IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Appeal Case No. 13/2015

In the matter between:

GALP SWAZILAND (PTY) LIMITED **Appellant**

And

NUR & SAM (PTY) LIMITED T/A BIG TREE FILLING STATION **First Respondent**

NUISA INVESTMENTS (PTY) LIMITED T/A SAKHULA FILLING STATION **Second Respondent**

Neutral citation: Galp Swaziland (Pty) Ltd) v Nur & Sam (Pty) Ltd t/a Big Tree Filling Station & Another *(13/2015)* [2015] *SZSC 13 (29 July 2015)*

Coram: **J.P. ANNANDALE AJA, M.J. DLAMINI AJA and R. CLOETE AJA**

For the Appellant **:** Adv P. Kennedy SC, with him

Adv L. Grenfell

For the Respondents **:** Adv F. Joubert SC

Heard: **20 JULY 2015**

Delivered: **29 JULY 2015**

Summary: Contract – Interpretation – Applicability of "Golden Rule" – Requirement for amendment of pleadings – Confirmation that a litigant cannot be granted that which he has not prayed for in the *lis.*

JUDGMENT

CLOETE AJA

[1] This is an appeal against a judgment handed down by the High Court of Swaziland in civil case number 111 of 2015. The notice of appeal raises 43 separate grounds of appeal.

BACKGROUND

[2] 1. The Appellant is a wholesaler and supplier of fuel products to various franchisees in Swaziland.

2. The Respondents are fuel retailers and are referred to as follows:

2.1 Nur and Sam (Pty) Limited trading as Big Tree Filling Station ("Big Tree");

2.2 Nuisa Investments (Pty) Limited trading as Sakhula Filling Station (“Sakhula”).

[3] The Appellant is the lessee under 2 lease agreements as follows:

1. Ncamase Investments in respect of the Big Tree site which is valid for a period 9 years and 11 months from November 2010 (“Big Tree Lease”).

2. Mojo Investments in respect of the Sakhula site which is valid for a period of 15 years from September 2010 (“Sakhula Lease”).

[4] The Appellant and each of Big Tree and Sakhula entered into identical franchise agreements on 20 July 2011 and 11 July 2011 respectively (“The Franchise Agreements”).

[5] Sakhula entered into an agreement of special right to trade on 11 July 2011 (“The Special Rights Agreement”). Big Tree did not enter into a similar agreement.

[6] Both Respondents obtained their respective rights of occupation of the respective sites as a result of the Appellant subletting the sites to them in terms of the leases referred to in 3 above. Both Respondents accordingly

paid rentals to the Appellant who in turn paid rentals to the lessors in terms of the said leases.

APPLICATION TO THE COURT *A QUO*

[7] The Respondents brought an application to the Court *a quo* on a certificate of urgency seeking, *inter alia*, the following which appears at page 4 of the record [We set out only those prayers which have any bearing on this appeal]:

> **3. Interpreting and declaring that the initial franchise agreement be effective until termination of the lease agreement as per Clause 6.1 of the franchise agreement and/or until the parties finalise their negotiation and enter into a new franchise agreement.**
>
> **4. Interdicting Respondent from ejecting the Applicants from their operation sites pending finalisation of this application and/or pending negotiations with Respondent on the terms of the new franchise agreement.**
>
> **4.1 Interdicting the Respondents from allowing new franchisees and/or anybody to take over the**

operation of the Applicants pending the finalisation of this current application and/or finalisation on the negotiation of the terms of new franchise agreement.

4.2 Directing and ordering the Respondent to continue supply of fuel, petrol and their products and/or services to the Applicant pending the finalisation of this current application and/or pending the finalisation on the negotiation of the terms of new franchise agreement.

4.3 Directing the Respondent to file and produce to this Honourable Court the Property Lease Agreement which the Respondent has with the Landlord(s) of the premises of Applicant's business operations.

4.4 Declaring that the deadline of the signatory of the new Franchise Agreement be on the 31st January 2015, null and void.

4.5 Further interdicting the Respondent from intervening and disturbing operations of the Applicants in any way.

5. That prayers 1, 2 and 4 hereinabove operate forthwith as an interim order pending the finalisation of the current application and/or pending the finalisation on the negotiations of the terms of the new franchise agreement.

6. That a rule nisi do hereby issue calling upon the Respondent to show cause on a date to be stated by the above Honourable Court why prayers 1 to 4 should not be made final.

7. That the Respondent pay costs of this application in the event that it is opposed.

8. Further and/or alternative relief.

[8] In their founding affidavit attested to by Nurane Calu, the Respondents made lengthy and repetitive allegations which are best summarised as set out below.

[9] From the papers it is clear that the Appellant had given notice to the Respondents and all other franchise holders that the then existing franchise agreement between them was due to expire on or about June 2014 and invited all such franchise holders to enter into negotiations with a view to the signing of new franchise and allied agreements [we will refer to these as

the "New Agreement"]. It is also common cause that the deadlines set by the Appellant for the signing of the New Agreements was moved to new dates on several occasions.

[10] At page 11 of the record under the heading "**Purpose of this application"** the Applicants state that:

> **"7. In this application the Applicant humbly seeks an Order of this Honourable Court to interpret the Franchise Agreement between the parties and make a declaratory order, specifically as to the date, when the agreement terminates, in terms of the provisions of the agreement."**

And:

> **"8. Furthermore, the Applicant seeks this Honourable Court to grant Applicants an interdict, interdicting the Respondent from ejecting and disturbing the business of the Applicant from their operation premises pending the finalisation of this application and/or pending the finalisation of the negotiations and signing of the parties to enter into a new franchise agreement."**

[11] At page 12 of the record:

"10. The Respondent is not only unfair and unilaterally interpreting the franchise agreement only to its benefit, but strategically evading to enter into any new contract with the Applicants."

[12] On page 13 of the record:

"11. Furthermore, the Respondent is victimising and evading to enter into any agreement with the Applicants as it has an impression that it cannot trust me, myself as being Directors (sic) of Applicants and also being Chairman of the SWAZILAND FUEL RETAILERS ASSOCIATION".

