CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 167/21

In the matter between:

MFOZA SERVICE STATION (PTY) LIMITED Applicant

and

ENGEN PETROLEUM LIMITED First Respondent

VINCENT MALEKA Second Respondent

Neutral citation:	*Mfoza Service Station (Pty) Ltd v Engen Petroleum Ltd and Another* [2023] ZACC 3
Coram:	Kollapen J, Madlanga J, Majiedt J, Mathopo J, Mhlantla J, Mlambo AJ, Theron J, Tshiqi J and Unterhalter AJ
Judgments:	Kollapen J (majority): [1] to [79] Mhlantla J (dissenting): [80] to [98]
Heard on:	17 May 2022
Decided on:	1 February 2023
Summary:	Petroleum Products Act 120 of 1977— section 12B(4)(a) — powers of an arbitrator — awarding of damages as a remedy

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Gauteng Local Division, Johannesburg):

1. Leave to appeal is granted.
2. The appeal is dismissed.
3. The applicant is to pay the costs of this appeal, including the costs of two counsel where so employed.

JUDGMENT

KOLLAPEN J (Majiedt J, Mathopo J, Theron J, Tshiqi J and Unterhalter AJ concurring):

Introduction

[1] This application raises the question whether damages are available as a remedy under section 12B(4)(a) of the Petroleum Products Act[1] (PPA). Section 12B(4)(a) of the PPA empowers an arbitrator in proceedings brought under that provision to determine whether petroleum wholesalers or retailers have engaged in unfair or unreasonable contractual practices and, if so, to "make such award as he or she deems necessary to correct such practice".

Background

[2] The applicant, Mfoza Service Station (Pty) Limited, conducts the business of a service station and entered into a lease agreement with the first respondent, Engen Petroleum Limited, a petroleum wholesaler which owns the premises from which Mfoza operated its petroleum retail business. The relationship between the parties was governed by the terms of the lease agreement, which has since come to an end. The provisions of section 12B of the PPA also find application as they introduce a standard of fairness and reasonableness into the contractual practices of the parties. Section 12B of the PPA provides:

> "(1) The Controller of Petroleum Products may on request by a licensed retailer alleging an unfair or unreasonable contractual practice by a licensed wholesaler, or *vice versa*, require, by notice in writing to the parties concerned, that the parties submit the matter to arbitration.

[1] 120 of 1977.

(2) An arbitration contemplated in subsection (1) shall be heard—

(a) by an arbitrator chosen by the parties concerned; and

(b) in accordance with the rules agreed between the parties.

(3) If the parties fail to reach an agreement regarding the arbitrator, or the applicable rules, within 14 days of receipt of the notice contemplated in subsection (1)—

(a) the Controller of Petroleum Products must upon notification of such failure, appoint a suitable person to act as arbitrator; and

(b) the arbitrator must determine the applicable rules.

(4) An arbitrator contemplated in subsection (2) or (3)—

(a) shall determine whether the alleged contractual practices concerned are unfair or unreasonable and, if so, shall make such award as he or she deems necessary to correct such practice; and

(b) shall determine whether the allegations giving rise to the arbitration were frivolous or capricious and, if so, shall make such award as he or she deems necessary to compensate any party affected by such allegations.

(5) Any award made by an arbitrator contemplated in this section shall be final and binding upon the parties."

[3] Following a dispute between the parties arising from allegations by Mfoza that it had suffered damages because Engen had breached the lease agreement, the Controller of Petroleum Products (Controller) directed that the parties submit their dispute to arbitration. The Controller concluded that the requirements for a referral to arbitration had been met and referred the matter to arbitration. All of the claims of Mfoza in the arbitration were pleaded as breach of contract claims, and the only relief sought was the payment of damages which related to alleged past loss of profit, loss of goodwill and loss of property value suffered as a result of the conduct of Engen.

[4] There is nothing in Mfoza's statement of claim that refers to conduct that would constitute unfair or unreasonable contractual practices. The second respondent (Arbitrator) also understood that what was before him, requiring determination, was an

objection by Engen that the claim of Mfoza was one for damages and that this was precluded by the PPA.

Findings by the Arbitrator

[5] Arbitration proceedings commenced, during which Engen raised three preliminary objections – only one of which is relevant in these proceedings. It objected to the monetary compensation sought by Mfoza on the basis that such relief amounted to a claim for damages. It said damages could not be awarded under the arbitral jurisdiction conferred upon the Arbitrator, in terms of section 12B(4)(a) of the PPA.

[6] The Arbitrator found that the dictum in *Business Zone SCA*,[2] that an award of damages was not competent under the remedial jurisdiction of section 12B(4), was not a proposition of universal application. He determined that a finding of an unreasonable or unfair contractual practice arising from a contract may well be corrected by way of monetary compensation.

[7] He also found that the scope of an arbitrator's power to make a corrective award in terms of section 12B(4)(a) is formulated in general terms, namely, an award which "he or she deems necessary to correct such [unfair or unreasonable contractual] practice". The Arbitrator took the view that this included having resort to a range of corrective measures. He sought to place reliance on the dictum in *Bright Idea*[3] in relation to section 12(4)(a) that—

> "[a] push-pull tension between freedom and constraint similar to subsection (4)(a) is also built into subsection 4(b). The arbitrator's apparently wide power to 'compensate any party' is restricted to 'frivolous or capricious' allegations and only against those who make them to give rise to the arbitration. An arbitrator is expressly allowed to impose a compensation award against a party for frivolous or capricious referrals. *In*

[2] *Engen Petroleum Limited v The Business Zone 1010 CC t/a Emmarentia Convenience Centre* [2015] ZASCA 176.

[3] *Bright Idea Projects 66 (Pty) Ltd v Former Way Trade and Invest (Pty) Ltd t/a Premier Service Station* 2018 (6) SA 86 (KZP).

> *the absence of any similar power to award compensation as a substantive remedy for unfair or unreasonable contractual practices, it would be a matter of interpretation of the PPA and the facts of a particular case, whether an award of compensation would be an effective remedy to correct a practice. This is confirmed in the Constitutional Court's holding that 'the arbitrator's remedial powers can go no further than correcting the contractual practice in question."*[4] (Emphasis added).

[8] He said that section 12B(4)(a) was to be interpreted to reflect a purposive and workable interpretation of the arbitral powers vested upon an arbitrator and that those would include the power to award compensation.

[9] The Arbitrator also found that there is no prohibition to be found in section 12B against making an award for monetary compensation for the purpose of correcting an unreasonable or unfair contractual practice. He found that there is no justification or logic in excluding an award for compensation which has a logical connection to, and represents a proportional redress against, an offending contractual practice.

[10] In dealing with the dictum of *Business Zone SCA* which was relied on by Engen, the Arbitrator said that our law distinguished between a monetary award resulting from a cause of action founded upon a contractual or delictual claim for damages, and other forms of monetary compensation arising from a different cause of action. He explained that just and equitable compensation, expressly provided for in the labour dispute adjudication of unfair labour practices, is not expressly prohibited under the open-ended corrective remedial powers of an arbitrator under section 12B(4)(a) of the PPA. He found that this is implied from the express terms of the powers of an arbitrator in section 12B(4)(a) of the PPA.

[11] In his award, the Arbitrator concluded that, as a matter of principle, there was no bar to an award for monetary compensation being made which arose out of an unfair or unreasonable contractual practice. He found that he had the power, under the broad

[4] Id at para 33.

rubric of monetary compensation, to award damages as well as other forms of compensation. He dismissed the preliminary objection.

