IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **CASE NO.:26/2021 REVIEW**

In the matter between:

ESPERANZA INVESTMENTS (PTY) LTD	**Applicant**

And

FLORENCE FALABO BENNETT N.O.	1st Respondent
EUNICE BENNET N.O.	2nd Respondent
PUMA ENERGY ESWATINI (PTY) LTD	3rd Respondent
THE NATIONAL COMMISSIONER OF ROYAL ESWATINI POLICE SERVICES (MANZINI DISTRICT) N.O.	4th Respondent
THE ATTORNEY GENERAL N.O.	5th Respondent

In re:

ESPERANZA INVESTMENTS (PTY) LTD	Appellant

And

FLORENCE FALABO BENNETT N.O.	1st Respondent

EUNICE BENNET N.O. 2nd Respondent

PUMA ENERGY ESWATINI (PTY) LTD 3rd Respondent

THE NATIONAL COMMISSIONER OF ROYAL

ESWATINI POLICE SERVICES (MANZINI DISTRICT) N.O. 4th Respondent

THE ATTORNEY GENERAL N.O. 5th Respondent

Neutral citation: *Esperanza Investments v Florence Falabo Benett N.O. 4 Others (CIV/REVIEW 26/2021) [2022] SZSC 03 (28th March 2022)*

CORAM: **S.B. MAPHALALA JA**

S.J.K. MATSEBULA JA

S.M. MASUKU AJA

M.J. MANZINI AJA

M.M. VILAKATI AJA

Date Heard: 17th February 2022

Date Delivered: 28th March 2022

Summary

Review – lease – Renewal of lease with an option to review – issue whether or not the Supreme Court on appeal eschewed the determination of a legal issue it was called upon to determine. Whether or not Clause 4.2 of the lease

relating to rent was unenforceable, void and of no force and effect. Further if clause 4.2 is severed from the entire lease, would the remainder of the lease be still on the same terms applicable at the initial period

Considered – condonation for late filing of Court process in the review application allowed.

Held: *legal issue is new matter not raised earlier in the High Court and Court of Appeal, unfair to Respondents to deal with a material legal issue for the first time on review – review application should fail.*

Held further: *that Applicant has failed to establish exceptional circumstances of the case that has occasioned a gross miscarriage of justice as perimeters under Section 148 (2) – application fails.*

On Respondent's counter-application for illiquid damages by way of motion against the Applicant. Held that counter-application raised for the first time on review, not competent and stands to be withdrawn by the 1st and 2nd Respondents.

Accordingly, application dismissed, decision of the Supreme Court on appeal upheld with minor adjustments on the eviction stay.

JUDGMENT

MASUKU AJA

[1] The Applicant (Esperanza) in the present review proceedings has received and archived unfavourable judgments since the genesis of its litigation against the Executrix and Trustee of the late Ben Gregory Bennett the 1st and 2nd Respondents (the Respondents) in the dispute. The dispute is however of commercial nature wherein the Respondents in *casu* moved the High Court for a re-possessory relief in their favour as the landlord of Esperanza claiming that its tenancy had been terminated on the leased premises, a business centre comprising a shop and a fuel filling station. The Respondents successfully obtained orders for ejectment of Esperanza from its occupation per Mlangeni J. at the High Court.

[2] Esperenza brought the matter on appeal before the Supreme Court and wherein its appeal was dismissed. The Appeal Court ordered the ejectment and eviction of Esperanza from the premises known as

Luve Filling Station with immediate effect but stayed the effect of eviction order (in its wisdom) for a period of 7 calendar days from date of that order to facilitate an orderly exist by Esperanza. The Supreme Court Judgment was delivered on 26th October 2021.

[3] As if it's a natural and automatic next-step, being dissatisfied with the Supreme Court Judgment, Esperanza filed the present Review Application in terms of Section 148 (2) of The Constitution (2005). It seeks orders from this Court to review its decision of the 26th October 2021.

