THE SUPREME COURT OF SWAZILAND

JUDGMENT

Held in Mbabane | Civil Appeal Case No. 32/2015

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**

v

GALP SWAZILAND **Respondent**

Neutral Citation: ***NUR & Sam (Pty) Ltd & Another v Galp Swaziland (13/2015) [2015] SZSC 40 (9th December 2015)***

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

For Appellant: **M. Magagula**

For Respondent: **P. Kennedy SC**

Heard: **10th November 2015**

Delivered: **09th December 2015**

JUDGMENT
MAJORITY

BY: M. DLAMINI AJA (S. B. MAPHALALA AJA & N. J. HLOPHE AJA CONCURRING; B. J. ODOKI JA & M. D. MAMBA AJA DISSENTING)

I have carefully read the judgment of my brother **Dr. B. J. Odoki JA**. I intend to respectfully differ on the merits of the case in so far as the applicants' case is concerned for reasons which are apparent in this judgment.

Review application

[1] I subscribe to the call for the Chief Justice to set out Rules on grounds for review by the Supreme Court. I may also add another ground to be considered in this exercise. I need not re-invent the wheel as the South African drafters of the Constitution eloquently coined this ground.

"...if the (Supreme Court) grants leave to appeal on the ground that the matter raises an arguable[1] point of law[2] general public importance[3] which ought to be considered by the court.[4]

[2] Borrowing from the Rules of the Supreme Court of Ghana, **M. J. Dlamini AJA**[5] laid out *inter alia "exceptional circumstances which have resulted in miscarriage of justice"*.[6] Expatiating further on the ground, the learned Justice cited **Adede JSC** as follows:

"....the mere fact that a judgment can be criticized is no ground for asking that it should be reviewed. ***The review jurisdiction is a special jurisdiction to be exercised in exceptional circumstances. It is not an appllicate jurisdiction. It is a kind of jurisdiction held in reserve, to be prayed in aid in the exceptional situation where fundamental and basic error may, have inadvertently been committed by the court, which error must have occasioned a gross miscarriage of***

[1] "in the sense that there is substance in the argument advanced " see Beatley & Co. v Pandor's Trustees 1935 TPD 365 at 366

[2] Must have prospect of success.

[3] "It must transcend the narrow interest of the litigants and implicate the interest of a significant part of the general public." See paragraph [26] of Andre Francois Paulsen & Another v Slip Knot Investment 777 (Pty) Ltd ZACC 5 [61/14] (24 March 2015)

[4] See Section 167 (3) (b) (ii) of Constitution of South Africa- Seventh Amendment Act 72 of 2012 (my own emphasis)

[5] President Street Properties (Pty) Ltd v Maxwell Uchechukwu and 4 Others (11/2014) [2015] SZSC 11 (29th July 2015)

[6] See page 12 paragraph 18 *supra*.

> ***justic****e. The review jurisdiction is not intended as a try-on by a party after losing …, nor is it on automatic next-step…., neither is it meant to be resorted to as an emotional reaction to an unfavourable judgment.*" (**Mechanical Lloyd v Narty [1987-88] 2 GLR 598**) (**Yebisi**, page 43) (my emphasis)

[3] Which is this fundamental and basic error inadvertently been committed which might reasonably result in gross miscarriage of justice *in casu*, if any?

[4] Before I attend to this question, it is apposite to deal with a point *in limine* taken by respondents. As correctly pointed out by my brother herein, respondent submitted that:

> "*With regard to the complainant 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 Applicant's Supplementary replying affidavit, and it therefore amounts to*

an attempt to appeal and not review the Supreme Court's judgment."

[5] On a similar submission by respondent, **Ngcobo J**[7] wisely pointed out:

"*The mere fact that a point of law is raised for the first time on appeal is not in itself sufficient reason for refusing to consider it. If the point is covered by the pleadings, and if its consideration on appeal involves no unfairness to the other party against whom it is directed, this Court may in the exercise of its discretion consider the point.*"

[6] His Lordship continued to highlight on "*unfairness*" in relation to a new point of law raised on appeal:

"*Unfairness may arise where for example a party would not have agreed on material facts or on only facts stated in the agreed statement of facts had the party been aware that there were other legal issues involved. It would similarly be unfair to*

[7] (Barend Petrus Barkhuizen v Ronald Stuart Napier (72/2005) ZACC 5 [2007] (4th April 2007) at paragraph 39

the other party if the law point and all its ramifications were not canvassed and investigated at trial."