[13] On page 14 of the record:

"12. In gist of my Application, I submit that the Applicants are seeking this Honourable Court to interpret the terms of the franchise agreement and declare that such agreement is to be effective until the termination of the lease agreement as per Clause 6.1 of the franchise agreement and/or until the parties finalise their negotiation and enter into new franchise agreement (sic)."

[14] On pages 17 and 18 of the record:

"On or about the 11th July 2011, the parties entered into an agreement whereas the Applicants, the Franchisee, to pay the Respondent, the Franchisor, that:-

2.1.1 The Franchisee shall immediately pay to the Franchisor a lump-sum ….. being a sign-on fee covering the duration of the lease of 9 years 11 months effective 1st September 2011.

2.1.2 The sign-on fee being a rental part-payment will allow from the Franchisee to secure an initial preferential rental rate of……..per month escalating at 7.5% per annum which date is agreed to be April of each year.

2.1.3 Should the agreement terminate earlier than envisaged, the Franchisee will be entitled to a prorated refund for the remaining period of the 9 years and 11 months.

2.1.4 The Franchisee is deemed to have chosen and elected to participate and be bound by the Galp Standard Franchise Agreement which is the main agreement on which the performance of the business is measured.

Kindly refer to annexure "G3" being the copy of the agreement between the Respondent and 2nd Applicant.

14.4 The main agreement which is referred to above, in clause 2.1.4, was entered into between the parties on or about the 20th July 2011. Kindly refer to Annexure attached and marked "G1" being the main initial franchise agreement between the parties. The said agreement was duly signed by authorised directors of each party and took commencement from the 1st July 2011."

[15] At page 19 of the record:

"14.6 However, the Respondent brought to the Applicants a new Franchise Agreement which had introduced new and different terms from annexure "G1". Henceforth, the Applicants were not in agreement with the new terms of the new franchise agreement proposed by the Respondent. The new franchise agreement provided by the Respondent raised several changes from the initial franchise agreement, which was not only detrimental to continuing business for Applicants but were vague and unclear for the Applicants to concede and sign to. Some of the important disputed issues within the new Franchise Agreement are as follows".

[16] The Respondents set out on number of disputed provisions in the New Agreement including that the New Agreement was *inter alia* only valid for 1 year.

[17] The Respondents set out various notices of dates on which the New Agreement was to be signed on the insistence of the Appellant which dates were on various occasions extended as a result of various interventions.

[18] The Appellant set as the final date by which the Respondents had to sign the New Agreements as 31 January 2015.

[19] At page 37 of the record:

"14.13 Furthermore, to much my surprise (sic), I found an advertisement on the "Swazi News" dated 24th January 2015, a press statement by the Respondent which stated herein as follows:

> **"In the unfortunate hypothetical result of unsigned Franchise Agreements before end of 31st of January, Galp will need to secure Caretakers in the interim period and invite qualifying members of the public and entities to take over the operation of vacant sites".**

[20] At page 39 of the record:

"As such, the Applicants found that it should rather sign the purported new franchise agreement presented by the Respondent, to stay the eviction and causing any harm to the citizens of Swaziland in its operation of business, however, reserving its rights to continue to negotiate and amend the terms of the agreement. On or about the 28th January 2015, the Applicants duly sent an email to the Respondents telling such intention and requesting for a correspondence on when the Applicants can come sign the agreement. Kindly refer to annexure marked "G21".

14.13.5 However, the Respondent reverted to Applicants that they shall not allow the Applicants to sign the agreement over and above which they deny they are in consensus with. The Respondent denied blatantly to continue any negotiations. Kindly refer to the annexure marked "G22". And further correspondences between Applicants and Respondents marked "G23" which reiterate the issues stated hereinabove are self-explanatory."

[21] On page 41 of the record:

> **"On the 31st January 2015, on the last day the Respondents had set for the signing of the agreement, the only time I was given to table and discuss the issues was around from 19:00 hours as another Retailer Company and the Respondent were negotiating from 9:00 am that day. And finally, before all the issues were discussed and concluded before the parties, on or around 23:40 hours, the Respondents blatantly refused to sign the agreement."**

[22] At page 43 of the record:

> **"15 Firstly, the Applicants have come to this Honourable Court to request this Honourable Court to interpret the initial franchise agreement"G1". Specifically, to interpret and make a declaration in terms of the agreement, as to the date when such agreement shall terminate. Although much of the above history covers the updating events on the up-rise of the new purported franchise agreement presented by the Respondent, it is essential to state that there is a**

disagreement between the parties herein on when the initial franchise agreement has or is to be terminated.

15.1 Applicant hereby submits that Clause 6.1 of the Franchise Agreement, annexure "G1" states:-

> **"This Agreement shall commence on the Commencement Date and shall endure for 3 years or until terminated in terms of either clause 6.2 or 14 below or simultaneously with and upon termination for any reason of the Galp Property Lease Agreement (Schedule..)."**

15.2 From the above clause, according to Applicant's understanding, the agreement terminates either:-

i) After lapse of 3 years, or,

ii) In terms of 6.2 , which is not applicable in the current situation as there were no variation of the rental turnovers and no written notice of termination of same reason has served, or

iii) In terms of 14, which is also not applicable as there were no breach of the terms of the agreement by the Applicants and/or any clauses under 14 apply, or

iv) Simultaneously with and upon termination of the property lease agreement.

Henceforth applying the above clause, Applicants believe that the property lease agreement, which should have been incorporated as the Schedule of the franchise agreement, determines the date of termination of the franchise agreement."

[23] At page 47 of the record:

"15.5 In terms of the 2nd Applicant, Applicants submits that the 2nd Applicant and Respondent whom entered into the written agreement annexure "G3", at paragraph 2.1.1 which clearly state that the lease of the premises shall be of 9 years 11 months effective from 1st September 2011, be the proper interpretation of the termination date of the franchise agreement.