Background

[4] By way of background, the dispute that came for determination at the High Court and the Supreme Court was on a landlord and tenant written lease in respect of the business premises known as Luve Supermarket and Filling Station. The terms of the initial period of the

lease in question came to an end, Esperanza had an option to renew the lease for a further period of three (3) years. The dispute in the matter was over the purported exercise of the option by Esperanza. The question at the High Court and on appeal was whether or not the Respondents could pre-empt the exercise of the option to review by notifying Esperanza that it did not intend to renew the lease and whether or not the effect of Esperanza's exercise of that option to renew notwithstanding the Respondent's pre-emptive action had the effect of creating and extending the lease agreement.

The Review Application

[5] On the 3rd November 2021 after the Supreme Court of appeal judgment, Esperanza brought the Review Application in terms of Section 148 (2) of The Constitution (2005) where it seeks this Court to review, correct and or set aside the judgment of the Supreme Court on appeal and replace it with an order allowing the appeal. It

also in the same prayer seeks an order setting aside the judgment of the High Court with costs.

Condonation for the late filing of Court process in the Supreme Court for the Review Application.

[6] On the 4th November 2021 His Lordship M.J. Dlamini JA granted an order in favour of Experanza staying the execution of the Supreme Court Order pending the determination of the review. By consent of the parties, the matter was referred to the Registrar of the Supreme Court to liaise with the Honourable Chief Justice for the constitution of a full-bench, timelines and an early hearing date. This proposal apparently was not achieved.

[7] The net result is that the Court was informed by both Counsel that neither of the parties had timelines set nor was there an agreement to

guide the exchange of filing of the Heads of Argument, the Record and Book of Authorities.

[8] Both Counsel ended up filing applications for condonation of late filing of the Court process. Esperanza's Counsel brought his application under a certificate of urgency a day but one of the hearing date. Counsel for the Respondents brought his application on the eve of the of the review. Both applications were filed together with all the process sought to be condoned.

[9] At the hearing of the matter both Counsel informed the Court that they had consulted each other regarding the condonation applications and that they both did not oppose each other on their applications hence they wished to proceed on the merits.

[10] They were asked to briefly address the Court on these respective applications. It has been the practice in our jurisdiction that condonation applications for late filing are not taken lightly. The Supreme Court on appeal in our jurisdiction has pointed out that the position is trite that whether the papers before Court on condonation and extension of time for filing is opposed or not, it remains a legal obligation on the part of the Court to determine if the papers meet the legal requirements for the relief sought. See: **Slomoes Corporation (Pty) Ltd v Bongani S. Dlamini N.O. and Others (78/2020) [2021] SZSC 33 (15 September 2021) at paragraph 8 page 5** , In that case the Respondent's Counsel had not opposed an application for condonation and extending the time frames for filing heads of argument by the applicant's Counsel. The Respondent's Counsel submitted at the hearing of the appeal that his client did not oppose and wished for the appeal to be determined without delay.

[11] The Court continued to analyze the applicable rules and how they have been applied in numerous appeal judgments and cited the judgment of the Supreme Court written by His Lordship Dr. Odoki in **Nokuthula Mthembu and Four Others v The Ministry of Housing and Another (94/2017) [2018] 30/05/2018** that sets out the requirements to be met in order for an application for condonation to succeed:-

"(a) That as soon as a party becomes aware of non-compliance with the rules she or he must immediately take steps to remedy such by way of application;

….

(d) That the Court in granting or denying the relief sought ought to consider prejudice likely to be suffered by the innocent party and the importance of the case.

[12] In the **Slomoes Corporation** case *(supra)* at paragraph [25] the Court found that not all the requirements for the condonation application had been satisfied by the third Respondent, the Court however, *mero mutu* condoned the late filing of the third Respondent's heads and bundle of authorities. It did however caution that the condonation ought not be construed as a departure from the now settled principles established on condonation and extension of time frames for filing of heads of argument and any other process so required.

[13] The Court went on to state that it took the following factors into account to condone the late filing: that the application for condonation was not opposed, the degree of lateness (3) days was relatively short, the seriousness of the matter in view of its commercial implications and that the Applicant will not suffer any prejudice as a

result of the order. The heads of argument and bundle of authorities were filed already.