[7] **Innes J**[8] had eloquently propounded on new points of law taken for the first time on appeal.

"*But where a new law point involves the decision of questions of fact, the evidence with regard to which has not been exhausted, or where it is possible that if the point had been taken earlier it might have been met by the production of further evidence, then a Court of Appeal will not allow the point to prevail. Because it would be manifestly unfair to the other litigant to do so. The rule has been thus stated by* ***Lord Watson (Connecticut Fire Insurance Co. vs Kavanagh, Ac., 1892, p.481)****: When a question of law is raised for the first time in a Court of last resort, upon the construction of a document, or upon facts, either admitted or proved beyond controversy, it is not only competent, but expedient, in the interest of justice, to entertain the plea. The expediency of adopting that course may be doubted when the plea cannot be disposed of without deciding nice questions of fact, in consideration of which the*

[8] Cole versus Government of the Union of South Africa 1910 AD 263 at 273

Court of ultimate review is placed in a much less advantageous position than the Court below. But their Lordships have no hesitation in holding that the course ought not, in any case, to be followed, unless the Court is satisfied that the evidence on which they are asked to decide establishes beyond doubt that the facts, if fully investigated, would have supported the new plea." (my emphasis)

[8] While **Galgut AJA**[9] stated on the same point:

"*It is the duty of an applicant tribunal to ascertain whether the Court below came to a correct conclusion on the case submitted to it. For this reason the raising of a new point of law on appeal is not precluded provided that certain requirements are met. If the point is covered by the pleadings and if its consideration on appeal involves no unfairness to the party against whom it is directed, a Court, in an appeal can deal with it.*(my emphasis)

[9] Bank of Lisbon and South Africa Ltd v The Master and Others 1987 (1) S.A. 278 at 290.

[9] *In casu*, there are no material disputes on facts. The matter turns on point of law *viz*. interpretation of clause 6.1 of the agreement. Following the above principle of our law, there was nothing wrong by respondent raising the points of law on appeal more so as they were pleaded in their heads of argument filed in this court.

Freedom of contract

[10] Exponents of this doctrine *pacta sunt servanda* state:

> "*Elementary and basic general principles that it is in the public interest that contracts entered freely and honesty by competent parties should be enforced."*[10]

[11] In **Collen v Rietfontein Engineering Works**,[11] their Lordships held:

> "*The problem for a court of construction must always be so to balance matters that without violation of essential principle, the dealings of a man may as far as possible be treated as effective,*

[10] Brand AJ in Afrox Healthcare BPR v Strydom 2002 (6) S.A. 21 at 26
[11] 1948 (1) S.A. 413 (A) at 428

and that the law may not incur the reproach of being the destroyer of bargains."

[12] According to **Van der Merwer**[12] *et al* wrote:

"*Freedom of Contract, for instance, means that an individual is free to decide whether, with whom, and on what terms to contract*".

[13] They add:

"*The principle of* ***pacta servanda sunt****, in turn, requires exact enforcement of contractual obligations created in circumstances which are consistent with freedom of contract and consensuality."*[13]

[12] Contract: General Principle 3rd Ed. Page 11
[13] *supra*

Case law on interpretation of contract

[14] The case of **Worman v Hughes and Others**,[14] point out:

> "*It must be borne in mind that in an action on a contract, the rule of interpretation is to ascertain, not what the parties' intention was, but what the language used in the contract means, i.e. what their intention was as expressed in the contract.*" (my emphasis)

[15] **Solomon J**[15] put it with more precision:

> "*The intention of the parties must be gathered from their language, not from what either of them may have had in mind*." (my emphasis)

[16] **Brian CJ**[16] reasoned:

> "*...that the intent of a man cannot be tried, for the devil himself knows not the intent of a man*."

[14] 1948 (3) SA 495 at 505 AD
[15] Van Pletsen v Henning 1913 AD 82 at 99
[16] Saambou-Nationale Bouvereniging v Friedman 1979 (3) SA 994

[17] **Lord Elden** once grumbled that his duty was not: "*to see that both parties really meant the same thing, but that both gave their assent to that proposition which, be it what it may, de facto arises out of the terms of their correspondences.*" (my emphasis)

[18] How then do courts determine the parties assented proposition?