15.6 **This is moreso because the agreement "G3" state that the Applicant be bound by the "main agreement", show that this agreement is to be the subsequent property lease agreement stated as per clause 6.1 of the main agreement.**

15.7 **Furthermore, clause 2.13 of the said property lease agreement** (sic) **state that:-**

"should the agreement terminate earlier than envisaged, the Franchisee will be entitled to a prorated refund for the remaining period of the 9 years and 11 months".

Neither of the Applicants have received any notice of such termination and/or refund. Such means that the property lease agreement, together with the main franchise agreement is still in effect and has not terminated.

15.8 **Henceforth Applicants is of the view that the Property lease agreement between the Applicants and Respondent** (sic) **are the "Schedules" of the main franchise agreement in terms of Clause 6.1 of the main franchise agreement, and as such, the date of**

termination of the franchise agreement is only upon the termination of the lease agreement."

[24] The Respondents then, as regarded the interdict, alleged that they had clear rights, that they would suffer prejudice and irreparable harm, that the balance of convenience rested with them and that they had no alternative relief.

[25] The Respondents accordingly prayed for the order in terms of the notice of motion referred to in paragraph 7 above.

APPELLANT'S OPPOSING AFFIDAVIT

[26] The Appellant filed an opposing affidavit answering each and every allegation made by the Respondents in their founding papers. We will set out those responses which are relevant to the allegations of the Respondents as above.

[27] At page 218 onwards under the heading "**BASIS OF THE OPPOSITION"** the Appellant, represented by Diogo Da Rocha Barros, stated that:

"7.2 The stance of the Respondent to the expiry of the franchise agreement was apparent on 20 March 2014, when Mr Fanie Mthethwa, its Commercial Director, addressed a letter of approach to the existing franchisees, including these applicants, indicating that the franchise agreements were to expire in the next few months and seeking an expression of interest to renegotiate the franchise agreement.

7.3 A copy of the letter sent to franchisees dated 20 March 2014 is annexed to the founding affidavit as annexure "G4". A confirmatory affidavit deposed to by Mr Mthethwa is annexed hereto marked "DB1".

7.4 As is contained in the letter of Mr Mthethwa, the Respondent had the sole prerogative to "*renew*" a franchise and no retailer franchisee is under duress to sign such if the current proposals are not acceptable to him or her.

7.6 Thus, the Applicants have known since 20 March 2014 what the respondent's stance was in respect of the expiry date of the existing franchise agreement.

7.7 Notwithstanding this, the Applicants waited until the much extended expiry of the time period, with no new franchise agreement being concluded, to launch this application, which they brought on three hours' notice to the Respondent.

7.11 The Respondent contends that the franchise agreement is perfectly clear as to duration and that that clause of the definitions section, read with the commencement date and clause 6.1 makes it clear that absent another agreement, the franchise agreement would expire at the end of the three year duration.

7.13 Thus the applicants seek to saddle the Respondent in perpetuity with a disgruntled pair of franchisees, in circumstances where, on the Applicant's own papers, the relationship between the parties has broken down irrevocably and there is no trust between them.

7.14 The Respondent declines to conclude a further franchise agreement with the Applicants, and it is not in law obliged to do so.

7.15 The damage which the Applicants have done to the Respondent's reputation within the Kingdom of Swaziland is considerable, in light of adverse press coverage which inaccurately reflected the position and the seeking to involve any external means by which the extension date of the new franchise agreement could be pushed out further.

7.19 The declaratory sought of nullity and voidness of the deadline of the signature of a new franchise agreement is incompetent at law, as such contractual extension does not comprise administrative action capable of review, nor is the extension of an expiry period contrary to the terms of the existing franchise agreement, where an express no waiver clause has been built in.

7.20 The interdict sought against the Respondent from intervening and disturbing operations of the applicants in any way, makes a

mockery of the franchise agreement which, of necessity, requires the parties to work together and which the Respondent is no longer prepared to do with the Applicants.

[28] At page 223 of the record:

"15. I note the relief sought, but state that <u>it is incompetent at law and that the Applicants' stance in this regard is inconsistent, as it has not elected which of the two version it relies upon, comprising first a suggestion that the franchise agreement's duration is inextricably linked to the property lease agreement, alternatively that a new franchise agreement is competent at the conclusion of the finalisation of negotiations"(</u><u>emphasis added</u>**<u>**).**</u>

[29] At page 224 of the record:

"17.4 It bears mentioning that of all seven franchisees initially adverse to concluding new agreements with the Respondent, it is only the Applicants who, as at the expiry date of the franchise agreements, have not concluded new agreements."

[30] At page 226 of the record:

"19.3 The Applicants knew the consequences to their businesses when they declined to conclude a new franchise agreement and work with the Respondent in the business.

19.5 The consequences to the Applicants' business must have been perfectly apparent to it from the time of signature of the franchise agreement for a duration of three years and it is not the Respondent who is stopping the business of the Applicants, when they have proved very successful in doing that for themselves."

[31] At page 227 onwards of the record:

"22.2 The agreement alluded to be signed on 11 July 2011 marked "G3", comprises an agreement which formed a precursor to the conclusion of the standard franchise agreement, marked "G1" and comprises an agreement on a special right to trade, but states at clause 2.1.4 thereof, that the franchisee is deemed to have chosen and elected to participate and be bound by the Galp Standard Franchise Agreement, which is the main agreement on which the performance of the business is measured.

22.4 There is nothing inconsistent in the Agreement of a Special Right to Trade with the duration of the Galp Standard Franchise Agreement as contained in clause 2 of the agreement of 11 July 2011, which states "*on or prior to the date of the signing of this agreement, the parties shall conclude a Galp Standard Franchise Agreement whose initial duration is for three years subject to a further renewal based on performance*".

22.5 There is no suggestion of a contractual right to renewal on the same terms or otherwise, but the initial duration was confirmed as three years and the further renewal based on performance, exactly what the Respondent was seeking to engage the Applicants in the process of concluding a new agreement.

25.1 I admit that the franchise agreements submitted for consideration differed from the initial franchise agreement.

25.2 The reason for that was obvious, in that there was no contractual right to renew on the same terms, but rather the conclusion of a new franchise agreement was on the basis of the development of the business relationship as set out in the email of Mr Mthethwa dated 20 March 2014."

