IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Case No.13/2015

In the matter between:

NUR & SAM (PTY) LTD

t/a BIG TREE FILLING STATION **1ST APPLICANT**

NUISA INVESTMENTS (PTY) LTD

t/a SAKHULA FILLING STATION **2ND APPLICANT**

And

GALP SWAZILAND (PTY) LTD

RESPONDENT

Neutral citation: *Nur & Sam (Pty) Ltd and Another vs. Galp Swaziland (Pty) LTD (13/2015) [2015] [SZSC 04] (9th December 2015)*

Coram: Dr. B.J. ODOKI JA,
S. B. MAPHALALA AJA,
M. D. MAMBA AJA,
N. J. HLOPHE AJA,
M. DLAMINI AJA,

Heard: 10th November 2014

Delivered: 9th December 2015

Summary:

Civil Procedure – Application for review of decision of the Supreme Court under Section 148 (2) of the Constitution – Principles applicable to review – Grounds or conditions for review – whether error in interpretation of contract is proper ground for review – whether new issues not raised in the Supreme Court can constitute grounds for review – Whether Applicants deprived of their property without compensation – No serious irregularity causing gross miscarriage of justice established – No jurisdiction for raising new issues – Application for review dismissed – Counter application by Respondent for review of judgment a single justice of Supreme court granting an order for stay of execution pending review under Section 149 (1) of the Constitution – Whether application involved determination of the cause or matter before the Supreme Court. – Single Judge has power to hear an application for stay of execution – Counter application dismissed.

JUDGMENT
(Dissenting)

DR. B. J. ODOKI JA.

[1] This is an application by Nur and Sam (Pty) Ltd. and Nuisa Investments (Pty) Ltd. (the Applicants) for review of the judgment of the Supreme Court delivered on 29 July 2015, allowing the appeal filed by the

Respondents, Galp Swaziland (Pty) Ltd., against decision of the High Court. The Application is brought under Section 148 (2) of the Constitution.

[2] The Respondent brought a counter Application to review the judgment of a single judge of the Supreme Court granting a stay of execution of the judgment of the Supreme Court, the subject matter of this review.

[3] The Applicants brought this Application for reviewing, correcting and setting aside the following order of the Supreme Court in the judgment dated 29 July 2015:

> **1. The Respondents are ordered to vacate the sites at the Big Tree Filling Station and Sakhula Filling Station, as identified in the lease agreement relating sites, by not later than 31 August 2015.**
>
> **2. In the event of failure of the Respondents to so voluntarily vacate the said sites by that date, the Appellants 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.**

[4] The Appellants prayed that the Respondents be ordered to pay costs, in the event they oppose the Application. They also prayed for such further and alternative relief as the court may deem fit.

[5] The Application was accompanied by the affidavit of Nurane Calu, a Director of the Applicants.

[6] The Respondent filed a counter-application for review of the judgment and order of Maphalala ACJ (as he then was) dated 23 September 2015, staying execution of the judgment of this court pending the determination of this review application. The Respondent prayed for an order in the following terms:

1. **the judgment and order of Maphalala ACJ dated 23 September 2015 under case number 13/2015, is reviewed and set aside, and substituted with an order dismissing the application for stay of execution, with costs to be paid by the Applicants jointly and severally, the on paying the other to be absolved, including the certified costs of senior and junior counsel.**

2. **the first and second Respondents are directed to pay the costs of the counter-claim jointly and severally, the one paying, the other to be absolved including the certified costs of senior and junior counsel.**

[7] The counter-application was accompanied by affidavit of **Fanie Matsenjwa**, the Commercial Director of the Respondent.

BACKGROUND

[8] The Applicants are fuel retailers operating petrol stations in terms of franchise agreements with the Respondent, who is a wholesaler and supplier of fuel and fuel products.

[9] The 1st Applicant purchased its business as a going-concern for E5.5 Million. The 2nd Applicant was appointed a franchisee to operate the filling station business as Eveni and developed the business. The 2nd Applicant paid E1 Million to the Respondent.

[10] Both Applicants operated the businesses in terms of identical franchise agreements with the Respondent. A key Clause to these Franchise Agreements which is at the centre of dispute between the Applicants and the Respondent is Clause 6.1 which provides that.