In **Merwe v Viljoen**[17] the court held:

> "*Where a certain clause in the contract was ambiguous and capable of more than one meaning and that consequently evidence of surrounding circumstances might show the meaning which parties intended.*" (my emphasis)

[19] **Coopers and Lybrand and Others v Bryant 1995 (3) SA 761**. The facts of the case were that on 20th December 1991 the respondent (Mr. Bryant) sued the appellant, a firm of Chartered Accountants and Auditors, for damages as a result of a breach of a verbal contract alternatively for negligent misrepresentation for an advice on the financial soundness of a business trading as Henco.

[17] 1953 (1) SA 99 at 125 t

[20] The applicant raised a special plea to the effect that respondent's claim was subject to a deed of cession dated 16th April 1985 between him and Standard Bank (the bank). The deed document read:

> "*I/We, the undersigned, Rolf Anthony Bryant, do here pledge, cede, assign and transfer into and in favour of the bank all my/our/company's right, title and interest in and all book debts, and other debts, and claims of whatsoever nature, present and future, due and to become due to me/us/the company and to all rights of action arising thereunder, as a continuing covering security for all sums of money which I/we/the company may now or at any time hereafter owe or be indebted to the bank...*"

[21] Reading the entire deed document, **Joubert JA** noted that "*the words between square brackets*" were not deleted and initialed by Mr. Bryant as he should have done since he did not act on behalf of a company. He did, however, delete and initial the word: "*Director*" below his signature.

[22] This deed document was described by **Joubert JA** as:

> "*The above deed of cession is in securitatem debiti to provide the Bank as cessionary with continuing security for allowing Mr. Bryan, as cedent, banking facilities. As consideration for all sums of money which he owed or may owe the Bank he undertook to cede, pledge or transfer to the Bank all his 'right' title and interest in and to all book debts and other debts and claims of whatsoever nature, present and future, due and to become A due to me and to all rights of action arising thereunder.*"

[23] The issue before court was whether the deed of cession covered the present claim by Bryant against the applicant. It was contended on behalf of Bryant that the intention of the parties in the cession by the words "*and other debts and claims whatsoever nature, like the book debts*" only referred to trading business of Mr. Bryant and not the claim against the applicant. **Joubert JA**[18] wisely propounded:

[18] Supra at page 44

"*The matter is essentially one of interpretation. I proceed to ascertain the common intention of the parties from the language used in the instrument. Various canons of construction are available to ascertain their common intention at the time of concluding the cession. According to the 'golden rule' of interpretation the language in the document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity, or some repugnancy or inconsistency with the rest of the instrument.*" (my emphasis)

[24] The learned Judge also stated:

"*The mode of construction should never be to interpret the particular word or phrase in isolation (in vacuo) by itself. The correct approach to the application of the 'golden rule' of interpretation after having ascertained the literal meaning of the word or phrase in question is, broadly speaking, to have regard:*

(1) to the context in which the word or phrase is used with its interrelation to the contract as a whole, including the

nature and purpose of the contract, as stated by Rumpff CJ supra;

(2) to the background circumstances which explain the genesis and purpose of the contract, ie to matters probably present to the minds of the parties when they contracted.

(3) to apply extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence of their own intentions." (my emphasis)

[25] The honourable judge proceeded to consider content, background and extrinsic evidence. He considered that Mr. Bryant also held a personal account with the bank and that he had used it for his marriage settlement, for a claim to recover a legacy under a will and also to recover his private assets. That in the analysis of a book debt, the cession referred to his business account with Standard Bank. The

court then held that the claim against the applicants was a private one and not relating to Mr. Bryant's trade and therefore the special plea raised by applicants could not be sustained against Mr. Bryant.

Case *in casu*

[26] The document to be interpreted *in casu* is the "*Galp Franchise Agreement*" (*The Franchise Agreement).* It is particularly clause 6.1 which stipulates:

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

[27] Clause 6.2 and 14 do not apply *in casu* by reason that they are suspensive condition clauses which never transpired and therefore not subject of the dispute. The question for interpretation is, when according to clause 6.1 cited above, was the Franchise Agreement to

terminate? Was it at the end of three years or upon termination of the Franchise Property Lease Agreement which was nine years and eleven months and fifteen years with respect to the Big Tree and Sikhula sites?