[32] At pages 239 onwards of the record:

"59.6 On an ordinary grammatical meaning of the words contained in clause 6.1 of the franchise agreement, it will be argued that three situations are envisaged in the alternative by the use of the word "or" being:

59.6.1 the agreement shall commence on the commencement date and endure for three years; or

59.6.2 until terminated in terms of either clause 6.2 or 14 (the franchisee's right to resile from the agreement on the changing of a formula alternatively the breach clause); or

59.6.3 simultaneously with and upon termination of any reason of the Galp Property Lease Agreement.

59.7 Thus, three situations are envisaged, in the alternative, and what has occurred in this instance is that the agreement endured for three years and there being no right contractually enshrined to renewal, then terminated by the effluxion of time.

60.2 On the applicants' own say so in these paragraphs, the agreement terminates after the lapse of three years.

60.4 There is no basis for the argument that the duration of the franchise agreement is dependent on the incorporation of a property lease agreement, which was even unidentified.

62.1 I deny that there is or has ever been a written lease agreement between the parties.

62.2 As is perfectly apparent and to the knowledge of the applicants, the lease is concluded with the landlord of the properties at which the sites trade.

63.5 Clause 3 of annexure "G3" states that *"on or prior to the date of signing this agreement, the parties shall conclude a Galp Standard Franchise Agreement whose initial duration is for three years, subject to a further renewal based on performance"*.

63.6 There is no contractual right to a guaranteed renewal and the terms of such renewal are not even dealt with.

63.7 It is perfectly apparent from annexure "G3" that any further renewal was to be based on performance and not linked to any lease period.

66. On the applicants' own say so it is addressing an alternative, being the third basis upon which the franchise agreement can be terminated, which is not even relied upon by the respondent,

who relies on the first provision of clause 6.1 which clearly and unambiguously states that the agreement shall commence on the commencement date and shall endure for three years.

69.2 There are three alternatives set out in the clause for termination, none of which are ambiguous.

70.1 I deny that the applicants are performing efficiently.

[33] At page 250 of the record:

"78.1 The only right for which the applicants contend and can contend is a personal right arising from a contract.

78.2 There is no right of possession of the site arising from any real right.

[34] The Appellant dealt with the issues raised in regard to the interdict. It denied that there was either a clear right or an alternative remedy.

[35] The Appellant then made a counter application for eviction of the Respondents on the basis that no valid franchise agreement existed between the parties, that no New Franchise Agreement had been entered into and as such the Respondents were occupying the Big Tree and Sakhula sites unlawfully and it prayed for an order in the following terms:

"10.1 evicting the first and second applicants from the sites at Big Tree Filling Station and Sakhula Filling Station as identified in the lease agreements;

10.2 an order that the applicants hand over the keys for both sites to the respondent's retail sales manager (Ms Welile Simelane) forthwith upon the granting of the eviction order;

10.3 costs of suit on an attorney and client scale".

[36] The Respondents replied to the opposing affidavit and mainly reiterated their allegations in the founding affidavit and replied on issues relating to the clearly acrimonious relationship between the parties. They denied that the Appellant had the right to evict them.

[37] The Appellant replied to the answering affidavit on their counter application and reiterated its stance in that regard.

HEARING OF THE MATTER BEFORE THE COURT *A QUO*

[38] The matter was heard before the Court *a quo* with Counsel appearing for both parties.

[39] From the transcript of the proceedings handed into this Court by the Appellant's Counsel, it is apparent that the following transpired at the hearing:

1. The Respondent's Counsel was heard.

2. The Appellant's Counsel was heard.

3. The Respondent's Counsel, in his reply to the argument of the Appellant's Counsel, right at the end of his reply, then raised new issues and sought a new order. The transcript reflects the following from page 80 onwards. (The paraphrasing is ours).

"J: What are your prayers?

AC: My prayers My Lord are I ask that the application in so far as Your Lordship should find that there was a duty to renew by virtue of page 278, that part of the letter which is part of the contract and it was

implied. Remember that there is a prayer on alternative relief and from the paper, and I didn't draft the paper and no insult to the draftsman thereof. I will do a draft order which I will also present His Lordship with but in brief Your Lordship should find that there was an obligation to renew, it was implied that the renewal would be for three years and that the renewal would be on the same terms and conditions as the existing franchise agreement subject to such changes as are permitted therein by the franchisor. Alternatively that Your Lordship directs an order that the franchisor signs the new franchise agreement that the other franchisers have already signed. That the franchisor has already signed the agreement and you have got in the papers, which my learned friend has an issue with, the applicants are prepared to sign so that as an alternative the respondent be directed to sign the new franchise agreement which is attached to the papers. It starts at page 115.

J: Are you talking about the proposed one.

AC: No this is the new franchise agreement as I understand it and it goes on to page 150. The order that I am seeking is that the respondent be directed to sign the new franchise agreement which it has signed with other franchisees and that the applicants simultaneously are also directed to sign the same because it is my submission that they are

prepared to sign that franchise agreement and costs to follow the course (sic) **and the costs of counsel……**

RC: My Lord I have no automatic right to address Your Lordship at this juncture so I seek an indulgence in order to object on record (to) the objection of the respondent on the fact that we are brought to Court on relief set out in the notice of application and now on an informal basis and with no justification new relief which did not form the basis of the application argued before Your Lordship is now (in)formed and in informal manner from the bar and we propose, in the event that Your Lordship is inclined to entertain that application or amendment of a notice of application to provide authority to the effect that it cannot be done.

And at the foot of page 82:

RC: My Lord there are two other aspects and the first has been rendered academic by this most recent turn of events but on the initial submissions that were made to Your Lordship it was now that Your Lordship can decide per clause 6.1 on the interpretation thereof. There has been no amendment to the notice of application as to the manner in which the relief is being couched and the respondent is mainly prejudiced by what is now a second change of stance by virtue of the fact that they have come to Court prepared to argue on an urgent basis

on the interim interdict only to find that first of all the main relief in terms of prayer 3 of the notice of application is being sought and now that is being abandoned and then some kind of specific relief which in my submission is incompetent at this juncture has been read before Your Lordship but we can deal with both of those in supplementary heads of argument.

