoor** at all, and that, assuming such service as alleged did in fact occur, that service was, in law, irregular as it did not comply with the peremptory requirements of Rule 4 (2) (e).

[53] With due respect, I find myself in disagreement with the view that *"...the Deputy Sheriff was quite entitled in law to serve any of the Directors of the 1st Applicant wherever ..."* Para [39] of Justice Ota's decision also refers. Rule 4 (2) (e) is clear: it does not in any way permit service of a company on the responsible person '*wherever*' that person is found. Even if we qualify the word '*wherever*' by "*in the circumstances*" (as the Learned Judge *a quo* did) it still does not add up. The least manifestation of service allowed by the Rules is by nailing or affixing a copy of the process to the door of the registered office, in this case at the premises on portion 10 and 15 of Farm 125 Manzini District. I do not think that sections 60 and 273 of the Companies Act, 2009, would apply here. Unlike cases such as **Federated Insurance Co. Ltd v Malawana** 1986 (1) SA 751, *in casu,* there is no independent or other evidence that the service was in fact effected as alleged by the Deputy Sheriff. Applicant denies any such service as alleged and **Arshad Mansoor** has filed an affidavit also denying that service was ever made on him as alleged. [See p.119 of **Book of Pleadings**, stamped **17 June 2015**] That service of process attested to by a Deputy Sheriff is usually accepted at face value should not be taken by courts of law as an invariable rule of practice, in particular, in applications for rescission which are founded on averred non- service.

[54] In paragraph [43] Ota JA correctly brings the '*director*' of a company among persons managing a company, within the umbrella of "*responsible persons*" as envisaged by Rule 4 (2) (e). We have no quarrel with this position as we also agree that it is now "*settled*". See also paragraph [50] of same Judgment.

[55] In para [45] Ota JA herself seems to have been somewhat hesitant on the propriety of serving a manager of the Applicant at the place where service is said to have taken place. I come to this view because Ota JA says the service was effected on one of the directors of the company "*...albeit at Buy and Save Power Trade, Manzini*". In my view the use of the word "*albeit*" expresses that hesitation. In terms of this para [45], it is strange that the court accepted the mere *ipse dixit* of Respondent that Applicant has no known registered office or "*licenced premises*" other than that its business was conducted from **Buy and Save Power Trade**, where he, the Respondent, had always dealt with the [Applicant] via its director. Respondent does not say that he diligently searched for the '*licenced premises*', and checked with the Registrar of Companies but found nothing. This of course would be strange because section 149 of the Companies Act, 2009, requires that every company must have in Swaziland not only a registered office "*to which all communication (may) be addressed and notices delivered*" but also a registered postal address. I am not persuaded to accept that Applicant had no such office as required by the law at the time of registration or subsequent to that date. In any event, "*Portion 10 and 15 of Farm 125, in the District of Manzini*", had to be the primary location where the Summons was to be served.

[56] I have already shown above that First and Second Respondents knew the whereabouts of Applicant's registered office or principal place of business. It is not at Buy and Save Power Trade. I find it difficult to accept that

"[applicant'] company does not have any physical address (offices)..." Respondent should clearly state that he did search for such 'physical address (offices) but did not find any. Absent diligent search, the allegation cannot be accepted in the face of the legal requirement for serving process on a company or corporation. Respondent was duty bound first to touch base at the known *"principal place of business"* before going to serve *"wherever"* or at **Buy and Save Power Trade**, as convenience dictated. I do not accept that Applicant needed to *"controvert"* anything and enter into a debate with Respondent regarding Applicant's *"principal place of business"*. It was the duty of Respondent to find that out. It is the duty of every person desiring to serve process on a company to find out the place where the law says the company must be served. No short cuts here.

[57] In para [48], Ota JA concludes that Applicant conducted its business at different locations, namely, portion 10 and 15 of Farm 125 Manzini, *"Buy and Save Power Trade"* (whose exact location has not been revealed by Respondent) as well as through its Estate Agents..." Now, there being many places found to have had a role in the business of the Applicant, what business does anyone have to say that the place pointed out by the Applicant is not the *"principal place of business"* of Applicant in terms of which all official communication is legally expected to happen?

[58] With due respect, I do not understand what Ota JA meant to convey in paragraph [50] where the Learned Judge speaks of service on a company *"in any other manner the law permits"*. If by this expression she meant to imply that it was the same as or equivalent to *"or in any manner provided by law"* as Rule 4 (2) (e) stipulates, then respectfully I differ. The expressions in my understanding do not mean the same thing. To *"permit"* has the connotation or signification of something otherwise not prohibited (if not otherwise illegal). To *'provide'* or *'provided'* on the other hand

signifies a positive act to make something available. Consequently, I respectfully differ with Ota JA's holding that so long as a company is served through its responsible officer/person this service could lawfully take place **anywhere** other than the places stipulated by the rule or in any other manner provided for in law. I have already expressed my view and understanding of this last alternative service under Rule 4 (2) (e). It is intended to accommodate situations where there is an Act of Parliament specifically or specially providing for the particular entity or similar entities another convenient manner of service. Or, with the leave of the Court, substituted service.