Litigation history

High Court

[12] Engen asked the High Court of South Africa, Gauteng Local Division, Johannesburg, to review and set aside the award on the basis that the Arbitrator committed a material error of law which constituted a gross irregularity, in that he exceeded his powers as contemplated by section 33 of the Arbitration Act.[5] The High Court's stance was that the Arbitrator incorrectly interpreted the provisions of section 12B(4)(a) of the PPA to confer a right upon Mfoza to claim patrimonial damages.[6] It said that the Supreme Court of Appeal and the Constitutional Court have held that the jurisdiction conferred in terms of section 12B(4)(a) is corrective.[7] It relied on the view taken by the Supreme Court of Appeal in *Business Zone SCA* that an award of damages is not competent under the corrective remedial jurisdiction, but only under a compensatory remedial jurisdiction.[8] As such, the relief sought by Mfoza did not fall within the corrective remedial jurisdiction of the Arbitrator.[9]

[13] The High Court went further to hold that the Arbitrator was confined by legislation to the powers that the statute conferred.[10] Consequently, it held that an arbitrator acting under the statue cannot award relief beyond the scope of what the courts have held that the statute permits, as this is the essence of the rule of law.[11]

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[5] 42 of 1965.

[6] *Engen Petroleum Limited v Mfoza Service Station (Pty) Limited*, unreported judgment of the High Court of South Africa, Gauteng Local Division, Johannesburg, Case No 2019/17400 (5 October 2020) (High Court judgment) at para 23.

[7] Id at para 24.

[8] Id.

[9] Id.

[10] Id at para 23.

[11] Id.

[14] The High Court explained that the aim of section 12B(4)(a) was to address the unequal bargaining power between parties, being a wholesaler and a licensed retailer.[12] It authorised corrective remedial action prospectively, and as such past wrongs could not be addressed in the form of a damages award. It explained that Engen could be directed to amend its ways in the future.[13] However, the statute under which the arbitration was convened, and from which the Arbitrator derived his powers to grant the specific relief, does not permit damages claims for past wrongs.[14]

[15] The Court found that the Arbitrator exceeded his powers as contemplated in section 33(1)(b) of the Arbitration Act and set aside the award.[15] It found that damages were not available as a remedy under section 12B(4)(a) of the PPA and that the Arbitrator was confined to determining his jurisdiction on the case pleaded and not on a case that was not before him. The latter was a reference to the forms of compensation other than damages that the Arbitrator made reference to and which the High Court said was not before him. The High Court further directed Mfoza to amend its statement of case to remove the claim for patrimonial damages.

Leave to appeal in the High Court

[16] Mfoza applied for leave to appeal against the High Court order and judgment. The High Court was however not persuaded that another court might come to a different conclusion and the application for leave to appeal was dismissed with costs.

Supreme Court of Appeal

[17] On 16 March 2021, Mfoza filed an application for leave to appeal with the Supreme Court of Appeal. The application was dismissed with costs on the grounds

[12] Id at para 26.

[13] Id at para 32.

[14] Id.

[15] Id at para 39.

that there were no reasonable prospects of success and there was no other compelling reason why an appeal should be heard.

In this Court

Mfoza's submissions

[18] In respect of jurisdiction, Mfoza submits that this application raises both constitutional issues, as well as an arguable point of law of general public importance. Mfoza submits that constitutional issues arise from the following: (a) the correct interpretation and ambit of a public power – an arbitrator's statutory power; (b) the confirmation or setting aside of an arbitration award implicating the administration of justice; and (c) the transformational aspects of the PPA that seek to give effect to the right to equality located in section 9 of the Constitution as well as the nature of the corrective powers of an arbitrator appointed to promote that purpose.

[19] The arguable point of law of general public importance is whether damages or compensation are competent awards under section 12B(4)(a) of the PPA. The proper interpretation of section 12B(4)(a) is an arguable point of law whose determination transcends the interests of the parties as it has implications for the petroleum industry as a whole. Mfoza submits that its prospects of success are good and that the public interest that the matter raises leads to the conclusion that the interests of justice favour the granting of leave to appeal.

[20] On the merits, Mfoza says that the restrictive interpretation of section 12B(4)(a) by the Supreme Court of Appeal in *Business Zone SCA*[16] is incorrect in that—

(a) the award of damages or compensation falls within the settled core of corrective justice and a corrective jurisdiction. The Arbitrator's corrective jurisdiction includes, but is not limited to, the competence to award damages or compensation;

[16] *Business Zone SCA* above n 2.

(b) interpreting section 12B(4)(a) as empowering an arbitrator to award patrimonial damages or compensation to correct an unfair or unreasonable practice accords with the transformational purpose of the PPA, which includes addressing unequal bargaining power in the industry; and

(c) the general competence to make any award so as to correct an unfair or unreasonable practice is framed in broad and open-ended terms. Section 12B(4)(a) confers upon an arbitrator "wide remedial power", which does not exclude damages or compensation.

[21] Mfoza also submits that the use of the word "correct" should not be understood or interpreted narrowly to qualify or cut down the provision. The payment of compensation is amongst the awards that may be necessary to correct a party's wrongful - or, in the context of section 12B, unfair or unreasonable - practice. It says that in some instances compensation may, depending on the circumstances, be the only remedy available to correct the unfair or unreasonable contractual practice.

[22] Mfoza submits that the High Court had no power to substitute the award. To support this contention, Mfoza states that, unlike section 172(1)(b) of the Constitution and section 8 of the Promotion of Administrative Justice Act,[17] section 33(1) of the Arbitration Act does not give the court wide discretionary powers to order any just and equitable remedy. The section provides for only one remedy: setting aside. Therefore, the High Court's substitution of the award was not competent and also stands to be set aside.

Engen's submissions

[23] Engen submits that Mfoza's application for leave to appeal does not engage the jurisdiction of this Court. It submits that Mfoza does not seek to assert any constitutional right. In addition, it denies that there are good prospects of success and argues that it is not in the interests of justice to grant leave to appeal.

[17] 3 of 2000.

[24] It submits that a monetary award does not alter, let alone transform, the structure of the parties' relationship when they exercise their rights or carry out their duties – it does not correct the practice that has been submitted to the arbitrator. Engen submits that this interpretation is supported by the text of section 12B, its underlying purpose, and the statutory context. Furthermore, it is the interpretation which best gives effect to the spirit, purport and object of the Bill of Rights.

[25] Engen relies on *Business Zone SCA*, where the Supreme Court of Appeal distinguished between corrective remedial jurisdiction under section 12B(4)(a) and compensatory remedial jurisdiction under section 12B(4)(b), with the former operating only prospectively. It also says that in *Business Zone CC*,[18] this Court held that the act of cancellation could in itself constitute a contractual practice and that this was the only aspect of *Business Zone SCA* which was overturned. On that basis, Engen submits that this Court accepted as correct the fundamental distinction between corrective remedial jurisdiction under section 12B(4)(a) and compensatory remedial jurisdiction under section 12B(4)(b).

[26] In order to determine the scope of an arbitrator's power under section 12B(4)(a) of the PPA, Engen submits that when interpreting a statutory provision, the point of departure is that the words employed must be construed in accordance with their ordinary grammatical meaning. However, Engen further submits that the interpretative exercise must have regard to both purpose and context. Engen relies on the following principles, as set out in *Goedgeleen*:[19]

(a) Statutory provisions should always be interpreted purposively, which purpose can include the provisions' social and historical background.