A discussion then followed, relating to the time limits for the lodgement of the proposed new relief and for the filing of additional heads of argument.

[40] Counsel for the Respondents thereafter filed a draft order, without, to the knowledge of this Court, based on reference to any authority, in which he besieged the Court to grant the new relief which the applicants now applied for, *inter alia* the following newly formulated order:

"1.1 The parties expressly agreed, alternatively impliedly agreed, that the existing franchise agreement would be renewed, subject to the performance of the First and Second Applicants;

1.2 the period of renewal would be for a period of three years commencing on 1 July 2014, *alternatively* 31 January 2015, in

accordance with the express or implied term referred to above, *alternatively* in terms of trade usage in the industry;

1.3 the renewal of the franchise agreement would be subject to the same terms and conditions as the existing franchise agreement, subject to such amendments as the Respondent was entitled to effect in terms of the aforesaid franchise agreement.

2. The Respondent's counter application is dismissed with costs.

3. The Applicants are awarded the costs of their application.

4. All the cost orders referred to above shall include the costs of counsel.

<u>IN THE ALTERNATIVE TO PRAYERS 1 – 4 ABOVE:</u>

The above Honourable Court should order as follows:

1. The offer by the Respondent to the Applicants to renew the franchise agreement on or before 31 January 2015 is deemed to have been accepted by the Applicants.

2. By virtue of the acceptance by the Applicants of the renewed franchise agreement on or before 31 January 2015, constitutes a renewal of the

franchise agreement commencing on 1 February 2015 and to endure for a period of three years in accordance with the standard duration of franchise agreements signed between the Respondent and other franchisees.

3. The Respondent is ordered to sign the new franchise agreement offered to the Applicants and after signature thereof, to submit same to the Applicants for their signature.

4. The Respondent's counterclaim is dismissed with costs.

5. The Applicant's application is granted with costs.

6. The cost orders referred to above shall include the costs of counsel.

[41] Counsel for the Appellant filed supplementary heads of argument which appear from page 416 of the record onwards and we deal only with the relevant issues as follows:

1. The letter written by Respondent's Counsel addressed to the Judge in the Court *a quo* comprised a disrespectful attempt to engage the Court in matters requiring condonation, further argument and seeking

directions to gain an unfair procedural advantage which should not be allowed.

2. It is a basic tenet of justice in terms of the *audi alteram partem* rule, that both parties shall be heard and that the hearing in fact took place in open court on 12 February 2015.

3. On 11 February 2015 the Respondents delivered brief heads of arguments at the end of which they stated **"The Applicants therefore will submit that a proper case has been made out for the relief that they seek in their Notice of Motion".**

4. There was no suggestion in the heads of argument that any amendment to the notice of motion or application would be brought or that any relief other than that set out in the notice of motion would need be considered by the Court *a quo.*

5. Setting out the details referred to above relating to the occurrence during argument in the Court *a quo*.

6. The Appellant opposed the purported proposed amendment which was highly prejudicial and unjust.

7. That the relief sought did not comprise a substantive application for an amendment to the notice of motion, it was not the case that the Appellant had been brought to Court to meet, comprised new matter

which the Appellant had no opportunity to deal with in its papers, is incompetent on the Respondent's own papers which indicate negotiations, not offer and acceptance, that the relief provides for alternatives which is unenforceable in practice and for the first time introduces a further alternative version relating to trade usage in the industry. Counsel referred the Court *a quo* to **Johannesburg City Council v Brume Thirty Two (Pty) Limited,** 1984 (4) SA 80 (TPD) at 90F where it was held that a completely different claim based on a different cause of action should not be permitted.

8. In applications, the affidavits comprise both the pleadings and the evidence of the essential facts which would be led at a trial and that which has been set out in the founding affidavit does not support the relief thereafter claimed and referred the Court to the matter of **Bezuidenhout vs Otto and Others 1996 (3) SA 320 (WLD) at 345C.**

9. In the matter of **Mgogi v City of Cape Town and another 2006 (4) SA 355 (CPD) before a full bench of the Cape Provincial Division wherein it was held *"that the relief sought in counsel's heads of argument in the first application under the rubric "further and/or alternative relief" did not accord with the applicant's notice of motion. It did not appear from either the founding or replying***

affidavit deposed to by the applicant that he was seeking such relief. Accordingly, it could not be considered by the Court" (paragraphs [11] and [13] at 362H and 363).

10. Referred the Court to **Commercial Union Assurance Company Limited vs Waymark NO 1995 (2) SA 73 (TKGD)** dealing with the principles of an amendments.

11. Referred the Court to the judgement in the matter of the **Prime Minister of Swaziland and Others vs Christopher Vilakati and Others Civil Case No: 35 of 2013** which in turn refers to other Swaziland judgements all of which provide that a litigant cannot be granted that which he has not prayed for.

12. Accordingly that the application to amend be dismissed with costs.

[42] Both parties filed heads of argument and correctly only dealt with those matters at the very core of the dispute between the parties and wisely did not seek deal with the clearly unfortunate acrimonious relationship between the parties. We will confine ourselves to those issues. In point of fact it bears to be mentioned that the parties were invited, at the hearing of this matter, to attempt to resolve issues between them and settle their dispute. This came to nought.

ARGUMENT FOR THE APPELLANT

[43] The Court *a quo* granted an order which was not sought in the notice of motion or the Respondents' papers before that Court.

[44] The procedure referred to in 39 above was not adjudicated on or seemingly dealt with in any way by the Court *a quo* in its judgement. It seemed to merely hand down as its own judgment that which had been proposed by the Respondents' Counsel at the time, virtually verbatim.

[45] By reference to the **Johannesburg City Council** case, referred to above, the abandonment of an existing claim and the substitution therefore of a fresh and completely different claim based on a different cause of action should not be permitted and it is incompetent to move the amendment objected to under the rubric "alternative relief" which has been held to be redundant and mere verbiage in modern practice.