> ***"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 simultaneous with and upon termination for any reason of the Galp property lease agreement";***

[11] In March 2014 the Respondent advised the Applicants that their franchise agreements were expiring in a few months and that the Applicants had to express an interest to renew the agreements.

[12] A dispute ensued between the Applicants and the Respondent over whether the franchise agreement had expired. At the centre of the dispute was the interpretation of Clause 6.1 of the Franchise Agreement. The Respondent contended that the agreement had expired. The Applicants on the other hand had a different interpretation of the Clause. The Applicants interpretation of Clause 6.1 was that the term of the Franchise Agreements was to run simultaneously with the Respondent's Property Lease Agreement. They based this on the reading of the Clause and the surrounding circumstances leading to the conclusion of the Franchise Agreement.

[13] The parties were unable to resolve the dispute and the Respondent insisted that the Franchise Agreement had terminated and required the Applicant to enter into a new Franchise Agreement which was materially different from the original Franchise Agreement. Apart from the difference in interpretation, this issue also became a focal point of dispute between the parties. The Respondent's attitude was that if the Applicants did not sign the new Franchise Agreements then they would have to vacate the sites where they operate filling stations and the Respondent would take over.

[14] Upon realizing that the Respondent was not compromising, the Applicants approached the High Court seeking the following orders:

"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 finalized their negotiation and enter into a new Franchise Agreement;

4. Interdicting Respondent from ejecting the Applicants from their operation sites pending finalization of this application and/or pending negotiations with Respondent on the terms of the new Franchise Agreement.

4.1 Interdicting the Respondent from allowing new franchisees and or anybody to take over the operations of the Applicants pending the finalization of this current application and/or finalization on the negotiation of the terms of the 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 finalization of this current application and/or pending the finalization on

the negotiation of the terms of the new Franchise Agreement;

4.3 Directing the Respondent to file and produce to this Honourable Court the Property Lease Agreement which the Respondent had with the Landlord(s) of the premises of the Applicants business operations;

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

4.5 That prayers 1, 2 and 4 herein above operate forthwith as an interim order pending finalization of the current application and/or pending the finalization on the negotiations of the terms of the new Franchise Agreement;

5. That prayers 1, 2 and 4 herein above operate forthwith as an interim order pending finalization of the current application and/or pending the finalization 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 prayer 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."

[15] The Respondent opposed the application and also counter applied for the ejectment of the Applicants from the filling stations. The basis for the counter application was that the Franchise Agreement had expired and the Applicants had no right to continue operating the filling stations.

[16] Following a hearing of the matter, the High Court granted the following orders:

1. The parties expressly agreed, alternatively impliedly agreed, that the existing Franchise Agreement would be renewed, subject to the performance of the 1st and 2nd Applicant;

2. The period of renewal would be for a period of three years commencing on 1st July 2014, alternatively 31st

January 2015, in accordance with the express or implied terms referred to above;

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;**

4. **The Respondent's counter application is dismissed with costs;**

5. **The Applicants are awarded the costs of their application;**

6. **All the cost orders referred to above shall include the costs of Counsel.**

[17] The Respondent noted an appeal against the decision of the High Court and it is in this appeal that the Supreme Court granted the following orders, which are subject of the review:

1. **The Respondents are ordered to vacate the site at the Big Tree Filling Station and the 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 include two Counsel.**

ARGUMENTS OF THE APPLICANTS

[17] The Applicants submit that the main ground for reviews, in a nutshell, is that the Supreme Court inadvertently committed a fundamental and basic error by ordering the ejectment of the Applicants from the sites in which they operate the filling station business under the

Respondent's franchise because such order will occasion a manifest and gross injustice to the Applicants who stand to be deprived of their proprietary rights without compensation, in circumstances where this is unjustifiable from a contractual, constitutional and public policy view point. This they contend creates an exceptional circumstance in which this court exercising its review powers, is justified to interfere to protect the Applicant's proprietary rights, from being unfairly expropriated by the Respondent.

[19] The Applicants amplified their grounds for review in their Heads of Argument and oral submissions in court. They pointed out that this court has powers to review any of its decisions and such grounds or conditions as may be prescribed by an Act of Parliament or by rules of court.