[18] *Business Zone 1010 CC t/a Emmarentia Convenience Centre v Engen Petroleum Limited* [2017] ZACC 2; 2017 (6) BCLR 773 (CC).

[19] *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (6) SA 199 (CC); 2007 (10) BCLR 1027 (CC).

(b) The provisions must be contextualised, by situating them in the scheme of the statute as a whole.

(c) The provisions should not only be interpreted, where possible, consistently with the Constitution, but the interpretation that best does justice to the spirit of the Constitution should be preferred.[20]

[27] On that basis Engen argues that the ordinary, grammatical reading of the section, read with regard to both purpose and context, is that the scope of the arbitrator's remedial power extends to remedying or putting right the relationship between contracting parties. What must be corrected is the manner in which the parties exercise or enforce their respective contractual rights and duties. The purpose of the arbitrator's remedial power is limited to correcting an unfair or unreasonable practice.

[28] Engen says that Mfoza's complaint that the High Court exceeded its powers by substituting the award with its own order is misplaced. It says that the review application concerned a discrete legal question regarding the scope of an arbitrator's powers. Having found that the Arbitrator was wrong to dismiss the *in limine* objection, was the end of the matter, and the order of substitution arose out of the setting aside order and did not exceed the power of the High Court sourced in section 33(1)(b) of the Arbitration Act.

The issues

[29] The following issues require determination:

(a) Is the jurisdiction of this Court engaged?

(b) Should leave to appeal be granted?

(c) Does section 12B(4)(a) of the PPA empower an arbitrator to make an award of damages or compensation as part of a corrective award arising out of an unfair or unreasonable contractual practice?

[20] Id at para 53.

(d) If not, was the High Court's order of substitution a competent order falling within the competence of that Court?

Jurisdiction

[30] The application for leave to appeal engages the jurisdiction of this Court in that it raises a constitutional matter as well as an arguable point of law of general public importance. The power of an arbitrator constitutes the exercise of public power pursuant to empowering legislation – being the PPA – and the interpretation of the section raises a constitutional matter.[21] The need to pronounce on the scope of the arbitrator's power in terms of section 12B(4)(a) transcends the interests of the parties and implicates the interests of a significant part of the general public – this is also an arguable point of law of general public importance.[22] My view is that our jurisdiction is engaged.

Leave to appeal

[31] The interests of justice in relation to the proper understanding and interpretation of the PPA would benefit from certainty regarding the powers of an arbitrator in terms of section 12B of the PPA. There are also reasonable prospects of success which must mean that leave to appeal should be granted.[23]

The merits

The effect of section 12B on contractual practices in the petroleum industry

[32] Section 12B, in general terms, provides that a licensed retailer or wholesaler in the petroleum products industry may, upon alleging an unfair or unreasonable contractual practice by the other party, request the Controller to submit the matter to arbitration. The arbitrator must determine whether the alleged practice is unfair or

[21] *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 20.

[22] *Paulsen v Slip Knot Investments 777 (Pty) Ltd* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) at para 26.

[23] *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 12.

unreasonable, and in such event, is obliged to make an award he or she deems necessary to correct such practice.

[33] The section may be seen as novel but has been regarded as a necessary legislative intervention in the transformation of the petroleum industry. While this appeal focuses on the powers of the arbitrator, this Court in *Business Zone CC* said that the most significant innovation brought about by section 12B was the introduction of a standard of fairness and reasonableness.[24] That standard would apply in the adjudication of disputes in all such contracts, regardless of whether they are subject to statutory arbitration or litigation in court. In *Crompton*,[25] this Court described the creation of the arbitral mechanism in the PPA as an attempt by the Legislature to address the unequal bargaining power between wholesalers and retailers in the petroleum industry.[26] It also said that section 12B provides access to arbitration "which may otherwise not exist possibly due to the unequal bargaining position retailers *vis a vis* wholesalers find themselves in", and that a purposive interpretation of the section was required to give effect to this right.[27]

[34] Section 12B also operates against the backdrop of a contractual relationship between the parties that is subject to the equitable standard of fairness and reasonableness. To that extent, it is a far-reaching measure that seeks to achieve a necessary and transformative objective in the petroleum industry, but it is also a measure that brings with it its own challenges. This Court has in *Business Zone CC* said that there was—

[24] *Business Zone CC* above n 18 at para 48.

[25] *Crompton Street Motors CC t/a Wallers Garage Service Station v Bright Idea Projects 66 (Pty) Ltd t/a All Fuels* [2021] ZACC 24; 2022 (1) SA 317 (CC); 2021 (11) BCLR 1203 (CC).

[26] Id at para 42.

[27] Id. See also *Business Zone CC* above n 18 at para 58.

> "no reason why the specifics of the general standard of fairness and good faith in the common law of contract should not be given shape in the context of petroleum contracts, as is done in the context of labour or rental housing contracts."[28]

[35] Section 12B(1) is limited to allegations of unfair or unreasonable contractual *practices.*[29] An aggrieved party who does not allege unfairness or unreasonableness will not have access to the section 12B arbitral system.[30] It has been described as a low threshold, but is nevertheless one that must be met before a referral by the Controller to arbitration may take place. In these circumstances, a party seeking redress outside of an allegation of an unfair or unreasonable contractual practice will only have resort to a court and may not invoke the section 12B arbitral system.

[36] In addition, recourse to arbitration is not mandatory in the sense that an aggrieved party is not obliged to use it. The Controller's power to refer a matter to arbitration must be preceded by a request from a licensed retailer or wholesaler.[31] An aggrieved party may elect not to utilise the provisions of section 12B but to litigate in court. This Court has said that the arbitral system that section 12B creates does not oust the jurisdiction of the High Court but presents an additional route for licensed retailers and wholesalers alike to have their disputes adjudicated more quickly, within rules and processes of their own design.[32]

[37] In sum, the features of the section 12B arbitral system reflects a mechanism that is limited in its scope and application. It is confined to dealing only with contractual practices that are alleged to be unfair or unreasonable and then to correct those practices. The jurisdiction of the High Court is not ousted by section 12B, and what emerges are

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[28] *Business Zone CC* above n 18 at para 55.

[29] Emphasis added.

[30] *Business Zone CC* above n 18 at para 61.

[31] Section 12B(1) of the PPA.

[32] *Business Zone CC* above n 18 at para 58. Section 12B(2) of the PPA allows the parties to a section 12B arbitration to determine the rules in accordance with which the arbitration will be conducted as well as the choice of arbitrator before whom the arbitration will proceed.

parallel systems whose scope and reach may differ but share a common adjudicative standard. It is within this context that I proceed to deal with the interpretation of section 12B(4)(a).

The interpretation of section 12B(4)(a)

[38] *Business Zone CC* and *Crompton* dealt with various features of the system created by section 12B but were not required to deal with the interpretation of section 12B(4)(a).