[46] By reference to the **Bezuidenhout** case, referred to above, the affidavits comprised both the pleadings and the evidence of the essential facts which would be led at the trial. Relief cannot be granted if the evidence set out in the founding affidavit does not support the relief claimed.

[47] The Respondents, in the Court *a quo* relied on the provisions of Rule 28 of the Rules of Court but it is submitted that the procedures prescribed by that rule had to be followed and not some informal and belated application from the bar.

[48] It is accepted that a Court has the right to grant an amendment but it should not impose material prejudice on the party against whom the relief is sought. In the matter of **Commercial Union Assurance Company Limited vs Waymark NO 1995 (2) SA 73** which was approved in the Constitutional Court it was found that whilst the Court had a discretion to grant or refuse an amendment, such amendment cannot be granted without some explanation being offered for it. The Applicant must show that *prima facie* the amendment has something deserving of consideration. If the amendment is not sought timeously, some reason must be given for the delay and the amendment must not cause an injustice to the other side which cannot be compensated by costs (our paraphrasing).

[49] By reference to **Mgogi** case, referred to above, the relief sought in this matter did not appear from either the founding or replying affidavit or the notice of motion.

[50] The order made by the Court *a quo* was accordingly not what the Appellant had been brought to Court to answer to and was of right entitled to deal with in its opposing papers. By reference to the case of **The Prime Minister of Swaziland and Others** and the other judgement referred to, which judgement is binding on all the Courts of Swaziland is **"that a litigant also cannot be granted that which he or she has not prayed for in the lis".**

[51] The Court *a quo* did not in fact interpret the provisions of 6.1 as directed to in the Respondent's notice of motion at all.

[52] The provisions of 6.1 of the franchise agreement are clear and unambiguous in every way and provide three scenarios outside of the breach provisions of the Franchise Agreements. The meaning of the conjunctive "or" is settled to indicate a conjunction to indicate alternatives. See the Oxford English Dictionary.

[53] The heading to clause 6.1 of the franchise agreement clearly refers only to commencement, term and early termination. It makes no provision of any

nature for any form of renewal which does not appear anywhere in such franchise agreements.

[54] The third scenario namely the **"termination simultaneous with and upon termination for any reason of the Galp Property Lease Agreement"** clearly was inserted to provide for early termination of those leases which provisions appear in both the Big Tree and the Sakhula lease.

[55] The Court *a quo* erroneously found that the Big Tree lease and the Sakhula lease were between the Appellant and the Respondents when it was clearly between the Appellant and the landlords.

[56] That the Court *a quo* accordingly found that the Franchise Agreements and the said leases were linked to the said leases and that the Franchise Agreements would be renewed for the period of the lease agreements. If this was to have been the case, the franchise agreements would have specifically provided for such arrangement.

[57] That the Court *a quo* erroneously found that the Respondents were ready to enter into the New Franchise Agreement on 31 January 2015 when from their own papers it was clear that this was not the case.

[58] That the Court *a quo* in fact, instead of interpreting the provisions of 6.1 of the Franchise Agreements, at 66 of its judgement incomprehensibly found that there was offer and acceptance by the parties relating to the New Franchise Agreement and found that a *Pactum de contrahendo* had come into effect and that same was binding on the Appellant. If that reasoning were to follow through, on the Court's own finding, the Franchise Agreements had ceased to exist and the parties were obliged to enter into the New Franchise Agreement which flies in the fact of the order actually granted.

[59] That the Special Rights Agreement which had been entered into only with Sakhula, was nothing other than a right to discounted rentals for the validity of the franchise agreement and that the provisions of that agreement, referred to elsewhere in this judgement clearly:

1. Did not provide for any provision for a renewal of three years;

2. Provided that Sakhula be bound by the Galp Standard Franchise Agreement which is the main agreement.

3. That in the event of the franchise agreement terminating earlier, the Respondent would be entitled to a refund.

[60] That there was no basis at law or fact for the Court *a quo* finding at 44 of the judgement that the franchise agreement states that the agreement will be extended for a further period and misdirected itself in that regard.

[61] That the order of the Court was accordingly totally flawed and should be overturned with costs including costs of Counsel.

[62] As regards the counter application, it followed that if it was found that the Franchise Agreements had expired and no New Franchise Agreements had been entered into, the Respondents were in unlawful occupation of the sites and the Appellant would have the right to the relief prayed for.

ARGUMENTS FOR THE RESPONDENTS

[63] That the prayer that underpins is that contained in prayer 3 of the notice of motion wherein the Respondents sought a declarator that the initial Franchise Agreements remained effective until termination a lease agreement or until the parties finalised negotiations to enter into a New Franchise Agreement.

[64] During argument Counsel of behalf of the Respondents sought and was granted an amendment to the relief initially sought and the amended relief was granted in terms of the judgment.

[65] The amendment sought was in terms of Rule 28 (8) of the High Court Rules and that an amendment sought from the bar was accordingly competent.

[66] If the party does not object to the amendment he or she is deemed to have consented thereto and is not entitled thereafter to argue that the Court should disregard it.

[67] By reference to **Luwalala and Others vs Port Nolloth Municipality 1991 (3) SA 98 (CPD) at 112 C-F** a Court is not confined to granting relief specifically sought in a litigants notice of motion and as such under the rubric “alternative relief”.

[68] That the Appellant knew exactly what it was facing from the papers.

[69] That the Franchise Agreements must be read together with the two leases and the Special Rights Agreement and since the Franchise Agreement does not define the lease it must be the document referred to in the Big Tree and Sakhula leases.

[70] Counsel conceded that the Court *a quo* had made many errors but had arrived at the correct decision at the end. He further conceded that Big Tree had not signed a Special Rights Agreement but that its case should be seen in the totality of all of the papers of the Respondents.

[71] That 6.1 of the Franchise Agreement can only mean in the third alternative that when the lease agreement expires the Franchise Agreement will expire

and as such a series of automatic renewals for the full period of both the leases, always based on performance. As long as the Respondents performed they were entitled to further renewals and there was no suggestion that they did not perform properly.