[14] In *casu*, the Court is being mindful of the fact that the **Slomoes Corporation** case was a case on appeal which is well guided by Rule 16 and 17 of the Appeal Court Rules. It is a well-known fact that there are no rules governing reviews published as yet, but this Court has developed and is still developing the jurisprudence in this regard pending the promulgation of the rules, an exercise that is long overdue.

[15] When this Court was called upon in open Court to condone the very late applications by both Counsel, it turned out that none of them opposed the requests against each other, their applications were both filed within the shortest possible time upon realizing their lateness, all

bundles including their heads of argument had been filed and the Court had read the papers.

[16] The Court for reasons as set out above condoned parties for the late filing of the heads of argument, record of proceedings and bundle of authorities. The condonation was granted despite the shortcomings manifested in the papers. These are the reasons for the condonation order.

Issues determined by the Supreme Court on Appeal.

[17] It should be helpful to briefly capture what the issues were first at the High Court and later at the Supreme Court of appeal before dealing with the grounds upon which Esperanza seeks to review the judgment of the Supreme Court on Appeal.

[18] Before the High Court, Esperanza unsuccessfully resisted an ejectment application by the Respondents who claimed a re-possessory relief as landlords on the basis that the tenancy had been terminated. The Respondent claimed that the lease agreement between the parties that ran from 1st April 2016 to 31st March 2021 with an option to review for a further period of three (3) years has lapsed. The option to review the lease vested with the lessee exercisable by written notice no less than two (2) months prior to the expiry of the initial period. The Respondents had pre-empted the option clause by sending a letter that purported Esperanza to exercise its option to renew wherein they communicated that they will not renew the lease at the end of its initial period. The written communication was sent before the date on which Esperanza could exercise its option to renew the lease.

[19] The High Court examined the validity of the Respondent's letter and interpreted it as preventing Esperanza from exercising its option and held that the lease agreement did not provide for a situation in which the lessor can pre-emptively inform the lessee that it will not review the lease. The Court went on to enquire on whether or not the Esperanza's letter exercising its option to renew sent to the lessor created a valid lease agreement between the parties. The Court *inter alia* examined Clause 3 (option to renew) extensively and concluded that in the absence of an agreement on the amount of rental there is no lease agreement and in the absence of some other bases upon which the right of occupation may be claimed by Esperanza, it was liable to be evicted.

[20] The renewal clause of the agreement examined was couched in the following terms:-

> *"3. Options*

3.1 The tenant shall have an option to renew the lease of the premises for a further period of three (3) years from the termination of the initial period.

3.2 The tenant shall exercise the option by written notice to the Landlord not less than two (2) months prior to the expiry of the initial period. Such notice shall be given to the Landlord at its domicilium citandi et executandi, for the time being.

3.3 The option shall be upon the same terms and conditions as are set out herein, save that there shall be no further option to renew.

3.4 It the Tenant does not exercise any option as provided in this clause, then its right to do so shall lapse."

[21] Dissatisfied with the High Court judgment Esperanza appealed to the Supreme Court. The Appellant *inter alia* challenging that the *Court a qou* erred in law and in fact to have rejected that its lease was

renewed by the exercise of its option to renew in terms of Clause 3 of the lease.

[22] The Appeal Court extensively dealt with the option to review clause of the agreement (Clause 3) and Clause 4.1 and 4.2 which it said in its analysis it related to the rentals and also impacted on the question of renewal of the lease agreement in law.

[23] Clause 4.1 and 4.2 of the lease were couched in the following terms:-

"4. <u>Rental</u>

4.1 The monthly rental payable by the Tenant to the Landlord shall be E15 000.00 (Fifteen Thousand Emalangeni) per month during the initial period.

4.2 The rental to be paid by the tenant to the Landlord during the options period shall be the amount agreed upon between the parties, provided that if they are unable to agree one month before the commencement of the option period concerned the Tenant shall be deemed not to have exercised the option."

[24] The Court confirmed the High Court's decision that an option to renew a lease which does not specify the rent but stipulates that the lease will be renewable at a rent to be agreed upon, will not result in a lease because agreement on rent is an essential element of a lease and until agreement has been reached on it, no lease is concluded. The conclusion of the Court was therefore that in *casu* in the absence of an agreement on the rental amount there was no lease agreement.