[20] The Applicants contended that this court has recently affirmed its powers of review and set out the parameters under Section 148 of the Constitution, and stated that it is not a jurisdiction that it would readily exercise except in exceptional circumstances, where the demands of justice make the exercise extremely necessary to avoid immediate harm to the Applicant. They relied on the decision of this court in **President Street Properties (Pty) Ltd vs. Maxwell Uchechukwu Appeal case No. 11/2014**

[21] The Applicants referred to the decision of the Supreme Court of Ghana in **Merchanical Llyod vs. Narty [1987-88] 2 G.L.R. 598** which was quoted with approval in the **President Street Properties case** *(Supra)* to the effect that review is not an appellate jurisdiction, but a kind of jurisdiction held in reserve to be prayed in aid in exceptional circumstances where a fundamental and basic error may have been committed by the court, which error must have occasioned a gross miscarriage of justice.

[22] As regards the interpretation of the Franchise Agreement which was the main borne of contention in this case, the Applicants submitted that the Supreme Court erroneously interpreted words ***"shall endure for three (3) years"*** in isolation from the rest of the words used in the provision, and thereby came to wrong conclusion that the agreement was for three years. It was their contention that had the Supreme Court interpreted the agreement correctly, it would have come to the conclusion that the agreement would be subject to renewal based on performance, and that it would run simultaneously with Galp Property Lease for 9 years 11 months.

[23] The Applicants further argued that the Supreme Court committed a fundamental error to sanction their eviction and to leave their investments without compensation. It was the Applicant's contention that they should have been given opportunity to sell or and recover the value of their investment.

[24] The Applicants submitted that the Supreme Court failed to protect and uphold their constitutional right not to be arbitrarily deprived of their property without compensation, and instead enforced the principle of freedom of contract or **Pacta Sunt Servanda.** The Applicants relied on Section 19 of the Constitution.

[25] The Applicants contended further that the Supreme Court is not entitled to give effect to contractual provisions which are contrary to public policy. They submitted that the law of contract must be subject to constitutional control. They relied on the decision of the Constitutional Court of South Africa in **Barend Petrus Barikhuizen vs. Ronald Stuart Napier** CCT 72/05 [2007] ZACC3. According to this decision, public policy imports the notions of fairness, justice and reasonableness, and that public policy would preclude the enforcement of a contractual term if its enforcement would be unjust or unfair or contrary to the public sense of justice of the community.

[26] It was therefore submitted by the Applicants that it would be contrary to good morals to allow a party who has an advantage in terms of the power relations, as the Respondent in this case, to enforce a bargain in terms of which it deprives the weaker party of its proprietary interest without compensation. In support of their submissions the Applicants referred to the case of **Sasfin (Pty) Ltd. vs. Benks 1989 (1) SA 1 (A), Schierhout vs. Minister of Justice 1925 AD 417 and Bafana Finance Mabopane vs. Makwakwa and Another 2006 (4) SA 581.**

[27] With regard to the Counter-Application against the order of stay by a single judge of this court, the Applicants submitted that a single judge had power to hear and determine the Application for stay of execution because it did not involve determining the matter in controversy.

[28] The Respondent submitted that the Applicants argue that the Supreme Court judgment should be reviewed under Section 148 (2) of the Constitution on the following grounds:

1. That the Supreme Court erred in its interpretation of clause 6.1 of the franchise agreement;

2. That the Supreme Court's order has resulted in the arbitrary deprivation of the Applicant's property rights in contravention of Section 19 of the Constitution,

3. That the Supreme Court erred in upholding the franchise agreement because it is contrary to public policy.

[29] It was the Respondent's contention that there is no basis for this court to review its main judgment as none of the above grounds constitute sufficient grounds for review. The Respondent maintained that the grounds raised for review were nothing more than an attempt to appeal the judgment in the guise of review, and therefore the application should be rejected.

[30] The Respondent referred to Section 148 (2) of the Constitution and noted that to date no statute or rules of court have been enacted to regulate reviews under the Section.