[72] That what the parties had in mind can be read into the main agreement and that was that there was an automatic renewal for three years on the same terms and conditions and referred the Court to the well known decisions of **Coopers & Lybrand vs Bryant 1955 (3) SA 761 (A) 767E-768E** .

[73] That in the event of an ambiguity contained in a contractual provision the *contra preferentum rule* must apply and in this case should apply against the Appellant.

[74] That the leases were intertwined with the Franchise Agreements and as such it must be read into the Franchise Agreements.

[75] That it was clear from the wording of clause 2 of the Special Rights Agreement that no other finding could be made but that the renewal would be on the same terms and conditions as the existing Franchise Agreement.

[76] Counsel conceded that if there was no binding existing Franchise Agreement between the parties, the Respondents had no reply to the counterclaim of the Appellant.

REPLY OF THE APPELLANT'S COUNSEL

[77] Counsel for the Appellant replied to the issues raised by Counsel for the Respondents and specifically that the Court *a quo* did not just interpret 6.1 but read into it a further period of three years and on the same terms and conditions.

[78] Counsel then referred the Court to the decision of the Supreme Court of the Appeal of South Africa under case number 920/2010 in the matter between **Natal Joint Municipal Pension Fund and Endumeni Municipality** and specifically dealing with the issue of amendment of pleadings it stated at page 12 and paragraph 15 as follows:

"The answer is that when pleadings are reopened by amendment or the issues between the parties altered informally, the initial situation of the *litis contestatio* falls away and is only restored once the issues have once more been defined in the pleadings in some other less formal manner".

[79] In the same judgement at page 15 the Court stated that:

"Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax, the context in which the provision appears, the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all those factors. The process is objective and not subjective. A sensible meaning is to be preferred to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to and guard against the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used.

FINDINGS OF THIS COURT

[80]

1. As regards the issue of the purported amendment to the prayers by the Respondent at the hearing of the Court *a quo*;

    1.1 The Court below did not in its judgment deal with the purported amendment of the relief sought in the notice of motion and is completely silent on the matter.

    1.2 What was asked at prayer 3 in the notice of motion, referred to elsewhere in this judgement, was simply that the Court was directed to "interpret and declare that the initial Franchise Agreement be effective until termination of the lease agreement as per clause 6.1of the Franchise Agreement and/or until the parties finalise their negotiation and enter into a new Franchise Agreement".

    1.3 With respect, the Court a *quo* did nothing of the sort and after convoluted reasoning issued an order which had not been pleaded for.

    1.4 In our view the purported amendment of the notice of motion, if it was granted, which does not appear from the

judgement, was erroneously granted, inter alia for the following reasons:

1.4.1 The manner in which it was brought was materially prejudicial to the Appellant and that the Appellant found itself facing issues which it had not been brought to Court to face. It formally objected to the process and could by no stretch of the imagination have been deemed to have consented to the proposed amendment as suggested by the Respondents' Counsel.

1.4.2 All of the objections and the references to the Case Law referred to by the Appellant in both the heads of appeal in this matter and the document referred to as Respondent's supplementary heads of argument appearing at 415 of the record were clearly ignored by the Court *a quo*.

1.4.3 That in terms of the decision in the **Johannesburg City Council** matter the Appellant was highly prejudiced by the purported substitution.

1.4.4 That the principles laid down in the **Commercial Union Assurance** matter were not followed by the Respondents.

1.4.5 That the judgement binding on all Courts in Swaziland in **The Prime Minister of Swaziland and Others** was ignored by the Court *a quo.*

1.4.6 That the sentiments expressed in the **Natal Joint Municipal Pension Fund** case referred to above clearly favours the Appellant in that by changing its plea for relief sought, the initial matter fell away and needed to be defined once more in the pleadings.

1.4.7 That in the matter that this Court was referred to by the Respondent's Counsel namely the **Luwalala** case, with all respect, a prayer for alternative relief can only be considered where the order is clearly indicated in the founding papers and is established by satisfactory evidence on the papers. In the further matter this Court was referred to by Respondent's Counsel namely **Orange River Land and Asbestos Company vs**

King and Others 6 HCG 260, that Court found that relief under this prayer cannot be granted which is substantially different to that specifically claimed, unless the basis therefor has been fully canvassed, vis the party against whom such relief in this particular form is being sought and has had the fullest opportunity of dealing with the claim for relief being pressed under the head of "further and/or alternative relief". We find that in the course of events, the Appellant was not given the full opportunity to respond to the purported amendment in the papers and at the very least the Court *a quo* should have given the Appellant the right to do so together with an appropriate order for costs as envisaged in the **Commercial Union Assurance** case.

1.4.8 Accordingly we find that this Court, following the sound principle of law in the **Prime Minister and Others** case, finds that the Respondents were not entitled to the relief granted in the Order of the Court *a quo* as they were not entitled to be

granted relief which was not the issue canvassed in the *lis*.

2. As regards the interpretation of 6.1 of the Franchise Agreement:

2.1 In our view the words in that clause are clear and unambiguous and clearly set out the three different scenarios of termination.

2.2 The heading of clause 6 clearly refers to **"Commencement, term and early termination".**

2.3 Nowhere in the Franchise Agreement does it provide that there is any right of renewal of that agreement after the expiry of the initial period. It is incomprehensible that the Court *a quo*, at 44 of its judgement stated that **"It is beyond disputation that the Franchise Agreement states that after the initial period of 3 years, the Franchise Agreement would be extended for a further 3 years on the same terms and conditions….."** There simply is no such provision in the agreement and as pointed out by Counsel for the Appellant, had that been the intention of the parties, it would have been included in the Franchise Agreement.

2.4 The Court *a quo* clearly confused the issue of the leases between the Appellant and the landlords. At 75 the Court finds that **"This I say because there is an existing lease agreement between the**

Applicants and the landlord. The said lease was signed by the parties and is valid for 9 years and 11 months".

2.5 With respect, on the assumption that the Court *a quo* believed that there was a Lease Agreement between the Respondents and the landlords, it sought to link the said lease agreements to the Special Rights Agreement (which by the way the Court *a quo* found was applicable to both Respondents despite the evidence to the contrary) and the lease agreements in arriving at a flawed decision.