[59] Whilst it may be true in some instances that the ultimate purpose of service in terms of the procedure followed is to "*bring the process to the notice and custody of the company*" (para [53]), in the instant case that the process was *'brought'* to the notice and custody of the Applicant, is categorically denied by the Applicant. As I have already stated, in the absence of independent evidence I cannot accept the return of service as necessarily reliable in the circumstances of this case.

[60] In my view, the concluding words of rule 4 (2) (e) "*or in any manner provided by law*" did not permit the deputy sheriff to serve **Arshad Mansoor** at **Buy and Save Power Trade**. It has not been shown that **Buy and Save Power Trade** is a business that belongs to Applicant, even though the deputy sheriff says **Buy and Save Power Trade** is the "*other*" business of **Arshad Mansoor**. Worst still the deputy sheriff does not say that the place where **Arshad** was found is another place of business of the Applicant even if it was not the principal place of business. The viable impression created is that **Buy and Save Power Trade** is a separate business where **Arshad** is a director. See the affidavit of the deputy sheriff

in support of Respondent's **Answering Affidavit** dated 7th **August 2013, p.89 Book of Pleadings** stamped **17 June 2015.**

[61] In the case at hand, I would be reluctant to accept at face value that service as alleged is a non disputed fact. The Applicant flatly denies the service; there is no other or independent evidence indicating that Applicant knew about the service. Applicant says Respondent "*went behind [its] back*", jumped ship and abandoned the Magistrates' Court for the High Court and there secured a default judgment against it. In other words, Applicant never knew about the High Court proceedings. Applicant was thus completely exposed and could not in any way take whatever defensive measures were available to it. It would seem the court *a quo* and the court on appeal both accepted the return of service as sacrosanct and beyond recall. That was not justified in all the circumstances of this case.

[62] In the proceedings below Applicant was challenging not just the **legality** of the service as alleged but also the **fact** that such service ever took place. This in itself narrowed the defensive options otherwise open to Applicant, such as that the summons was not explained to it. This option did not arise.

Conclusion

[63] From the analysis given herein above, in terms of what might justify setting aside the judgment *a quo,* I am of the view that this Court does not have to find any single solid ground to rely on. One or more grounds, individually or combined may suffice to upset the judgments of the High Court as well as the Supreme Court. Coming to a decision on any one or more of the grounds is a consideration of the unique and particular facts of the case before court. For my part I would be most reluctant to keep closed the only window and refuse to open the only door to a person in the predicament of Applicant. That Applicant is responsible for its own misfortune I do not

know, but even that is not necessarily conclusive one way or the other. Such a finding *in casu* is modified by the fact that the service as alleged is certainly not without any blemish: the service is controversial, to put it mildly. Proof of the alleged service is entirely one sided. The deputy sheriff says he went to effect service in the company of the Respondent, but this does not cure or rectify the inherent defect which has manifested in the challenge to proper service, as is provided for by law and under Rule 4 (2) (e).

[64] Finally, it will be noted that in the case of **Federated Insurance Co Ltd v Malawana** 1986 (1) SA 751 (AD) Trengove JA, at page 759 D-H, says in respect of the subrule similar to our Rule 4 (2) (e):

> *"I am therefore of the opinion that, in the context of sub-rule (v),the words 'principal place of business' of a company relate to the main or principal place of business of the company within a certain area, namely the area of jurisdiction of the Court from which the summons was issued. Giving the words in question their ordinary meaning, I am of the opinion that the effect of Rule 4 (1) (a) (v) can be stated as follows: (a) a summons may always be served upon a company at its registered office wherever that may be situated; (b) if a company has no place of business within the Court's jurisdiction, the summons would have to be served at its registered office; (c) if the company has only one place of business within the Court's jurisdiction, that would be regarded as its principal place of business within that area, and the summons would accordingly be served there; and (d) if a company has more than one place of business within the Court's jurisdiction, the summons would have to be served at the company's chief or principal place of business within that area, unless, of course, it is served at its registered office.* ***A litigant should not, in practice, have any real problem in identifying the principal place of business of a company within the area of jurisdiction of a particular***

> ***Court for, in case of doubt, he could approach the company itself for the information.*** *And if such information cannot be obtained from the company, or any other source, service could, in any event, be effected at the company's registered office."(My emphasis)*