[31] The Respondent submitted that under the common law Section 148 (2) provides for a special form of review which is an exception to the generally applicable principle of ***res judicata*** and the need for finality in litigation. As such it allows a review in exceptional circumstances

only, where it is necessary to correct a manifest injustice caused by an earlier order in which there is no alternative remedy. Reliance for this proposition was placed on the of **Vilane and Another vs. Lipney Investment (Pty) Ltd. Civil Case No. 78/2013 (SC) at Page 6.**

[32] The Respondent maintained that Section 148 (2) of the Constitution does not apply in circumstances where an appellant simply seeks to reargue or to raise fresh arguments that were initially available to it but which it did not raise in the appeal itself. This would amount to nothing more than an attempt again to appeal the judgment in question and to obtain ***"a second bite at the cherry"*** as this was not the purpose for which the Supreme Court is granted powers of review. Reference was made to the decision of the Supreme Court in **President Street Properties (Pty) vs. Maxwell Uchechukwu and others** (*supra*) in support of this submission.

[33] Regarding the complaint was that the Supreme Court erred in its interpretation of clause 6.1 of the Franchise Agreement, the Respondent submitted that the court was correct in finding that clause 6.1 of the agreement provided that it terminated after three years.

[34] The Respondent submitted that the arguments that the Applicants raise in this application that clause 6.1 was ambiguous and regard must be had to the context and background including the special right to trade agreement were raised in the High Court and Supreme Court and the Supreme Court considered this argument regarding contractual interpretation and rejected it. It was the Respondent's intention that the Supreme Court was clearly mindful that it was required to adopt a **"sensible meaning"** over an interpretation that would be insensible or **"unbusiness like"**, as the interpretation suggested by the Applicants would lead to absurd consequences.

[35] The Respondent maintained that consideration of public policy and sound administration of justice militate against allowing a dissatisfied party to an appeal to reargue issues by bringing a application for review as the process would have no end. This would not only burden this court unnecessarily with far heavier load, but would also underlimine the authority of the Supreme Court, as well as the vital need for certainly and finality in litigation The Respondent cited the decision of the Constitutional Court of South Africa in the Case of **Van Vyk vs. Unitas Hospital and others 2008 (2) SA 472 Para. (31)** where it was stated that ***"A litigant is entitled to have closure on litigation. The Principle of finality in litigation is intended to allow parties to get on with their lives"***

[36] The Respondent submitted that the arguments by the Applicant that they have been arbitrarily deprived of their property was not raised before the Supreme Court on the previous occasion. It was the Respondents contention that it was not competent for the Applicants to seek to review the Supreme Court's judgment on the basis of an argument not raised before it previously. The Respondent relied on the decisions of this court in **President Street Properties Case (supra) and Commissioner of Police and Another vs. Dallas Dlamini and Others** Civil Case No. 39/2011. The Respondent had not been given an opportunity to answer the issues, nor the Supreme Court to consider them, submitted the Respondent.

[37] The Respondent argued that in any case there had been no interference with the Applicants' property rights because the 1st Applicant did not pay to the Respondent the E5.5 Million to take over the operation of the Big Tree Service Station, but it was paid to the previous owner, Mr. Dlomo. Moreover, it was contended by the Respondent that the Applicant failed to sign the renewal of their contract due to their own conduct. The Applicants also did not establish what *"Good Will"* they had been deprived of without compensation.

[38] The Respondent finally submitted that Section 19 of the Constitution does not apply to deprivation of property by individuals but by Government **See Phoebus Apollo Avialin CC vs. Minister of Safety and Security 2003 2 SA 34 CC at Para. [4]**

[39] With regard to the complaint that the Supreme Court erred in upholding the Franchise Agreement, because it is contrary to public policy, in that the agreement arbitrarily deprived them of their property rights, the Respondent submitted that this argument was raised for the first time in the Applicants' Supplementary replying affidavit, and it therefore amounts to an attempt to appeal and not review the Supreme Court's judgment.

[40] It was the contention of the Respondent that the Applicants entered into the Franchise Agreement freely and voluntarily and the allegation of unequal bargaining power between the Applicant and the Respondent was raised for the first time in the current Applicant's heads of argument. Moreover, the maxim *pact sunt servarda* expresses public policy requirement that contracts which have been entered freely and voluntarily should be honoured. Reference was made to the case of Barkhuizencase vs. Naper 2007 5 (SA) 323 in support of this principle. The Supreme Court was therefore correct to uphold the Franchise Agreement, the Respondent submitted.

[41] On the Counter-Application the Responded argued that Maphalala ACJ, sitting as a single judge, did not have the power to vary or stay the Supreme Court's order under Section 149 (1) of the Constitution, because a single judge changed the decision of the Supreme Court which required three judges.