[39] In *Cool Ideas*,[33] Majiedt AJ described the approach to statutory interpretation as follows:

> "A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely
>
> (a) that statutory provisions should always be interpreted purposively;
> (b) the relevant statutory provision must be properly contextualised; and
> (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a)."[34]

[40] Section 12B(4)(a) requires an arbitrator to establish whether the alleged contractual practices are unfair or unreasonable and, if so, to correct such practice by the making of an award. It follows that all that an arbitrator is required to do is to make a determination whether a contractual practice is unfair or unreasonable. There is no power nor requirement for the arbitrator to go beyond that and matters of fault, causation, loss, or damage fall outside of the enquiry. Once an arbitrator has made a determination that a contractual practice is unfair or unreasonable then the arbitrator has

[33] *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC).

[34] Id at para 28.

wide powers but they are confined to correcting the practice. One must therefore distinguish the limited nature of the determination that an arbitrator is required to make and the wide powers of redress following such a determination. The purpose of making the award is that it must be *necessary to correct such practice.*[35] The arbitration model is a creation of statute and the power of the arbitrator is derived from the PPA. It is a power that must be exercised within its lawful parameters and for the purpose it has been given.[36]

[41] It must follow that the award may go no further than correcting the practice. This is the ordinary meaning that the section must attract, and it was not in dispute before us that the remedial power of the arbitrator is limited to being a corrective one. The meaning of what it is to "correct a practice" is where the parties part ways.

[42] A related but important issue is whether the corrective power must also be applied within an ongoing contractual relationship between the parties. The argument is that if the parties' relationship has come to an end, then there was nothing to correct, and there can be no basis for a referral to arbitration by the Controller. This Court in *Business Zone CC* rejected the view that section 12B can only apply against the backdrop of an ongoing contractual relationship between the parties and held that even a single act of cancellation could amount to a contractual practice under section 12B(4)(a).[37] It said, however, that in such an event, the arbitrator's powers could extend to correcting the practice by setting aside the termination and reinstating the contract. So, it seems like the notion of "correction" finds application in the context of relationships that remain in existence - either in law or in fact. In both instances, the continued existence of the relationship would provide the basis for a corrective award where there continues to exist a practice that is subject to correction.

[35] Emphasis added.

[36] *Minister of Public Works v Haffejee N.O*. [1996] ZASCA 17; 1996 (3) SA 745 (SCA) at para 11.

[37] *Business Zone CC* above n 18 at para 76.

[43] It follows from this that section 12B is primarily concerned with relationships, and the need for such relationships to conform to the principles of fairness and reasonableness. Where either or both of those standards have been breached through an unfair or unreasonable practice, the objective of a remedial award must be to bring the relationship into conformity with the required standard by correcting the practice. The language of section 12B(4)(a) requires no more of an arbitrator than an award that would correct the practice. The correction that the section requires is that of a practice and a practice, in turn, is about what the parties are doing or perhaps not doing.

[44] The focus of the enquiry is therefore, not whether "correct" may have a wide or narrow meaning and may include damages but rather what is necessary to correct a practice with the emphasis being on *practice*. An award of compensation may address the consequences of an unfair or unreasonable practice but not necessarily conformity by a party with a standard of conduct which entails performance. The power to correct a practice is inextricably linked to addressing and bringing the relationship between the parties to the standard of fairness and reasonableness that section 12B demands. The section was never intended to address all of the disputes and claims between the parties that may arise out of their contractual relationship. In particular, regard being had to the dicta of this Court in *Business Zone CC*, the corrective power could be exercised where no relationship existed between the parties that was capable of being corrected.[38] In that situation, all that would be before the arbitrator would be a historical contractual practice. In those instances, there would be no practice to correct by an arbitral award even though the consequences of such a practice, if constituting a breach of contract and resulting in loss, may be the basis for an action in the courts.

[45] In that event, the aggrieved party would be required to prove the requirements that would normally attach to such an action including breach, loss, and factual and legal causation. Section 12B however contemplates a much simpler process – a determination whether a contractual practice is fair or reasonable and, if not, the making

[38] *Business Zone CC* above n 18 at para 76.

of an award to correct that practice. The limited arbitral system therefore represents a deliberate legislative choice to deal with only correcting the conduct of a party to an unfair or unreasonable contractual practice.

[46] In this context "to correct a practice" is therefore about restoring the relationship by identifying the contractual practice that imperils the relationship, and then making an award that will end the practice in question. It would, in such circumstances, be an intervention that was essentially forward-looking and corrective in the sense of putting right a relationship. In *Business Zone SCA*, the Supreme Court of Appeal distinguished, in the context of section 12B(4), what it termed the corrective remedial jurisdiction and the compensatory remedial jurisdiction, concluding that corrective remedial jurisdiction can only operate prospectively.[39]

[47] This Court overturned that part of the Supreme Court of Appeal's judgment, which found that an ongoing relationship was a prerequisite to access the arbitral system in section 12B. It did so, however, to the limited extent that the corrective power could be used to reinstate such a relationship, and in that scenario, a relationship would have come into existence. It also left intact the Supreme Court of Appeal's analysis and conclusion on the difference between corrective and compensatory jurisdictions and when they were applicable.

[48] Mfoza takes the view that section 12B is not about relationships but contractual practices. However, this really is a distinction without a difference as those practices that the section identifies as the basis for arbitration exist within a relationship - not in isolation. It is those relationships that this Court has identified as manifesting an imbalance in power and it is those relationships that require fixing. That is the innovation that section 12B introduces.

[39] *Business Zone SCA* above n 2 at para 45.

[49] Mfoza argued that "to correct" should not be confined to dealing with a contractual practice and making a forward-looking award, without at the same time dealing with the past consequences of that practice. It said that dealing with its consequences was integral to correcting it and takes the view that this approach supports an interpretation of the section that includes the power to award compensation.

[50] Engen's stance was that the Arbitrator was confined to making an award necessary to correct an unfair or unreasonable contractual practice. My view is that the limited role "to correct a practice" does not extend to addressing the historical effect or consequences of that practice, as that is not what is required to correct the practice. One is reminded that the determination an arbitrator is required to make is confined to whether a contractual practice is unfair or unreasonable. This in itself limits the scope of the arbitrator's powers which do not extend to making an award of compensatory damages. There is a significant difference between correcting a practice as opposed to addressing the consequence of a practice. An award of compensation that deals with the consequences of an unfair or unreasonable contractual practice may compensate but leave a practice uncorrected – this is not what section 12B(4)(a) has in mind. It will be recalled that all that section 12B(4) requires to trigger a referral to arbitration is an allegation of an unfair or unreasonable contractual practice which would then require correction. The question of loss and the compensation for loss falls outside of the section 12B process.

[51] I have already made reference to the overall scheme of the section and the limited purpose for its introduction in the industry. If that purpose is limited to correcting an unfair or unreasonable contractual practice, then there is no basis to interpret the power of an arbitrator to make a compensatory award for past loss when such an award is not necessary to correct the unfair or unreasonable contractual practice. In *Chisuse*,[40] this Court said that "in legal interpretation, the ordinary understanding of the words should serve as a vital constraint on the interpretative exercise, unless this interpretation

[40] *Chisuse v Director-General, Department of Home Affairs* [2020] ZACC 20; 2020 (6) SA 14 (CC); 2020 (10) BCLR 1173 (CC).

would result in an absurdity"[41] and, further that "[t]he purposive or contextual interpretation of legislation must, however, still remain faithful to the literal wording of the statute".[42] That constraint must find application here.