2.6 The reliance of the Respondents on clause 2 of the Special Rights Agreement (where it has been conceded that only Sakhula entered into such agreement) is unfounded. The Special Rights Agreement is nothing more than:

2.6.1 A preliminary document entered into prior to entering into the Franchise Agreement and which contains only a special "bonus" to Sakhula relating to preferential lease rates;

2.6.2 At 2.1.2 thereof it provides

"the sign-on fee being a rental part payment will allow for the Franchisee to secure an initial preferential rental rate……";

2.6.3 At 2.1.3 it clearly provides that

"should the agreement (Franchise Agreement) **terminate earlier than envisaged, the Franchisee will be entitled to a prorated refund for the remaining period……";**

2.6.4 At 2.1.4 it clearly states that

"the Franchisee is deemed to have chosen and elected to participate <u>by the Galp Franchise Agreement, which is the main agreement</u> on which the performance of the business is measured".

2.7 As such the Respondents acknowledged that the Franchise Agreement was the Main Agreement and the Special Rights Agreement cannot as such override or supercede the Franchise Agreement.

2.8 Over and above that, as is standard practice in commerce, the parties clearly had in mind that the Franchise Agreements would be the only agreement which would regulate their relationship in light of the provisions of clause 28 of the Franchise Agreements which, under the heading **"ENTIRE AGREEMENT"** provides

"**This Agreement constitutes the entire agreement between the parties and supersedes all previous oral or written understanding or agreement/s of any kind relating to the Businesses, the Premises or the subject matter thereof".**

2.9 The Court is well aware of the principles of interpretation as set out in the **Coopers & Lybrand** case and the many cases which have followed.

2.10 This Court finds that there is no ambiguity whatsoever in the wording of 6.1 in that:

2.10.1 The term of the Franchise Agreement was for 3 years.

2.10.2 The provisions of 6.2 and 14 did not apply to this matter.

2.10.3 The third scenario at 6.1 was clearly inserted to cover an event where there was a termination of either or both of the Big Tree and/or Sakhula lease agreements prior to the 3 year term set out at 5.9.1 above. Both of those leases contain provisions for early termination upon breach.

2.11 Accordingly it is not necessary for this Court to examine any of the case law relating to the issue of the "golden rule", suffice it to say that we associate ourselves with the *dictum* contained in the **Natal Joint Municipal Pension Fund** case.

2.12 To interpret clause 6.1 as suggested by the Respondents would lead to absurd consequences.

3. The Court *a quo* found in error that the Respondents were ready to sign the New Franchise Agreement on 31 January 2015 when it is clear from their own papers that they wished to sign the documentation under protest whilst continuing negotiations.

4. The Court *a quo* found at 66 of the judgement that a *pactum de contrahendo* had come into effect on the basis that the Appellant had made an offer to the Respondents to sign the documentation, that the offer was accepted, that the Appellant was not entitled to repudiate the offer or renege on the offer and as such a *pactum* came into effect. Given the evidence on the papers, not only is this factually incorrect but if the reasoning of the Court *a quo* is to be followed, then the franchise agreements had terminated and the new agreement would become effective as soon as it was signed by the parties. This clearly is wrong.

5. The order made by the Court *a quo* , which was not prayed for, was in any event vague and embarrassing and in the alternative and without giving sound reasons in the judgement, it was found that the parties have agreed that there would be automatic renewal for a further 3 year period. Again, and with respect, there is no authority therefor.

6. In our view the maxim *caveat subscriptor* applies here. A person who signs a contractual document thereby signifies his assent to the contents of the document and if these subsequently turn out not to be to his liking he has no one to blame but himself. See **Burger vs Central SAR 1903 TS 571** where it was stated that at 578 “It is a sound principle of law that a man, when he signs a contract, he is taken to be bound by the ordinary meaning and effect of the words which appear over his signature”.

7. Ironically the Court *a quo* cites both that matter and the matter of **Cassim vs Kadir 1962 (2) SA 473** where the Court held that

   "the contract in its existing form, is therefore efficacious and complete and needs no addition in the form of implied terms".

   We agree with both of those judgements and find that they apply to the Respondents.

8. We need not deal with the supposition that the Appellant could, by Order of Court or otherwise, be compelled to sign any form of agreement with any party.

9. We accordingly find that the Franchise Agreements between the Appellants and the Respondents terminated by effluxion of time in their specific terms after a period of 3 (three) years from the Effective Date of each of those Agreements and that in the absence of the parties having signed the proposed New Franchise Agreement, no valid and binding agreement exists between the parties.

[81] Accordingly the Appeal is upheld, the order of the Court *a quo* set aside with costs, such costs to include the certified costs of two Counsel.

[82] As regards the counter application of the Appellant, Counsel for the Respondents quite correctly conceded that if this Court found that the Franchise Agreements had expired and were no longer valid, that the

Respondents had no right to remain on the respective sites. Having found that the Franchise Agreements had in fact lapsed at the end of the 3 year contract period, we have no alternative but to hold that the counter application of the Appellant must succeed. Counsel for the Appellant suggested that a reasonable period of 30 days be granted to the Respondents to vacate the respective sites voluntarily. We believe that such a period is reasonable and accordingly make the following order:

1. The Respondents are ordered to vacate the sites at the Big Tree Filling Station and Sakhula Filling Station, as identified in the lease agreements relating to those sites, by no later than 31 August 2015.

2. In the event of the failure of the Respondents to so voluntarily vacate the said sites by that date, the Appellant shall be entitled to evict the Respondents from those sites.

3. An order is issued that the Respondents shall hand over the keys of both sites to the Respondents' Retail Manager (Ms Welile Simelane) forthwith upon either the voluntary vacation by or the eviction from the premises of the Respondents.

4. Costs of the suit are awarded to the Appellant, such costs to include two Counsel.

R CLOETE AJA

I agree

J P **ANNANDALE AJA**

I agree

MJ **DLAMINI AJA**