[42] The Respondent further argued that the Maphalala ACJ should have held that Section 145 (2) of the Constitution was applicable and that this view is confirmed by Section 149 (3) which provides that a Supreme Court bench of three judges can reverse a decision of a single judge. It was the Respondent further contention that it would procedurally be unacceptable and nonsensical on one hand to provide the safeguard that an order of a single judge can be varied by three judges but on the other hand to allow an order of three judges to be varied by a single judge.

[43] Lastly, the Respondent submitted that it is manifestly in the public interest for this court to decide the issue now, even if it will not have a direct impact on the parties in this case. The Respondent cited the case of **MEC for Education, KwaZulu-Natal and Others v. Pilly 2008** (1) SA 474 (CC) at Para. [32], in support of his submission.

THE LAW

[44] The supervisory and review jurisdiction of the Supreme Court is provided in Section 148 of the Constitution as follows:

> ***"(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 purpose of enforcing or securing the enforcement of its supervisory power.***
>
> ***(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 rules of court.***
>
> ***(3) In the exercise of its review jurisdiction, the Supreme Court shall sit as a full bench."***

[45] The composition of the Supreme Court is provided for in Section 145 of the Constitution. The Section provides for the coram of the Supreme Court as follows:

"(2) The Supreme Court shall be duly constituted for its ordinary work by not less than three justices of the Supreme Court.

(3) A full bench of the Supreme Court shall consist of five justices of that court"

[46] The need for a full bench to deal with reviews seems an innovation as in many other jurisdiction, reviews are carried out by the same panel or number of judges who determined the previous decision in the Supreme Court. The purpose of a full bench may have been to give the process more serious consideration before reviewing the decision of the Supreme Court.

[47] The Supreme Court is also given power to depart from its previous decision under Section 146 (5) of the Constitution which provides,

"(5) While it is not bound to follow the decisions of other courts save its own, the Supreme Court may depart from its own previous decisions when it appears to it that the previous decisions was wrong. The decision of the Supreme Court on questions of law are binding on other courts."

[48] The power to depart from its previous decisions is different from review power because it appears that it may be exercised only in a subsequent case, not the same one being reviewed. The provision is intended to liberalise the doctrine of precedent in the highest court to allow progressive development of local jurisprudence by departing from previous decisions where the interests of justice so demand. It is not provided that the exercise of this power requires a full bench, but this can be developed through court practice or court rules.

[49] It is common cause that the grounds and conditions upon which the Supreme Court may review its decisions have not been prescribed by Parliament, nor through the rules of court. It is high time such grounds and conditions were laid down to provide guidance on the matter. The Chief Justice could take the lead and make the necessary rules, having regard to the interest of justice and rules which have been in other jurisdictions with similar provisions or traditions. A similar call to the Chief Justice was made by Dlamini AJA in the case of **President Street Properties (Pty) Ltd vs. Maxwell Uchechukwu and Others** *(supra)*

[50] A number of decisions of this court have considered the purpose, scope and principles and grounds upon which the Supreme Court may exercise its review jurisdiction including **President Street Properties**

case *(supra)* and **Commissioner of Police**, **The Principal Secretary Ministry of Public Service and Others vs. Xolile Sukati** Civil Case No. 45/2014 [2015] SZSC 38.

[51] **In the President Street Properties Case** *(supra)*, Dlamini AJA discussed the importance and need of this new jurisdiction of the Supreme Court, and its relationship with the principles of ***functus officio*** and ***res judicata*** as follows:

> ***"[26] In its appellate jurisdiction the role of this Supreme Court is to prevent injustice arising from the normal operation of the adjucicative 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 a 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 be 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 <u>functus offficio</u> or the matter is <u>res fudicata,</u> 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 last resort."

[52] After citing authorities from various jurisdictions, Dlamini AJA identified some of the conditions which might justify review as follows:

> ***"[15] From the above authorities some of the situations already identified as calling for judicial intervention are exceptional circumstances, fraud, patent error, bias, presence of some most unusual element, new facts, significant injustice or absence of effective remedy."***

[53] I am of the view that the grounds identified by Dlamini AJA are a useful starting point for crafting grounds upon which review may be entertained. The decision will no doubt significantly contribute to the development of the jurisprudence of review in this country.