[52] Although section 12B(4)(a) does not expressly exclude compensation, it would have to be shown then that the power under this section would be necessary to correct the practice and that it cannot be exercised if the power to award compensation under section 12B(4)(a) does not also exist. In *Amabhungane*,[43] Madlanga J said:

> "This case presents us with an opportunity to deal not with the common and oft-dealt-with necessary or ancillary implied power (which I will simply call the ancillary implied power), but with what I would call a primary implied power. . . . An ancillary implied power arises where a primary power – whether express or implied – conferred by an Act cannot be exercised if the ancillary implied power does not also exist."[44]

[53] The question then is whether the power to award compensation under section 12B(4)(a) is necessary without hollowing out the PPA as a whole, rendering the section inoperable. In my view, no ancillary implied power arises as the primary power of the arbitrator to correct can be given effect to, without the power to make an award of compensation under section 12B(4)(a).

[54] If the section is interpreted as Mfoza would have it, then the arbitrator would have unlimited powers. Those powers would include the power to make a prospective award to correct an unfair or unreasonable contractual practice, the power to award compensation for past loss arising out of an unfair or unreasonable contractual practice, and the power to make a compensatory award for allegations giving rise to arbitration

[41] Id at para 47.

[42] Id at para 52.

[43] *Amabhungane Centre for Investigative Journalism NPC v Minister of Justice and Correctional Services* [2021] ZACC 3; 2021 (3) SA 246 (CC); 2021 (4) BCLR 349 (CC).

[44] Id at para 63.

that were frivolous or capricious. This Court reminded us in *Business Zone CC* that the remedial powers of the arbitrator are limited.[45] However, the interpretation which Mfoza seeks would place no limitation on those powers. Such a stance is not sustainable and does not accord with the idea of an arbitrator exercising limited remedial corrective powers as section 12B requires.

[55] There are other reasons why the term "to correct" cannot have the meaning that Mfoza contends for.

[56] The Legislature, in conferring the powers of the arbitrator in section 12B(4)(b), gives the arbitrator the power to make a compensatory award arising out of frivolous or capricious allegations, while the language of section 12B(4)(a) makes no reference to a compensatory award. It must be clear that the Legislature sought to carefully demarcate the remedial powers of the arbitrator to the different situations contemplated by the PPA. The choice of language and the scope of the power of the arbitrator provides evidence of a clear intent to invest the arbitrator with different powers in the different circumstances contemplated by subsections (4)(a) and (4)(b) of section 12B. That demarcation suggests that if the lawmaker intended the arbitrator to have the power to make a compensatory award in terms of section 12B(4)(a), it would have simply done so as it did in the context of section 12B(4)(b). That it chose not to do so is evidence of a deliberate legislative choice and one that fits into the overall scheme of the PPA and must be respected.

[57] The structure of section 12B(4) also invokes the maxim *inclusio unius est exlusio alterius* (the specific inclusion of one implies the exclusion of the other). Through its specific inclusion and exclusion of different kinds of remedial powers, the Legislature intended to provide different regimes of arbitral intervention. In particular, the inclusion of the power to compensate in section 12B(4)(b) and the exclusion of a similar power in section 12B(4)(a) must activate the maxim. This supports the conclusion that

[45] *Business Zone CC* above n 18 at para 92.

the power to make a compensatory award is excluded from section 12B(4)(a). In *Pickfords*,[46] Majiedt J said that the maxim is not a rigid rule of statutory construction and must be applied with caution. At the same time, he referred to the maxim as a principle of "common sense".[47]

[58] A further reason why "to correct" does not lend itself to the generous interpretation Mfoza seeks, is that the very nature of the arbitral system created by section 12B may not be suited to the making of a compensatory award. The arbitral system of section 12B is not arbitration by agreement, which is a common feature of most arbitration processes. There are a number of features of the section 12B system that are fit-for-purpose and fall into the limited scope of the arbitral system. They include the following:

(a) The parties are obliged to submit to arbitration upon a referral by the Controller (there is a limited right of appeal to the Minister only).

(b) Any award made by the arbitrator is final and binding upon the parties.

[59] The effect of this is that, on the interpretation that Mfoza contends for, a party who has to meet a claim for damages under section 12B(4)(a) would be deprived of the protections afforded by the ordinary legal process, including a right of appeal, and that may infringe a party's right of access to courts as enshrined in section 34 of the Constitution.

[60] If the power of the arbitrator is seen as a limited one confined to correcting forward-looking conduct, it would largely fall into the fit-for-purpose limited scope of section 12B. It may stray somewhat from the ordinary access to court guarantees but that may be justified if regard is had to the limited power of the arbitrator and the transformative objective of the section.

[46] *Competition Commission of South Africa v Pickfords Removals SA (Pty) Ltd* [2020] ZACC 14; 2021 (3) SA 1 (CC); 2020 (10) BCLR 1204 (CC).

[47] Id at para 50.

[61] It is a different matter, however, when an arbitrator makes a final and binding compensatory award. When the outward effect of the award on a party is considerably greater, the demand for the constitutional guarantee of access to court must be more pressing. A non-appealable award falls considerably short in meeting those access to court guarantees. It is for these reasons as well that I take the view that the arbitral model that section 12B introduces was never intended to deal with claims of compensation. The design of the system simply does not lend itself to the proper adjudication of such claims. Absent the protection of the ordinary rules of litigation and absent a normative framework that is defined in advance, it is too great a risk to the constitutional values of equality and fairness to permit a final and binding compensatory award to be made in those circumstances with no right of appeal to a court.

[62] Another reason why section 12B(4)(a) cannot have the meaning Mfoza contends for is that it may lead to disparate outcomes and consequences, which conflicts with the constitutional values of fairness and equality.

[63] In *Crompton*, Mhlantla J, in dismissing a claim that section 12B ousted the jurisdiction of the High Court, said:

> "The provisions of section 12B and the Petroleum Products Act, in general, do not assign jurisdiction exclusively to the arbitrator over disputes between licensed retailers and wholesalers in the petroleum industry. Nor do they provide that the dispute resolution mechanism in section 12B is mandatory, or that it must be exhausted before parties may approach the High Court where there are allegations of unfair or unreasonable contractual practices.
>
> . . .
>
> Clearly, the parties have a choice between the section 12B arbitration and High Court litigation and both forums must apply the fairness standard."[48]

[48] *Crompton* above n 25 at paras 26 and 28.

[64] The effect of this holding is that a court or an arbitrator will be equally competent to enquire into allegations of unfair or unreasonable contractual practices arising out of section 12B and make an award necessary to correct such a practice. And, while the same adjudicative standard will apply in both settings, the differences in the nature of the two settings are significant in the consequential rights of the parties.

[65] An award made by an arbitrator is final and binding and subject to limited review – largely to misconduct, irregularity or impropriety in obtaining the award.[49] An award made by the High Court would ordinarily be appealable subject to leave being granted. This impacts on the equality before the law guarantee as well as the right of access to courts found in section 34 of the Constitution.

[66] This significant difference in consequence is a further reason why the arbitral power should not be construed as wide as Mfoza would have it, as it could lead to disparate outcomes to allow a compensatory award to be made in terms of section 12B(4)(a). It would mean that a party who is obliged to submit to statutory arbitration faces the risk of a non-appealable award of damages. Section 40 of the Arbitration Act provides:

> "This Act shall apply to every arbitration under any law passed before or after the commencement of this Act, as if the arbitration were pursuant to an arbitration agreement and as if that other law were an arbitration agreement: Provided that if that other law is an Act of Parliament, this Act shall not apply to any such arbitration in so far as this Act is excluded by or is inconsistent with that other law or is inconsistent with the regulations or procedure authorized or recognized by that other law."