[25] Esperanza's application grounds for review of the judgment of the Appeal Court are best captured as follows:-

25.1 that the Supreme Court eschewed the determination of the legal issue it was called to determine and that was whether Clause 4.2 of the lease agreement was unenforceable, void and of no force and effect. Severable from the entire lease to the extent that Esperanza had duly exercised the option to renew the lease on the same terms applicable as in the initial period;

25.2 That the Supreme Court did not apply itself to this legal issue for which if it had it would have come to a different conclusion. Nothing in the judgment of the Court addresses the legal issue inspite of it being encapsulated in ground 2 the Notice of Appeal.

25.3 That the judgment creates bad law. The clauses should have been interpreted in context as a whole to determine the amount of rental payable during the option period regard being had to Clause 4.2 of the agreement;

25.4 That the Supreme Court failed to develop the common law of contract, particularly of options in leases and also failed to develop the law of interpretation of agreements instead it took a narrow and simplistic approach which did not resolve the legal issue between the parties *viz* enforceability of Clause 4.2.

[26] It should be mentioned that a considerable amount of effort had to be taken by the Court to appreciate concisely the grounds for the review, regard being had to the fact that it had to be gathered not only from

the founding affidavit but also from the Esperanza's condonation application, the heads of argument and the replying affidavit.

[27] Whilst the founding affidavit criticized the Supreme Court to have eschewed the interpretation of Clause 4.2 of the lease causing bad law, the heads of argument says the Supreme Court's failure to determine the legal issue resulted in the Court reaching a wrong decision. The condonation application says failure to resolve all legal issues resulted in an error of law by the Court culminating in injustice to Esperenza. The prolix gives an undeserving impression that Esperenza was hard pressed to find the basis on which to ground the review.

[28] Esperenza went on to say the circumstances cited above presents a procedural error resulting in error or law on the part of the Supreme Court culminating in gross injustice to the Applicant.

[29] At the very start of Esperanza's argument in Court, Counsel was asked if the legal issue that he said was at the centre of the legal dispute was ever raised at the Court of Appeal and at the High Court.

[30] Although the answer from Esperanza's Counsel was in the affirmative to the extent of identifying paragraph 2 of notice of appeal to support his submission, it is not however, the case if one looks closely at notice of appeal. The Esperanza's appeal was that the High Court erred in failing to find that the option to renew the lease exercised by Esperanza in terms of Clause 3 of the lease did not renew the lease. Nothing more can be read to suggest that the said "legal issue" in Clause 4.2 as articulated in the review proceedings was raised and canvassed the way it has been so vehemently covered before this Court.

[31] The Court has neither benefitted from a reference to a transcript of the Supreme Court proceedings nor the heads of argument from the parties at Court. The Supreme Court judgment and the High Court judgment dealt with Clause 3 and 4 of the lease agreement. The Court's approach was not whether or not Clause 4.2 was couched in a way that it frustrated the lessee' s option in Clause 3. The Court was never requested to consider the validity or otherwise of Clause 4.2 or its sever-ability.

[32] The High Court and Appeal Court's approach on Clause 3 and 4.2 related to rentals during the option period, that it had to be agreed upon before one can talk of a renewal of the lease agreement. It said because there cannot be a lease agreement without an agreement on the rental amount, the rental was an essential element of the lease agreement.

[33] Counsel for Esperanza got the opportunity to argue the “legal issue” of Clause 4.2 before this Court citing the authority in **Hugo, Kirsten & Kirsten (Pty) Ltd and Collotype Labels (Pty) Ltd (323/2019) [2020] ZASCA 21 (2nd March 2020)**. In that case the lease agreement contained clauses providing for negotiation of new lease on expiry of current lease. Clause 3 of that lease gave the lessee Collotype the first option to renew the lease subject to the fulfilment of certain obligations of the agreement and a new rental agreement, acceptable to the lessor.

[34] In the Court below (the **Hugo Case** *supra*) Langa AJ had taken the view that Clause 3 created an option and that because, the exercise of the option was dependent on the acceptance of the renewal by lessor it was void for vagueness. He found that, Clause 3 being an option, was an essential term of the lease and that, in the absence of Clause 3, Collotype would not have concluded the lease at all. For

these reasons His Lordship concluded that Clause 3 was not severable from the remainder of the lease, with the result that the whole lease agreement was void as a consequence of the void renewal option Clause.