[54] It appears that Section 148 of the Constitution has similarity with Section 133 of the Constitution of Ghana, which provides for power of the Supreme Court to review its decisions on such grounds and subject to such conditions as may be prescribed by rules of court.

[55] As pointed out in the **President Street Properties Case** *(supra)* in 1966, the Supreme Court of Ghana made rules under this article prescribing the grounds and the procedure applicable. Rule 54 provides the following grounds for review:

> ***"54 The Court may review any decision made or given by it in any of the following grounds:***
>
> ***(a) exceptional circumstances which have not resulted in miscarriage of justice;***
>
> ***(b) discovery of new and important matter or evidence which after exercise of due diligence was not within the applicant's knowledge or could not be produced by him at the time the decision was given"***

[56] However***, "exceptional circumstances"*** have not been defined in the rules and therefore guidance can only be obtained from judicial pronouncements in cases that have come for review before the Supreme Court of Ghana.

[57] It has been held that what constitutes exceptional circumstances cannot be comprehensively defined. See **Republic vs. Mimapair, President** of the **National House of Chiefs, ex parte Anneyah** [2006] SC GLR 59.

[58] In **Mechanical Lloyd Assembly Plant Ltd v. Nartey** [1997 – 1998] 2 GLR 598, Taylor JSC, suggested some criteria indicative of exceptional circumstances which may necessitate review provided they resulted in gross miscarriage of justice. These were:

(a) Matters discovered after trial court, which will be relevant, exceptional and capable of tending to show that if they had been discovered earlier, their effect would have influenced the decision.

(b) Cases falling within the principle enunciated in **Mosi v. Bogyina** [1963] 1 GL 337, that is, where judgment is void either because it was not warranted by way of law or rule of procedure.

(c) The class of judgments which can legitimately be said to have been *per-in curiam* because of failure to consider a statute or a case of fundamental principle of procedure and practice relevant to the decision and which would have resulted in different decision.

(d) Mistake or error apparent on the face of the record which could be an error of fact or of law and which can be pointed out without long arguments.

(e) Any other sufficient reason.

[59] The Supreme Court of India is given power to review its decisions in Article 137 of the Constitution of India. The rules governing review jurisdiction are contained in order XI Rule 47 of the Supreme Court Rules. The Rule provides that an application for review may be brought on the following grounds:

(a) Discovery of new evidence which was not within the Applicant's knowledge an under normal circumstances could not have been known at the trial. The evidence must be so important that it could have turned the judgment the other way.

(b) Mistake or error apparent on the face of the record which could be an error of fact or of law and which can be pointed out without long arguments.

(c) Any other sufficient reason.

[60] In Uganda, the Constitution does not provide for review jurisdiction of the Supreme Court as in Swaziland and Ghana, although the drafters of the Uganda Constitution 1995 had access to the Ghana Constitution. The power of review is contained in the Supreme Court Rules of 1966. The power is both inherent and statutory.

[61] Rule 2 (2) of the Supreme Court Rules provides for the inherent power of the Supreme Court as follows:

> ***"(2) Nothing in these Rules shall be taken to limit or otherwise affect the inherent power of the court and the Court of Appeal, to make such orders as may be necessary for achieving the ends of justice or to prevent abuse of the process of any such court, and that power shall extend to setting aside judgments which have been proved null and void after they have been passed, and shall be exercised to prevent an abuse of the process of any court caused by delay."***

[62] Rule 35 provides for correcting errors in what is known as the **"slip rule"** as follows:

> "(1) A clerical or arithmetrical mistake in any judgment of the court or any error arising in it from an accidental slip or omission may at any time, whether before or after judgment has been embodied in an order, be corrected by the court, either of its own motion or on the application of any interested person so as to give effect to what was the intention of the court when judgment was given.
>
> (2) An order of the court may at any time be corrected in the court either on its own motion or on the application of any interested person, if it does not correspond with the order of a judgment it purports to embody or where the judgment has been corrected under sub rule (1) of this rule, with the judgment corrected."