[49] Section 33(1) of the Arbitration Act provides:

> "Where—
>
> (a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or
>
> (b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or
>
> (c) an award has been improperly obtained,
>
> the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside."

[67] While the Arbitration Act refers to an arbitration agreement, the form of arbitration created by section 12B of the PPA is not by agreement between the parties. Courts should generally tread with caution when defining the scope of the arbitration or the powers of an arbitrator under such circumstances. This is particularly so in the context of the dispute before us where a party to the arbitration may face the risk of a non-appealable award of damages if it was found that the arbitrator had the power to award such damages. In the absence of clear language by the Legislature to that effect the interpretative exercise should proceed with some caution and an interpretation which is more consistent with recognising and protecting the rights of the parties should be preferred against one that places those rights at risk. In *Wary Holdings*,[50] Kroon AJ said the following regarding competing interpretations of a statute:

> "This Court has not yet been called upon to deal with the situation where two conflicting interpretations of a statutory provision could both be said to promote the spirit, purport and objects of the Bill of Rights and the decision to be made is whether the one interpretation is to be preferred above the other. It seems to me that it cannot be gainsaid that this Court is required to adopt the interpretation which better promotes the spirit, purport and objects of the Bill of Rights. That would, after all, be a more effective '[interpretation] through the prism of the Bill of Rights'. By the same token, where two conflicting interpretations of a statute could both be said to be reflective of the relevant structural provisions of the Constitution as a whole, read with other relevant statutory provisions, the interpretation which better reflects those structural provisions should be adopted."[51]

[68] There would of course be instances where the consequence of an unfair or unreasonable contractual practice may result in loss or damage. A party in such a situation may have recourse to court to pursue a damages claim. Given that the contract between the parties is underpinned by the normative framework of fairness and reasonableness, the breach of such a standard could form the basis of an action for

[50] *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* [2008] ZACC 12; 2009 (1) SA 337 (CC); 2008 (11) BCLR 1123 (CC).

[51] Id at paras 46-7.

damages before the courts. That the Legislature has opted for a limited arbitral model as evidenced in section 12B is entirely consistent with the need for an efficient and cost-effective mechanism to correct unacceptable contractual practices. That it does not extend beyond that is also a legislative choice that makes good sense for the reasons I have given, and is a choice that must be honoured.

[69] The suggestion that the arbitrator may, as part of a corrective award, make an award of damages simply does not fit into any interpretation of the section. An award of damages, if one is competent, must be preceded by a determination of a breach of contract or some other basis to justify an award of damages. The difficulty is that the arbitrator is not empowered to stray into those areas as the power given to the arbitrator in terms of section 12B(4)(a) is limited as I have indicated.

[70] In summary, the purpose of the section is confined to determining whether a practice is unfair or unreasonable and then, if it is, to make an award to correct it. There is simply no room for any suggestion of an award of damages, and the determination that must precede it, in this carefully constructed innovation to the PPA. To suggest otherwise would be to give the arbitrator a power that does not accord with the PPA.

[71] I have had the pleasure of reading the second judgment penned by my Sister Mhlantla J, in which she concludes that the powers of the arbitrator in terms of section 12B(4)(a) are wide enough to include compensation and awarding damages. I deal briefly with the basis on which she arrives at this conclusion:

(a) The wide nature of the arbitrator's powers. I have argued that while the arbitrator enjoys wide powers of correction, they are limited to correcting an unfair or unreasonable contractual practice. It cannot be suggested that those wide remedial powers have the effect of increasing the scope of the determinative powers of the arbitrator.

(b) There is nothing in section 12B(4)(a) that excludes compensation or damages as a corrective award. While, on the face of it, that may well be so, if regard, however is had to the language, purpose and context of the

section then everything militates against the interpretation that section 12B(4)(a) contemplates such a process and such a power. There are no separate and distinct concepts of "compensation" in section 12B(4)(a) and (b), as the second judgment suggests, as section 12B(4)(a) is silent on compensation.

(c) Interpreting section 12B(4)(a) to exclude compensatory awards would render the scheme of the PPA nugatory, as it would then only be available "for those few cases where the unfair or unreasonable contractual practice is a premature termination of a contract and where such a contract still subsists when the matter is arbitrated".[52] This is not the case. The mechanism and the remedy of an award would be available in all instances where there is an unfair or unreasonable contractual practice which is capable of being corrected. Of course, if a relationship has come to an end there would be nothing by way of a practice to correct. In those instances, however, the remedy of damages may well be pursued through the courts. Damages are, however, a different matter from correcting an unfair or unreasonable contractual practice.

Substitution

[72] The High Court made the following order:

> "43.1 The award of the second respondent which appears in paragraph 33.2 of the arbitration Award dated 3 April 2019, is reviewed and set aside.
>
> 43.2 The award in paragraph 33.2 is substituted with the following:
>
> 'The second objection is upheld. An arbitrator acting in terms of section 12B(4)(a) of the Petroleum Products Act No. 120 of 1977 as amended, has no jurisdiction to grant patrimonial damages to a claimant in terms of section 12B(4)(a), in this case, Mfoza. Mfoza is directed to amend its Statement of Case so as to remove the claim for patrimonial damages, and to do so within 10 days of this award.

[52] See the second judgment at [95].

43.3 By virtue of the expiry of the 10 day period referred to in paragraph 43.2 of this order, Mfoza is directed to amend its statement of case within 10 days of receipt of this order by mail or such further period authorised by the second respondent or agreed to by Engen.

43.4 Mfoza is to pay the costs of this application."[53]

[73] Mfoza also challenges the order of the High Court by saying that it erred in substituting the award of the Arbitrator. It says that even if the High Court was correct in finding that the Arbitrator exceeded his powers, it could only—

(a) set aside the award in terms of section 33(1)(b) of the Arbitration Act; and

(b) in terms of section 33(4) of the Arbitration Act and at the request of either party, submit the dispute to a new arbitration panel constituted in the manner directed by the Court.

[74] The High Court did not act in terms of section 33(4) of the Arbitration Act, nor was there a request by any of the parties to that effect. It did, however, say that there was no case made out that the Controller should appoint a new arbitrator as it concluded that, even though the Arbitrator had erred, he was "perfectly well intentioned and *bona fide*".[54] That largely disposes of the argument located in section 33(4) of the Arbitration Act as, absent a request by the parties to the Court, the provisions of section 33(4) are not activated.

[75] Was the High Court entitled to make the order it did beyond setting aside the award? Mfoza relies on the *dicta* in *Hos+Med Medical Aid Scheme*[55] to argue that the High Court's order of substitution went beyond the remit of section 33(1)(b) of the Arbitration Act. In this case, the Supreme Court of Appeal held:

[53] High Court judgment above n 6 at para 43.

[54] Id at para 39.

[55] *Hos+Med Medical Aid Scheme v Thebe Ya Bophelo Healthcare Marketing & Consulting (Pty) Ltd* [2007] ZASCA 163; 2008 (2) SA 608 (SCA).