[35] The Supreme Court in the **Hugo** case *(supra)* held a different view from that of **Langa AJ** to say Clause 3 in which the duration of the lease was stipulated speaks to Collotype being given a “first option” to lease the premises for a further period of 10 years but that “right” is made subject to conditions. Considered holistically, the Court held that what the parties intended in that case was not an option to a binding agreement subsidiary to the lease agreement to keep open an offer to renew the lease – despite the use of the word “option” in the clause. Instead, they put in place a mechanism to regulate the negotiation of a new lease shortly before the expiry of the current lease, if that is what Collotype wished to do. In this sense (The Court

continued) Clause 3 is akin to a right of pre-emption. It purported to give Collotype a “right” to a preference over other potential lessees.

[36] The Court in *casu* pointed out to Esperanza’s Counsel that, the **Hugo** case *(supra)* was distinguishable to the one in *casu* and in any event even if these were important points of law at play it was not appropriate that they be raised at the apex Court of review without the due opportunity of being raised and dealt with at the High Court and Supreme Court of Appeal. The Respondent’s Counsel could not deny the Court’s reasoning.

[37] **Can the legal issue be allowed on review if it was raised for the first time on Review?**

[38] This Court dealt with this question both in the minority judgment of **Dr. Odoki JA** and the majority judgment of **M. Dlamini AJA** albeit coming to different conclusions. In the Supreme Court case of **NUR & SAM (Pty) Ltd t/a Big Tree Filling Station and Others v Galp Swaziland (13/2015) [2015] SZSC 40 (9th December 2015). Dr. B.J. Odoki JA** faced with a situation where he had to enquire whether or not a second ground upon which review was sought had resulted in the arbitrary deprivation of applicant's right to property in contravention with Section 19 of The Constitution at paragraph [98] had this to say:-

> *"Even if the section applied and 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 proceedings when the applicants had opportunity to do so. It would be unfair for the Respondent to face a new case on review which the applicants could have raised in earlier proceedings."*

[39] Reading Dr. Odoki's reasoning in *obiter*, the urge exists to readily accept it but there is always the other side of the coin when one reads the majority judgment of **M. Dlamini AJA** on the same question.

[40] Justice **M. Dlamini AJA** allowed the points of law raised on appeal because they were no material disputes of facts, the matter turned around the interpretation of Clause 6.1 (in that case) and that they were "placed" in their heads.

[41] The Court referred to Mr. Justice **Ngcobo J** (as he then was)in the South African case **Barend Petrus Barkhuizer v Nappier 2007 (5) SA (CC); [2007] ZACC 5 (4th April 2007) at paragraph 39**:-

"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."

[42] **Galgut AJA** in the case of **The Bank of Lisbon and South Africa Ltd v The Master and Others 1987 (1) SA at 270 at 290** stated that:-

"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 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 appeal can deal with it."(underlining ours)

[43] In *casu*, it does not appear that this point was ever raised in the pleadings at the High Court and on the Notice of Appeal at the Supreme Court despite Applicant's Counsel saying so. It is raised for the first time in Esperanza's Founding Affidavit, the condonation application, the Heads of Argument and the Replying Affidavit.

[44] Should we agree that it was an important legal issue to be considered then all the reasons it deserved to be raised at the earlier Courts and not before this Court on review. It would also be unfair to the Respondents to deal with a material legal issue raised for the first time on review. The Supreme Court sitting on a review Court is

understandably reviewing issues and conclusions that have been canvassed by an earlier Court and cannot review new matters.

[45] The Court therefore holds that the legal issue is a new matter which was not raised earlier in the proceedings when Esperanza had the opportunity to do so. It would be unfair for the Respondents to face a new case on review at the apex Court in the hierarchy of our jurisdiction giving the parties no room to manoeuvre the legal issue further. The review ought to fail on this ground alone.