[28] Surely there is ambiguity in clause 6.1. I have already demonstrated the position of the law on what ought to happen where a clause in the contract is ambiguous. The court must apply what I would term "*the tripartite*" approach (that is, content, background and extrinsic) which was well defined by **Joubert JA** above. [19]

[29] **Joubert JA** enquired as to the circumstances under which the deed of cession was entered or the background circumstances which explains the genesis and purpose of the contract. He learnt that Mr. Bryant had loan facilities with the Bank. In order to secure the loan facilities the cession deed was then concluded. Similarly *in casu*, under what circumstances was the "*The Franchise Agreement*" entered into *in casu.*

[19] Page 768 Coopers *supra*

[30] The applicants purchased the business filling station from Mr. Dlomo for the sum of E5.5 million as a going concern. At that time the filling station was operating under Shell (Pty) Ltd franchise. The applicants held lease agreements with the landlord. Respondent commenced business in Swaziland and took over from Shell (Pty) Ltd. It appears that when respondent took over the business in Swaziland, unknown to applicants, negotiated with the landlords. Applicants were then informed to direct monthly rentals to respondent. Applicants and second respondent then concluded an agreement which reads:

> "*1. The Franchisor has agreed to appoint the Franchisee as the operator of the new Galp service station at Eveni along Mantjolo road, on Plot 6 and 7 of Farm 1118 Mbabane.*
>
> *2. 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. (my emphasis)

2.1 In this regard it is agreed:

2.1.1 That the Franchise shall immediately pay to the Franchisor a lump sum amount of ..... being 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 for the Franchisee to secure an initial preferential rental rate of .....per month escalating at 7.5% per annum which date is agreed to be the 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 9 years 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 business is measured.

2.1.5 The Franchisee shall not be entitled to mortgage, pledge, grant a lien, or grant or permit any encumbrance of whatsoever nature over the service station for the duration of this agreement.

Signed at ***Matsapha*** *on the* ***11th July 2011****."*

[31] Few days after *viz.* 20th July 2011, the parties entered into the Franchise Agreement of which I have cited the relevant clause.[20] This agreement was concluded by respondents and first applicant. The commencement date was said to be 1st July 2011.[21]

[32] I must point out that under the first agreement, that is, the Agreement on a Special Right to Trade (The Trade Agreement), the applicant

[20] At para .....*supra*
[21] See page 71 of book of pleadings

paid the sum of E1 million to the respondent in terms of Clause 2.1. This is confirmed by respondent at follows:

> *"38.6 In terms of the "Special right to trade" agreement, Mr. Calu paid E1 million to the Respondent upfront as a sign-on fee (clause 2.1.1) which the Respondent used to cover the construction costs of the site. The sign-on fee was a rental part-payment, which entitled Mr. Calu to a preferential rental rate for ten years (clauses 2.1.1 – 2.1.2)"*

[33] The respondents argue that the Trade Agreement signed on 11th July 2011 was subject to the Franchise Agreement. Once the Franchise Agreement was concluded, the Trade Agreement novated. Respondent relies on clause 2 of the Agreement on Trade Agreement which reads:

> "2. *On or prior to the date of the signing of this agreement, the parties shall conclude a Galp Standard Franchise Agreement '<u>whose</u>' initial duration is for three years*

subject to a further renewal based on performance." (my own emphasis)

[34] We know for a fact that at the time of signing of the Trade Agreement, the Franchise Agreement was not in place. From reading of this clause, it unequivocally reads that the Franchise Agreement. "*<u>whose</u> initial duration is for three years subject to further renewal based on performance.*" "*Whose*" refers to the Franchise Agreement. In other words, even though the Franchise Agreement was not before the parties when the Trade Agreement was concluded, it is clear that the parties already formulated a condition under the Franchise Agreement. That condition was that the Franchise Agreement would have a duration of initial period of three years subject to renewal based on performance. From this clause, it is clear that the parties intended that the agreement to be formulated later would give an initial period of three years subject to renewal depending on performance. *In casu*, it is common cause that the parties have no qualms over performance.