[63] In **Orient Bank Ltd. v. Frederick Zaabwe and Another** Civil Application No. 17/2007 [2008] UGSC 1 the Supreme Court dismissed an application for review holding that the Applicant proposed to ask the Supreme Court to reverse its findings not because they resulted in

accidental slip or omission but because, in view of the Applicant, the findings were erroneous. The court observed

> ***"It is trite law that a decision of this court on any issue of fact or law is final; so that the unsuccessful party cannot apply for its reversal. The only circumstances under which this court may be asked to revisit its decision are set out in Rules 2 (2) and 35 (1) of the Rules of this court."***

[64] In **British American Tobacco Uganda Ltd. vs. Mnijabuko and Others,** MISC. Application No. 07/2013 [2014] UGSC 15, the Supreme Court dismissed an application for review of its judgment holding that in none of the grounds of appeal in the previous case had the application challenged the decision of the Court of Appeal for failure to consider the issue of part-payment made by the Applicant to the Respondent's advocate, nor was the matter raised in the Supreme Court during the hearing of the appeal, and therefore the issue could not be considered on review.

[65] In an earlier decision of the Court of Appeal for East Africa, in **Lakhamski Brothers vs. R. Raja and Sons** [1966] EA 313 at Page 314, Sir Charles Newbold P. emphasized the importance of the

principle of finality of judgments in the administrating justice as follows:

> ***"There is a principle which is of the very greatest importance in the administration of justice and that principle is this: it is in the interest of all persons that there should be an end to litigation. This Court is now the final court of appeal and when this court delivers its judgment that judgment is so far as the particular proceedings are concerned the end of the litigation. It determines in respect of the parties to the particular preceding their final legal position, subject as I have said to the limited application of the slip rule. This court being the Final Court of Appeal in the legal system of this country cannot be asked to sit on appeal against its judgment."***

[66] While the Supreme Court of Uganda has not enacted specific rules to set out the grounds for review, it is clear that it will only permit review in exceptional circumstances under its inherent power in accordance with rules 2 (2) and 35 (1) of the Rules of the Court. The general trend is not to allow appeals disguised as reviews.

CONSIDERATION OF GROUNDS

[67] The first ground upon which the Applicant sought to review the previous decision of the Supreme Court was that the Supreme Court erred in its interpretation of clause 6.11 of the Franchise Agreement.

[68] The Supreme Court made its finding on this issue in para [80] of the judgment where it stated,

> ***"9. We accordingly find that the Franchise Agreements between the Appellants and the Respondents terminated by affluxion 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."***

[69] I am unable to fault the conclusion reached by the Supreme Court. I agree with the Supreme Court that the words in clause 6.1 of the Franchise Agreement are clear and unambiguous and set out clearly the three different scenarios of termination. Nowhere in the Franchise Agreement is it provided that there is any automatic right of renewal of that agreement after the expiry of the initial period of three years but that renewal would be based on performance. There is evidence that the Applicants were offered a renewal for one year lease which they

did not take up. If they had done this they would have had time to reorganize their business by selling their good will or otherwise. If this offer will exist they should take it.

[70] The interpretation placed on clause 6.1 by the Applicants seems to have risen from their misconception that there was a lease agreement between the Applicants and the landlords and thus they sought to link the lease agreements with the Special Rights Agreement which was only applicable to the 2nd Applicant.

[71] It is my view therefore that the Supreme Court did not err in its interpretation of the Franchise Agreement.

[72] Even if the Supreme Court had erred in its interpretation of the Franchise Agreement, I do not think that this would have constituted an exceptional circumstance to constitute a ground for review; considering the principles which have been discussed earlier in this judgment. It seems that the Applicants wanted to have **"a second bite at the cherry"** by disguising what appears as a second appeal as a review.

[73] In the case of **Vilane N. O. and Another vs. Lipney Investment (Pty) Ltd** Civil Case No. 78/2013, the application for review was rejected on the ground that the court had misdirected itself in law and in fact, as an attempt to reargue the case as if it were another appeal.

[74] In the **Principal Secretary, Ministry of Public Service and Others vs. Xolile Sukati**, Civil Appeal Case No. 45/2014 in dismissing an application for review, the Court stated that the cause of action regarding the validity of the Respondent's appointment had been duly argued, and therefore the court could not be allowed it to resuscitate in subsequent proceedings. In para. [21] Nkosi AJA stated,

> ***"It is thus competent to rationalize Section 148 (2) as an exception to the res judicata doctrine. The Section must as of necessity be applied with caution as it goes against the underlying principle that the court must prevent the recapitulation of the same action and must always to put a limit to needless litigation. It must ensure that certainty is maintained in cases which have been decided by the courts. Therefore, where any cause of action has been prosecuted to finality between the same parties, any attempt by one party to bring the***

matter to the court on the same cause of action should not be permitted."