[46] Esperanza further contends that the alleged failure by the Appeal Court to determine the legal issue in Clause 4.2 resulted in the Court reaching a *wrong decision* which impugned the Applicant's right to a fair hearing. The Respondents' counter argument in the totality of the grounds advanced by Esperanza, is that it has failed to exhibit on a balance of probabilities any gross or manifest injustice committed by

the Supreme Court. That the purported review application is actually an appeal disguised as a review.

The Review Jurisdiction

[47] The review jurisdiction of this Court has been considered in a number of cases by this Court. The case of **President Street Properties v Maxwell Uchechukwu & 4 Others** where the Court affirmed its powers of review and has set out the parameters under Section 148 (2) of The Constitution (2005). Other frequently cited cases of this Court include:- **Dallas Busani Dlamini and Another v Commissioner of Police (39/2014) [2014] SZSC 68 (3 December 2014; Swaziland Revenue Authority v Impunzi Wholesalers (Pty) Ltd (06/2015) [2015] SZSC 06 (09 December 2015); The Weekend Observer (Pty) Ltd and 2 Others v Sipho Makhabane (100/20178) [2019] SZSC 39 (25/11/29 2019)**

[48] A browse through the decisions reveals that it is not a jurisdiction that would readily be exercised except in exceptional circumstances, where the exercise is extremely necessary to avoid immediate harm to the Applicant **(Dr. Odoki at paragraph [20] of the NUR & Sons (Pty) Ltd (supra).)**

[49] There has been extreme caution against the exercise of the jurisdiction simple to give an opportunity for a second bite at a cherry. This is not what the review jurisdiction is for. In this regard Justice **M. J. Dlamini AJA** (as he then was) in the **President Street Properties case (supra) paragraph [22]** cited the Ghanaian constitutional review power of the Supreme Court of Ghana where **Wiredu JSC** observed in **Nyanemekye (No. 2) v Opuku [2002 55 GLR 567 at 570**:-

'…the review jurisdiction of the Court, being special, will not and must not, be exercised merely because Counsel for the applicant refines his appellate statement of the case, or thinks-up more ingenious argument which he believes might have favoured the applicant had they been so presented in the appeal hearing. An opportunity for a second bite at the cherry is not the purpose for which the Court was given the powers of review ***(Yebisi pg 43)****; and "Thus, the review jurisdiction is to be called in and in exceptional circumstances where justice, for which the Court exist, will be sacrificed if the decision is not reviewed* ***(Yebisi pg 45)***

[50] At paragraph [37] of the **President Street** judgment, His Lordship Dlamini M went on to cite **Adade JSC** also of the same Supreme Court of Ghana on Article 133 where he issued warning on the exercise of the review jurisdiction:-

*"the mere fact that a judgment can be criticized is no ground for asking that it should be reviewed. The review jurisdiction is a special jurisdiction to be exercised with exceptional circumstances. It is a kind of jurisdiction held in reserve, to be prayed in and in exceptional situation where fundamental and basic error may have inadvertently been committed by the Court which error must have occasioned a gross miscarriage of Justice. The review jurisdiction is not intended as a try-on by a party after losing… nor is it an automatic next step…, neither is it meant to be resorted to as an emotional to an unfavourable judgment" (**Mechanical Lloyd v Norty (1987-88) 2 GLR 598 (Yebisi, pg 43)'.***

[51] The judicial statement cited above resonates quite well with Esperanza's Counsel call at the hearing that the Court should "think out of the box". Esperanza's assertions on the interpretation of Clause 4.2 became live for the first time in the Founding Affidavit and cemented on reply. It was brought through in such an ingenious

thought to favour Esperanza at the review stage an attempt to give Esperanza an opportunity for a second bite to the cherry as it were. The argument presented was touted to show that the Supreme Court has created a bad precedent in law hence it ought to be reviewed. This is far-cry attempt to demonstrate exceptional circumstances that has occasioned a gross miscarriage of justice to Esperanza. It must fail.

Was there an error of judgment on the part of the Supreme Court?

[52] Esperanza argued that the purported failure of the Supreme Court to deal with Clause 4.2 resulted in procedural error of judgment that culminated in gross injustice to it. Esperanza went on to say that the Court's failure resulted in the Court reaching a **wrong decision**.