[35] The Franchise Agreement further defines another scenario upon which the sum of E1 million would cover. This is the period of nine years eleven months, referred to by respondent in their heads as ten years. The clause reading 2.1.3

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

[36] Clause 2.1.3, as cited above, is very much expected in the above situation. It envisages that the Franchise Agreement would provide for an initial three years duration to be renewed on condition of performance. Should the appellant fail to perform according to Franchise standard, the Agreement would be terminated after the initial period of three years. It is for this reason therefore, that the respondent undertook to refund a prorated fee to set off the remaining period from the ten years.

[37] Turning to the Franchise Agreement. As I have cited clause 6.1, we know that the condition which was so succinctly defined as to be incorporated to this agreement (Franchise) of an "*initial period of three years depending on performance*" was now absent. Instead of it reading "*initial period of three years*" it simply reads "*3 years*." However the second clause which was present under the Trade Agreement which refers to the Galp Lease Agreement (2.1.3 of Trade Agreement) was incorporated under the Franchise Agreement. This is the clause reading "*simultaneous with and upon termination for any reason of the Galp Property Lease Agreement.*"

[38] From the above analysis, reasoning suggests that both parties intended that their agreement should last for nine years eleven months and fifteen years respectively, being the period of the lease agreement between respondent and the landlord or on termination of the lease agreement.

[39] This conclusion in fact finds support from the respondent's submission. Respondent as clearly evident from its pleadings pointed

out that the sum of E1 million paid as cover fee by applicants would cover the period of nine years eleven months. The termination prior to this period referred to in the Agreement was one following a breach of the agreement as per clause 14 and or change of the Franchise specification in product and should applicants dislike Franchise changing its product as per clause 6.2 or should Franchise terminate its lease agreement with its landlord for whatever reason.

[40] Secondly, respondent has submitted that it is willing to refund the applicants the prorated balance from E1 million. This condition is not found in the Franchise Agreement but in the very Trade Agreement which respondent argued that it terminated upon signature of the Franchise Agreement. This is a clear indication that in the minds of both parties before court that the Franchise Agreement could not be interpreted in isolation to the Trade Agreement. The Trade Agreement was still applicable and binding. At any rate, this conclusion is fortified by the Franchise Agreement which was concluded after the Trade Agreement and it reads:

"*Definitions:*

> *"Agreement"* *this agreement together with all applicable Schedules attached to or referred to in this Agreement including <u>any other existing and valid Retail Business Agreement</u>."*(my emphasis)

[41] The above clause demonstrates clearly that the Franchise "*document*" did not on itself form an agreement. There were other documents which, together with the Franchise document formed the Agreement. This "*other"* refers to the Trade Agreement. In fact, *in casu*, all the parties refer to two documents signed and no other namely, Trade Agreement and Franchise Agreement.

[42] It is therefore not clear how respondent on one hand appreciates that the period of nine years and eleven months or fifteen years has not lapsed and therefore is willing to refund the applicants and has only lapsed for purposes of trade.

[43] The respondent contended in its Heads of Argument before the Supreme Court that the reason they signed the Trade Agreement with Mr. Caru, deponent in applicants' founding affidavit was:

> *"37.3 In order to assist Mr. Caru recoup the E5.5 million which he had paid to Mr. Dlomo, the Respondent elected not to exercise its remedies for breach of contract, but instead to allow Mr. Caru the option of entering into a franchise agreement with it in relation to the Big Tree service station. Mr. Caru opted to do so. Thus he was contractually obligated to operate the Big Tree service station subject to the terms and conditions of the franchise agreement with the Respondent."* (my emphasis)

[44] One wonders as to how in an economy such as Swaziland would respondent have "*recoup*" a sum of E5.5 million within three years. The period of nine years and eleven months and fifteen years respectfully appears to be reasonable by any standard, or should I say fair, reasonable and just.

[45] The wise words of **J. De Villiers JP**[22] must always be remembered when interpreting clauses in contracts. It was contended before the learned Judge that the wording "*the day when the sum of Pounds 60 is paid in full and not until then, the company should view the land sold*" meant that there was no deed of sale until the said amount was paid. The learned Judge holding that the deed of sale was concluded on the date of signature and that the suspensive clause did not determine the date of conclusion of the contract. He then stated:

> "*Courts of law do not hesitate to strip transaction of disguise and reveal their true nature"*[23] (my emphasis)

[46] *In casu*, the true nature of the contract between the parties was that applicants should trade for a period running with the lease. In the totality of the above, appellants' review ought to succeed.