[75] The second ground upon which review was sought was that the Supreme Court decision has resulted in the arbitrary deprivation of the Applicant's property in contravention of Section 19 of the Constitution.

[76] Section 19 of the Constitution provides,

> **"(1) A person has a right to own property either alone or association with others.**
>
> **(2) A person shall not be compulsorily deprived of property or any interest in or right over property of any description except where the following conditions are justified:**
>
> **(a) the taking of possession or acquisition is necessary for public use or in the interest of defence, public order, public morality or public health;**
>
> **(b) the compulsory taking of possession or acquisition of the property is made under any law which makes provision for-**

(i) prompt payment of fair compensation and a right of access to a court of law by any person, who has an interest in or right over the property,

(ii) a right of access to a court of law by any person who has an interest or right over the property;

(c) the taking of possession or the acquisition is made under a court order"

[77] It is clear to me that Section 19 of the Constitution does not apply to this case. The Respondent rightly submitted that it applies to public acquisition by the State or public institutions and not by private persons like the Respondent.

[78] Even if the Section applied and was not complied with, it would not have constituted a ground for review because it would be a new matter which was not raised in the earlier proceeding, when the Applicants had opportunity to do so. It would be unfair to require the Respondent to face a new case on review which the Applicants could have raised in earlier proceedings. The Applicants would have a remedy to bring fresh action against the Respondent.

[79] The third ground for review was that the Supreme Court erred in upholding the Franchise Agreement because it was contrary to public policy. This is a new argument which was not raised in earlier proceedings. No reasons were given why the agreement was contrary to public policy when it was a normal commercial or business contract entered into freely and voluntarily between the parties. The fact that disagreements have arisen between the parties does not render the franchise agreements contrary to public policy. The Applicants ought to have made sure that they understand the terms of the Agreement and ensure that their interests are fully protected on termination of the Franchise Agreement.

[80] As I have observed above, the Applicants should take up the offer made by the Respondent for renewal of the Franchise Agreement for one year upon such terms as both parties will agree. It is in the interest of both parties that they should pursue this option which will enable the Applicants to reorganize their business having regard to the relationship with the Respondent.

[81] For the reasons I have given, the application for review has no merit and must be dismissed with costs.

[82] As regards the counter application challenging the power of a single judge of the Supreme Court from entertaining an application for stay of execution, Section 149 of the Constitution provides,

> ***"(1) subject to the provisions of subsection (2) and (3) a single judge justice of the Supreme Court may exercise power vested in the Supreme Court not involving the determination of the cause or matter before the Supreme Court.***
>
> ***(2) ……..***
>
> ***(3) In Civil matters, any order, direction or decision made by a single justice may be varied, discharged, or reversed by the Supreme Court of three justices at the instance of either party to that matter."***

[83] It was submitted by the Respondent that a single justice of the Supreme Court has not power to vary a decision of the Supreme Court. In the first place, the operating words in Section 149 (1) are "***not involving the determination of the cause or matter"*** before the court. This in effect means that a single justice has power to deal mainly with ***"interlocutory matters"***. Such matters do not involve

the determination of the matter before the court, for instance an appeal or review. A stay of execution does not vary a decision of any court but merely postpones its execution.

[84] It should be noted that Section 149 (3) provides a safe-guard in civil matters where a party who is not satisfied with the decision of single justice may refer the matter to a bench of three justices of the Supreme Court. The Respondent should have utilized this procedure instead of applying for review.

[85] Consequently the counter application for review must be dismissed.

[86] In the result, I make the following orders:

(a) The Application for review is dismissed with costs.

(b) The Counter-Application for review is dismissed with costs for two counsel.

(c) The Applicants are free to take up the offer by the Respondent to review the Franchise Agreement for one year upon such terms as the parties will agree.

This option should be exercised within one month from the date of this judgment.

_____

DR. B.J. ODOKI

JUSTICE OF APPEAL

I agree

_____

M.D. MAMBA

ACTING JUSTICE OF APPEAL

For the Applicants: **Mr. M. Magagula**

For the Respondent: **M. P. Kennedy SC**