[53] The end result or conclusion made by Esperanza is untenable in review proceedings. Procedural error or error in judgment *viz a viz* wrong decision are mutually exclusive.

[54] A further discussion on the subject matter is not however warranted any further in this judgment as it has been pointed out earlier that the Applicant has not made the cut for the review application.

[55] Suffices to observe the following statement by **Professor Cora Hoexter** in the book *ADMINISTRATIVE LAW IN SOUTH AFRICA 1st Edition at page 252*, she says –

> *'…the traditional distinction between legality and merits, or process and rule-stance, mean that it is not the function of the Court or review to ask whether the administrator was "right" or*

“wrong” in its conclusions, but only whether the conclusion was arrived at in an acceptable manner.”

The Respondent’s Counter Application

[56] Late in the day of the review proceedings and for the first time in the proceedings, the Respondents filed a counter application. In essence the Respondents said in the event the review is dismissed, Esperanza should indemnify the Respondents of all claims for standing time by the contractor for demolishing the existing structure at Luve Filling Station.

[57] The claim is for the sum of E726 665.55 (Emalangeni Seven Hundred and Twenty Six Thousand, Six Hundred and Sixty Five, Fifty Five cents) which had apparently been demanded way back in November 2021 by the contractor (a certain Sam mbela Construction (Proprietory) Ltd against the Respondents.

[58] Esperanza objected to the counter-claim submitting that this Court has no jurisdiction to hear and determine the claim as it is not a Court of first instance. The claim is also not competent by way of motion proceedings as it is an illiquid amount in damages so the argument went.

[59] When Counsel for the Respondents was quizzed by the Court on whether or not the Respondents really believed in the success of the claim before this forum, Counsel was very wise to concede that a counter application raised for the first time on appeal is not desirable or cannot be entertained by the Court sitting as a review Court.

[60] We agree that the counter-application ought not to be entertained by this Court and it stands withdrawn by the Respondents with costs.

Costs

[61] Both parties prayed for punitive costs against each other but neither of the parties pursued the proposition justifying such costs on the papers and in argument. The costs for the condonation application if any are to be paid by each party and the costs for the review should follow the course at an ordinary scale.

Eviction order

[62] The parties were invited to make submission on the eviction orders, namely on the number of days on which to be given to Esperanza to vacate the premises if the application is dismissed. Esperanza prayed for 30 days whilst the Respondents sought to have the eviction orders enforced with immediate effect upon delivery of the judgment.

Conclusion

[63] Considering the facts, the law and the circumstances of the application before us as set-out above for the review and setting aside the judgment *a quo* we conclude that Esperanza has failed to satisfy the Court that this is a matter that is justifiable to exercise its review jurisdiction.

[64] Esperanza has failed to ground exceptional circumstances where a fundamental and basic error may have been inadvertently committed by the Supreme Court, which error must have occasioned a gross miscarriage of justice. The Court cannot assist Esperanza in resolving the unfavourable judgments handed down by the Supreme Court confirming the judgment of the High Court. The application is dismissed with costs.

[65] The Following orders are pronounced:

1. The application for review is dismissed;

2. The decision of the Supreme Court handed down on the 26th October 2021 is upheld;

3. The order ejecting Esperanza from the premises is upheld but only varied to the extent that is stayed for a period of 30 calendar days from date of service of this order upon Esperanza, after which Esperanza and all those holding title under be ejected from the premises known as Luve Filling Station and Supermarket

4. Each party to pay its own costs for the condonation application.

5. The 1st and 2nd Respondents are ordered to pay wasted costs for the withdrawn counter application.

6. Esperanza is ordered to pay costs for the review at an ordinary scale.

_____

S.M. MASUKU

AJA

I agree

_____

S.B. MAPHALALA

JA

I agree

_____

S.J.K. MATSEBULA

JA

I agree

_____

M.J. MANZINI

AJA

I also agree

_____

M.M. VILAKATI

AJA

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FOR THE APPLICANT: **M. NKOMONDZE OF NKOMONDZE ATTORNEYS**

FOR THE RESPONDENTS: **H.M. MDLADLA OF S.V. MDLADLA & ASSOCIATES**