Public Policy

[22] Provident Land Trust Ltd v Union Government (Minister of Mines) 1911 AD 615
[23] See page 627 *supra*

[47] The applicants contend that the interpretation given by the court is contrary to public policy. The respondent, on the other hand, argue that the interpretation was in line with public policy. **Brand AJ**[24] stated:

> *"Elementary and basic general principle that it is in the public interest that contracts entered into freely and honestly by competent parties should be enforced."*

[48] **Van Heerden JA**[25] eloquently pointed out:

> *"...if there is one thing which more than another public policy requires is that men of full age and competent understanding shall have the utmost liberty of contracting and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by court of justice*."

[49] **Van der Merwe**[26] having emphasized the importance of *pacta servanda sunt* quickly expanded:

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[24] Afrox Health care BPR v Strydom 2002 SA 21 at 26
[25] In Benlou Properties (Pty) Ltd v Vector Graphics (Pty) Ltd 1993 (1) SA 179 at 187
[26] *Op. cit.* at page 11

"*Important though the notion of autonomy and the principles derived from it may be fort the law of contract, they are not applied absolutely. The fact that an obligation is recognised by the law and receives its effect through the agencies of the state, necessarily implies that contracting parties, when exercising their private autonomy are subject to the values of society.*" (my emphasis)

[50] The author proceeds:

"The very principles of morality or socio-economic expediency, which will in many circumstances support a policy favouring the exact enforcement of contracts freely entered into by consenting parties, may in particular circumstances, require that less weight be attached to the ideals of individual autonomy and freedom of action. The rules of the law of contract reflect the attempts in the legal system to achieve a balance between relevant principles and policies so as to satisfy prevailing perception of justice and fairness, as well as

economic, commercial and social expediency. For this reason, the law of contract has a dynamic and changing nature."

[51] In other words, the court must strike a balance between *pacta sunt servanda* and public policy. Before discussing the guidelines to striking the balance, it is apposite to define public policy. **Ngcobo J**[27], writing a majority decision in the Constitutional Court stated on public policy:

"*All law, including common law of contract is now subject to constitutional control. The validity of all law depends on their consistency with the provisions of the constitution and the values that underlie our constitution. The application of the principle pacta sunt servanda is therefore subject to constitutional control."*

[52] At paragraph 35 the learned Judge emphasises the point as follows:

"No law is immune from the constitutional control. The common law of contract is no exception. And courts have a

[27] Barend Petrus Barkhuizen v Ronald Stuart Napier (72/2005) [2007] ZACC 5 (4TH April 2007) at paragraph 15

constitutional obligation to develop common law, including the principles of law of contract, so as to bring in line with the values that underlie our constitution."

[53] He then highlights:

"*When developing the common law of contract, courts are required to do so in a manner that prompts the spirit purport and object of the Bill of Rights*."

[54] At paragraph 28 the learned Judge explains:

"*Public policy represents the legal convictions of the community; it represents those values that are held most dear by the society*."

[55] He further explains[28]:

"73. Public policy imports the notions of <u>fairness</u>, <u>justice</u> and <u>reasonableness</u>. Public policy would preclude the enforcement of a contractual term <u>if its enforcement</u>

[28] At paragraph 73 *supra*

would be unjust or unfair. Public policy, it should be recalled 'is the general sense of justice of the community, the boni mores, manifest in the public opinion." (my emphasis)

[56] He then continues:[29]

> *"74. The contentions by the parties on the question whether clause 5.2.5 is enforceable regardless of how unfair or unjust this might be in a given case, raises difficult and complex questions concerning the development of the common law of contract, in particular, the need to extend the application of the common law legal principles that seek to achieve justice and fairness to time limitation clauses."*

[57] At paragraph 30 the honourable Judge hits the nail on the head when he writes:

[29] At paragraph 74

"*This approach leaves space for the doctrine of pacta sunt servanda to operate, but at the same time allows courts to decline to enforce a contractual terms that are in conflict with the constitutional values even though the parties may have consented to them.*"

[58] I do not lose sight of what the learned Judge says at paragraph 57:

"*The first question involves the weighing-up of two considerations. On the one hand, public policy, as informed by the Constitution, requires, in general, that parties should comply with contractual obligations that have been freely and voluntarily undertaken. This consideration is expressed in the maxim* ***pacta sunt servanda*** *which, as the Supreme Curt of Appeal has repeatedly noted, gives effect to the central constitutional values of freedom and dignity. Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital party of dignity. <u>The extend to which the contract was freely and voluntarily concluded is clearly a vital factor as it will</u>*

determine the weight that should be afforded to the values of freedom and dignity. The other consideration is that all persons have a right to seek judicial redress. These considerations express the constitutional values which must now inform all laws, including common law principles of contract." (my emphasis)

[59] He then, with much precision, state a very important principle of our law which I also endorse:[30]

"It follows in my judgment, that the first inquiry must be directed at the objective terms of the contract. If it is found that the objective terms are not inconsistent with public policy on their face, the further question will then arise which is whether the terms are contrary to public policy in the light of the relative situation of the contracting parties. In Afrox, the Supreme Court of Appeal recognized that unequal bargaining power is indeed a factor which together with other factors, plays a role in the consideration of public policy. This is a recognition of the potential injustice that may be caused by

[30] At page 59 *supra*

inequality of bargaining power. Although the court found ultimately that on the facts there was no evidence of an inequality of bargaining power, this does not detract from the principle enunciated in that case, namely, that the relative situation of the contracting parties is very relevant consideration in determining whether a contractual term is contrary to public policy. I endorse this principle. This is an important principle in a society as unequal as ours." (my emphasis)

[60] Turning to the case *in casu*, applying this principle of our law, I now intend to hold, as per **Ngcobo J** *supra*, an enquiry on the bargaining power of the parties. *In casu*, I need not the eye of an eagle or a microscopic device to ascertain the bargaining power of the parties. The respondent has summarized the position very well in its heads of argument.[31] It outlined:

"37.1 Mr. Caru paid E5.5 million in order to take over the operation of the Big Tree service station from the previous franchise, Mr. Dlomo. Thus Mr. Caru did not

[31] See paragraph 37

pay the E5.5 to the Respondent but to the previous franchise of the Big Tree service station, Mr. Dlomo.

37.2 *In addition, the agreement between Mr. Caru and Mr. Dlomo was in breach of Mr. Dlomo's franchise agreement with the Respondent, in terms of which the right to operate the franchise could not be ceded or sold without Respondent's permission.*

37.3 *In order to assist Mr. Caru to recoup the E5.5 million which he had paid to Mr. Dlomo, the Respondent elected not to exercise its remedies for breach of contract, but instead to allow Mr. Caru the option of entering into a franchise agreement with it in relation to the Big Tree service station. Mr. Caru opted to do so. Thus, he was contractually obligated to operate the Big Tree service station subject to the terms and conditions of the franchise agreement with the Respondent."* (my emphasis)

[61] In adjudicating on the case of **Barend Petrus Barkhuizen** (*op. cit*.) the learned Judge having highlighted what I have just demonstrated above also took time to enquire on good faith – *bona fide.* **Wessels**[32], states of good faith:

> *"...in accordance with what the community as such considered acting in good faith in the specific circumstance to be."*

[62] **Jansen JA**[33] pin points:

> "*This means that in respect of the so-called negotia bona fide the court had wide powers of complementing or restricting the duties of parties, of implying terms, in accordance with the requirements of justice, reasonableness and fairness*.[34]

[63] He further states:

> *"...'the community standards of justice and equity...' may change with times"*[35]

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[32] Law of Contract paragraphs 1997 1980 (1) 645
[33] In Tuckers Land and Development Corporation v Hovis
[34] At page 651
[35] *Supra*

[64] In light of that the requirements of *bona fide* underlies our law of contract, could it be said that a party who asserts that the reason it entered into a contract with the applicants is because it wanted it to "*recoup*" its E5.5 million. The applilcants and Mr. Dlomo had breached its (respondent's) franchise agreement. This intention by respondent for applicants to "*recoup*" its E5.5 million is not highlighted in any of the two agreements presented in court nor does it allege that such intention was communicated to applicants. Surely there was no good faith in such a transaction. It is my considered view that had respondent communicated its intention to applicant, applicant would have been better informed on concluding the contract. He would have exercised his right of choices accordingly.