[65] The above passage in my opinion, settles the question of service in this case beyond any reasonable controversy. The Second Respondent clearly served at the wrong place of business even if **Buy and Save Power Trade** belonged to the Applicant. Nothing was said in the judgment of the court *a quo* or on appeal that can possibly save the service from being declared irregular and invalid. Even Ota JA in **Regent Projects (Pty) Ltd v Steel and Wire International (Pty) Ltd and Others** (unreported) at para [11] had correctly reflected that the service on any of the "*responsible persons*" of a company "*is usually effected at the company's registered office or its principal place of business*". It does not appear and it is not so stated that **Buy and Save Power Trade** is the registered office or principal place of business of Applicant. The service, if it ever took place, simply was irregular. The result has been a gross miscarriage of justice providing an exceptional circumstance to revisit the prior decision and order of the Supreme Court.

[66] The difference between the case at hand and the **Malawana** case *(supra)* is that in the latter case service on a responsible person had not been denied and had in fact been independently verifiable by the steps taken by the company to challenge the regularity of the service. That is not the case here. I therefore do not agree with Ota JA para [64] that the facts of the **Malawana** case "*are germane to the facts and circumstances of this case*".

[67] Had there been independent evidence of the irregular service, independent evidence that Applicant had sight or knowledge of that service, I would have been inclined to condone the irregularity. But since there is no such

evidence and Applicant has unequivocally and consistently denied having ever been served, there is nothing to condone and this Court (on appeal) ought not to have dismissed the appeal. Otherwise Applicant stands to suffer real prejudice. Respondent would have to serve correctly.

[68] It is my considered view that in all the circumstances of the case, Applicant has satisfied cumulatively that there are exceptional circumstances for it to be allowed to defend the case brought against it by the Respondent. The Applicant must therefore have its day in court. Even though there is as yet no clearly laid down procedure I am of the view that in the circumstances of the case there is a real requirement to reopen the proceedings in order to avoid real injustice and I do not see any alternative effective remedy. If Respondent has a good cause he has nothing to lose except suffer the inconvenience of further waiting. The application for review succeeds.

[69] In this case, in passing, the manner in which the Applicant's case has been handled by Counsel at different intervals of the struggle from inception at the Magistrate's Court in Manzini, is not without some concerns. It is not entirely fair to say that a party in litigation must stand or fall by the quality of the counsel it appoints. In other words, Applicant's case could have been handled better than happened and this review would probably not have occurred.

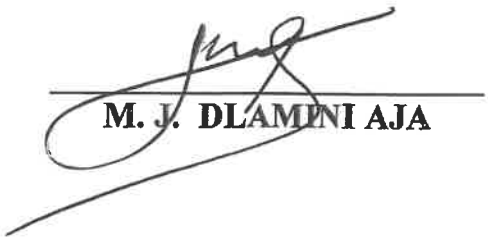
[70] It is ordered:

(a) The application for review succeeds;

(b) The Judgment of the Supreme Court dated 3rd December 2014 is set aside;

(c) The Judgement of the court a quo dated 9th April 2014 is set aside;

(d) Each party is to bear its own costs.

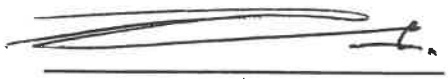


M. J. DLAMINI AJA

I agree

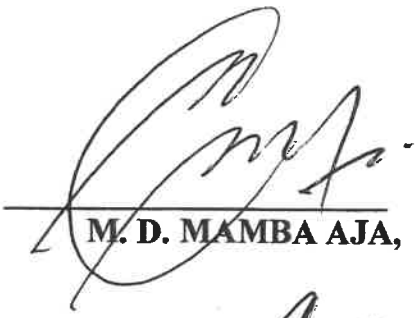
M.C.B. MAPHALALA ACJ,

I agree



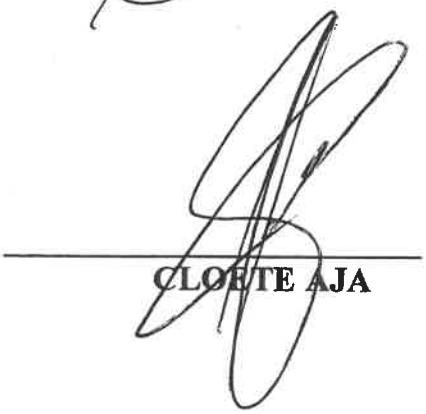
J. P. ANNANDALE, AJA,

I agree



M. D. MAMBA AJA,

I agree



CLOETE AJA

For the Applicant : **Mr. M. E. Magagula**

For Respondents : **Mr. S. M. Bhembe**