> "Where neither party requests that the matter be referred back to the arbitrator, or appeal tribunal, then an award made in excess of its powers should simply be set aside by the court in terms of section 33 of the Arbitration Act. Equally, because of the peremptory wording of section 33(4), a court does not have the discretion to substitute its own order for that of the appeal tribunal."[56]

[76] The orders which Mfoza describes as orders of substitution, and which indeed are styled that way in the order of the High Court are, on careful scrutiny, no more than an explanation of the setting aside award. The order contained in paragraph 43.2 of the High Court judgment is no more than a restatement of the main finding of the High Court that an arbitrator does not have the jurisdiction in terms of section 12B of the PPA to award patrimonial damages. In addition, and arising out of that, the High Court ordered Mfoza to amend its statement of case.

[77] It cannot be said that the order of the High Court evidences substitution of its own order in place of the award of the Arbitrator. The order read in its entirety, simply sets aside the award and having done so explains the effect of the setting aside. It does not constitute an order of substitution and does not in any manner violate the provisions of section 33(1)(b) of the Arbitration Act.

Conclusion

[78] The appeal falls to be dismissed and costs should follow the result. The costs of two counsel are justified.

Order

[79] The following order is made:

1. Leave to appeal is granted.
2. The appeal is dismissed.
3. The applicant is to pay the costs of this appeal, including the costs of two counsel where so employed

[56] Id at para 43.

MHLANTLA J (Madlanga J and Mlambo AJ concurring):

[80] I have had the pleasure and benefit of reading the comprehensive judgment penned by my Brother Kollapen J (first judgment). I agree that this matter engages the jurisdiction of this Court and that leave to appeal should be granted. However, I disagree with the first judgment's interpretation that the arbitrator's remedial powers under section 12B(4)(a) of the PPA are narrow and not inclusive of compensation.

[81] The point of departure must be a consideration of section 12B(4) of the PPA. Section 12B(4) provides:

> "An arbitrator contemplated in subsection (2) or (3) –
> (a) shall determine whether the alleged contractual practices concerned are unfair or unreasonable and, if so, shall make such award as he or she deems necessary to correct such practice; and
> (b) shall determine whether the allegations giving rise to the arbitration were frivolous or capricious and, if so, shall make such award as he or she deems necessary to compensate any party affected by such allegations."

[82] From a reading of section 12B(4) a few things become apparent, the first being that the arbitrator's remedial powers are wide. Section 12B(4)(a) gives the arbitrator the power to "determine whether the alleged contractual practices concerned are unfair or unreasonable" and, if the arbitrator has made a positive determination on that aspect, the section mandates the arbitrator to "make such award as he or she deems necessary to correct such practice".[57]

[83] The operative phrase in section 12B(4)(a) is "such award as he or she deems necessary". In this regard, the statute clearly denotes broad and discretionary powers.

[57] Section 12B(4)(a) expressly states that an arbitrator "shall make such award as he or she deems necessary to correct such practice". The use of the word "shall" denotes a mandate.

Furthermore, the plain text of the section does not exclude compensation. This Court has also implicitly recognised that the arbitrator's powers under section 12B(4)(a) are wide.[58] When comparing the powers of the Controller under section 12B(1) and the powers of the arbitrator under section 12B(4), this Court remarked "[t]hat the Controller's discretionary threshold is a low one is clear when consideration is had to the mandate and powers of the arbitrator under section 12B(4)".[59]

[84] Second, a reading and assessment of section 12B(4)(a) demonstrates that compensation is not disqualified from the corrective remit of the arbitrator. My Brother takes the view that section 12B(4)(a) excludes monetary compensation in all its forms as part of the corrective remedial jurisdiction of an arbitrator and that, by conferring the power to make a compensatory award arising out of frivolous or capricious allegations in section 12B(4)(b), while making no reference to a compensatory award in section 12B(4)(a), the Legislature did not intend to vest compensatory powers in the arbitrator under section 12B(4)(a).[60] I respectfully disagree with that view.

[85] The fact that compensatory powers were not explicitly included in the range of powers conferred on the arbitrator under section 12B(4)(a) cannot be construed as indicative or demonstrative of the legislative intention to exclude compensatory awards from the arbitrator's remit. This is more so in view of the broad and general terms in which section 12B(4)(a) has been framed.[61] Further, insofar as "compensation" is concerned, parallels cannot be drawn between the framing of section 12B(4)(a) and

[58] *Crompton* above n 25 at para 45, where this Court held:

> "Although the above was said in the context of private contractual arbitration, it applies equally to statutory arbitration in terms of section 12B, which must be understood as arbitration ordinarily is in the law of contract. The benefits of arbitration outlined in *Lufuno* are evident from the text of section 12B itself and were considered in *Business Zone*. Among others, the parties can choose both a specialised arbitrator and the rules of procedure which that arbitrator is to follow, *the arbitrator has wide remedial powers to remedy the unfair or unreasonable contractual practice and make compensatory awards*; and, the arbitrator's award is final and binding, which avoids the ordinary appellate processes applicable to litigation, and thus saves time and resources". (Emphasis added).

[59] *Business Zone CC* above n 18 at para 62.

[60] Id at [56]

[61] Section 12B(4)(a) does not provide a list of remedial awards that may be made by the arbitrator.

section 12B(4)(b) as contemplated by the first judgment, bearing in mind the distinct purposes and functions of both subsections.

[86] As I see it, section 12B(4)(a), in the first instance, concerns the power to determine whether an unfair or unreasonable contractual practice has taken place and, in the second instance, the power to make an award that the arbitrator deems necessary to correct the practice once it has been determined that an unfair or unreasonable contractual practice has taken place. In *Business Zone*, this Court elucidated that section 12B(4)(a) concerns the mandate given to the arbitrator to "enter into and interrogate the merits of the alleged contractual practice in order to make a determination into the unfairness or unreasonableness thereof".[62] On the other hand, section 12B(4)(b) comes into play where it has been determined that allegations that led to the arbitration were "frivolous or capricious" and it grants the arbitrator the powers to "make such award as he or she deems necessary to compensate any party affected by such allegations". This Court correctly interpreted section 12B(4)(b) to be a "legislative safeguard to prevent frivolous and capricious use of the section 12B referral mechanism".[63] It thus becomes apparent that section 12B(4)(a) is meant to be remedial, while section 12B(4)(b) is meant to be a deterrent against exploitation or abuse of process.

[87] In the light of the distinction that must be drawn between the objects and functions of section 12B(4)(a) and section 12B(4)(b), it naturally follows that "compensation" under both provisions is distinct. Under section 12B(4)(a), compensation is remedial in nature. Essentially, compensation in this context takes the place of a contractual remedy, not unlike restitution, specific performance and contractual damages. By contrast, compensation under section 12B(4)(b) is meant to be punitive or retributive. In this context, compensation functions as a sanction and not a remedy in the same sense as in section 12B(4)(a). The section 12B(4)(b)

[62] *Business Zone CC* above n 18 at para 63.

[63] Id.

compensation is, to a large extent, akin to a costs order, more specifically a punitive costs order. This much was said in *Business Zone*, where this Court held that—

> "the arbitrator is not only mandated to determine frivolity and capriciousness, but is empowered to make a compensatory award, which imposes remedial and punitive costs beyond that of an ordinary costs award. This provides a strong deterrent for parties seeking to exploit the section 12B(1) arbitration mechanism."[64]

[88] To illustrate this point, reference must be made to the facts of this matter and the aims of section 12B(4)(a). As I understand the case, the qualifier in section 12B(4)(a) is "such award as he or she deems necessary *to correct such practice*".[65] Therefore, the arbitrator's duty is to issue an award that will effectively correct the unfair or unreasonable practice. In order to fully appreciate what is meant by "to correct", the term must be dissected. As it is not defined in the PPA, reference must be made to its ordinary definition or meaning.[66] By deductive reasoning, "correct" in this context is used as a transitive verb. The Oxford Dictionary defines "correct" as "to make something right or accurate".[67] According to the Collins Dictionary, "[i]f you correct a problem, mistake, or fault, you do something which puts it right".[68] The Cambridge Dictionary as well as the Merriam-Webster Dictionary contain similar definitions.[69]

[89] The central question then is: what type of awards fall in the category of corrective measures? In my view, an award of compensation would be an effective remedy to correct a practice and thus would fall within the category of corrective measures.