[65] That as it may, in fact, this is exactly what the applicants are seeking for in this court. They are saying a term of nine years eleven months and fifteen years is reasonable for them to "*recoup*" their investment. This term is there in the first contract (Trade Agreement) and also the second contract (Franchise Agreement). It stands to reason that it

should be given effect more so in light of respondent's submission that its intention of entering into an agreement with applicants was for applicants to "*recoup*" its investment. Respondent demonstrated this intention by providing in the contract that the agreement would run with the lease agreement.

[66] I think public policy imposes a duty upon court to interpret contractual transactions between parties in line with what the public perceive as sense of justice and fairness and in accordance with the business efficacy. I mention business efficacy because respondent still appreciates that the sum of E1 million paid for its franchise would only give value in a period of nine years eleven months. It is for that reason that even during the hearing of this matter before this court it is still willing to refund the prorated balance from nine years eleven months. It is therefore surprising that the same party (respondent) would submit that the value of E5.5 million would be recovered within three years only. This reasoning to me, with due respect, is absurd. Absurdity is incompatible with public policy which promotes sense of justice in the community or "*the bonis mores*" [36].

[36] See Lorma Productions and Others v Dallas Restaurant 1981 (3) SA 1129 at 1153

[67] What exacerbates the position by respondent is that respondent narrates the circumstances upon which the sum of E1 million was paid to it by applicants. It stated that Galp issued an expenditure freeze instruction (*capex freez*) at the time when Sakhula site was under construction. Applicants negotiated with Galp and offered the sum of E1 million in order for the construction to proceed as applicant was desirous to trade without any hindrances after all applicants had paid for the goodwill of the business as well.

[68] This sum of E1 million was used to finance the construction at Sakhula site. It was agreed between the parties that the applicants would recover the sum of E1 million by respondent deducting rentals from it. The anticipated period was nine years eleven months.

[69] It is, in all honesty gross miscarriage of justice for a person who: (i) was found running a business as a going concern with a lease agreement under its name; (ii) after paying for the same, an amount of E5.5 million and I must emphasis that this is a very significant amount

by our standard; (iii), where respondent takes over from Shell (Pty) Ltd and is expected to do construction in order to change the face of the business from Shell to Galp outlook, fails to do so for reasons not attributed to the first applicants; (iv) the first applicant then foot the bill for construction so that the business complies with Galp specifications; is suddenly told within a short period (three years) to pack and go. Total disregard is paid to its investment. Surely, applicants in the eyes of justice, are entitled to enjoy the fruit of their toil (investment).

[70] I must end by pointing out that this sense of justice did not only operate in the mind of respondent as I have demonstrated above,[37] as it appreciated from the onset that respondent ought to recoup its investment, but also in my brother who wrote the majority judgment. I say this because, in his judgment, he repeatedly called for the parties to go back to the negotiation table and he wisely concludes:

> *"It is in the interest of both parties that they should pursue this option which will enable the applicants to reorganise their business having regard to the relationship"*

37

[71] I must point out our a*xiom, "Justice should not only be done but should manifestly and undoubtedly be seen to be done."*[38] *In casu*, justice can best be seen to be done by upholding the interpretation to their term of contract, clause 6.1 which was operating in all parties' mind at each time they set to conclude the two sets of the contracts. This is that they intended their agreement to bind them for a period equivalent to the lease agreement.

[72] In the above circumstances, I hereby make the following order:

1. The Applicants application succeeds.

2. The Judgment of the Supreme Court is in this regard set aside in its entirety and substituted with the following one;

    2.1 The Franchise Agreement between the Applicants and the Respondent, forming the subject of these proceedings is declared to be in force and to be

[38] The Chairman of the Liquor Licensing Board v Joshua Mkhonta & 3 Others 01/2013 at page 15

terminable when the Galp Property Lease Agreement between the Respondent and the Landlord in each such situation terminates.

3. The Respondent's counter application be and is hereby dismissed.

4. Each party is to pay its own costs.

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M. DLAMINI
ACTING JUDGE OF APPEAL

I agree

_____

S. B. MAPHALALA
ACTING JUDGE OF APPEAL

I agree

N. J. HLOPHE
ACTING JUDGE OF APPEAL