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[64] Id.

[65] Emphasis added.

[66] See *Independent Institute of Education (Pty) Limited v Kwazulu-Natal Law Society* [2019] ZACC 47; 2020 (2) SA 325 (CC); 2020 (4) BCLR 495 (CC) at para 18.

[67] Oxford Advanced Learner's Dictionary "Correct *verb*", available at https://www.oxfordlearnersdictionaries.com/definition/american_english/correct_2.

[68] Collins Dictionary "Correct", available at https://www.collinsdictionary.com/dictionary/english/correct.

[69] See Cambridge Dictionary "Correct", available at https://dictionary.cambridge.org/dictionary/english/correct and Merriam Webster Dictionary "Correct", available at https://www.merriam-webster.com/dictionary/correct.

[90] A positive finding that compensatory remedial action falls within the ambit of corrective measures would not be controversial or tantamount to reinventing the wheel as, under the general law of contracts, compensation has already been recognised and confirmed as performing a corrective function. It is widely accepted that contractual damages fall under the category of contractual remedies that serve a compensatory function.[70] This much was confirmed by the Supreme Court of Appeal in *Basson*.[71] There is a wealth of jurisprudence on the employment of damages to "right a wrong". In *Victoria Falls & Transvaal Power Co Ltd*,[72] the Appellate Division, when discussing the assessment of compensation for breach of contract, held:

> "The sufferer by such a breach should be placed in the position he would have occupied had the contract been performed, so far as that can be done by the payment of money, and without undue hardship to the defaulting party."[73]

The same principle has been espoused in *Novick*,[74] *Bellairs*,[75] *Freddy Hirsch Group (Pty) Ltd*[76] and *Basson*.[77]

[91] If it is accepted that damages are aimed at "making something right" – ergo serving a corrective role – and that damages are a form of recompense, by transitive reasoning it follows that compensation qualifies as a corrective measure.

[92] From the factual matrix of the matter before us, the cause of complaint that led to arbitration was Engen's alleged frustration of Mfoza's business operations by

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[70] See Hutchison et al *The Law of Contract in South Africa* 1 ed (Oxford University Press Southern Africa, 2009) at 310 and Stuart-Steer "Reconsidering an Understanding of Damages as a Surrogate of Specific Performance in South African Law of Contract" (2013) *Responsa Meridiana* 65.

[71] *Basson v Hanna* [2016] ZASCA 198; 2017 (3) SA 22 (SCA) at para 22.

[72] *Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1.

[73] Id at 22.

[74] *Novick v Benjamin* 1972 2 SA 842 (A) at 860A-B.

[75] *Bellairs v Hodnett* 1978 1 SA 1109 (A) at 1146H.

[76] *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* [2011] ZASCA 22; 2011 (4) SA 276 (SCA) at para 26.

[77] *Basson* above n 73 at para 26.

delivering fuel late and failing to honour its contractual obligations. Under these circumstances, if the arbitrator makes a finding to the effect that Engen's conduct amounts to an unfair contractual practice, it would be expected that the arbitrator would issue an award that effectively orders Engen to refrain from frustrating Mfoza's business operations and that compels Engen to observe the terms of the contract. However, Mfoza did not ask for that remedy (presumably because the contract had since terminated), but it has alleged that it had suffered financial loss and thus claimed an award of compensation. Under the circumstances, an award of compensation would be an effective remedy to correct the practice as the relationship between the parties had broken down and the arbitrator would not be able to compel the parties to work together again.

[93] As to the question whether the power to make such arbitral awards falls within the arbitrator's remedial remit, parallels can be drawn between this matter and labour law cases, specifically with reference to the Commission for Conciliation, Mediation and Arbitration (CCMA). Section 193(1)(c) of the Labour Relations Act[78] empowers a CCMA arbitrator to make an order of compensation as a remedy for unfair dismissal and unfair labour practice.[79] The nature of an arbitrator's powers at the CCMA may be viewed as analogous to the arbitrator's in the present case.

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[78] 66 of 1995.

[79] Section 193(1) and (4) provides:

> "(1) If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the Court or the arbitrator may—
>
> (a) order the employer to reinstate the employee from any date not earlier than the date of dismissal;
>
> (b) order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal; or
>
> (c) order the employer to pay compensation to the employee.
>
> . . .
>
> (4) An arbitrator appointed in terms of this Act may determine any unfair labour practice dispute referred to the arbitrator, on terms that the arbitrator deems reasonable, which may include ordering reinstatement, reemployment or compensation."

[94] Additionally, it is imperative to view the scope of the arbitrator's powers in the light of the broader legislative scheme and intention. As has been aptly and correctly observed by my colleague in the first judgment,[80] and by this Court in several cases,[81] the primary objective of section 12B is to transform the petroleum and liquid fuels industry by levelling the playing field as it relates to the bargaining power between wholesalers and retailers, and by introducing the standard of fairness and reasonableness in the contractual relationships between petroleum wholesalers and retailers.[82]

[95] If the arbitrator's powers are constrained to remedial action that only operates prospectively – to the exclusion of compensatory awards as proposed by the first judgment – then section 12B(4)(a) and the greater scheme of the PPA would be rendered nugatory. Essentially, there would be virtually no effective remedy available for the vast majority of retailers or litigants who experience unfair or unreasonable contractual practices, save for those few cases where the unfair or unreasonable contractual practice is a premature termination of a contract and where such a contract still subsists when the matter is arbitrated. This result cannot reasonably be what the Legislature envisaged.

[96] Further, it is worth noting that section 12B of the PPA has been the subject of numerous judgments of this Court in the last decade alone and that the PPA has been amended approximately six times, with the last amendment being the insertion of section 12B itself in 2005. Given the wide saturation of the PPA in our legal order, it can be said that if the primary legislative intention was to restrict and limit the scope of the arbitrator's powers to only encompass prospective remedial action, thereby excluding an award of compensation from the scope of corrective measures under

[80] See the first judgment at [33] - [34].

[81] See *Crompton* above n 25 and *Business Zone CC* above n 3.

[82] See the first judgment at [34].

section 12B(4)(a), the Legislature would have said as much in explicit terms by now. However, as it currently stands, the text of section 12B(4)(a) tells a different story.

[97] Consequently, in my view, the arbitrator's remedial powers under section 12B(4)(a) of the PPA are considerably broad. The arbitrator is left with an open-ended range of corrective measures from which to choose and there is no express prohibition of an award of monetary compensation. Therefore, there is no basis to say that compensation is excluded. It is included in the wide inventory of awards that an arbitrator may make under section 12B(4)(a) of the PPA to remedy unfair and/or unreasonable contractual practices.

[98] Accordingly, had I commanded the majority, I would have made an order granting leave to appeal and upheld the appeal with costs.

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