CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 196/21

In the matter between:

RISSIK STREET ONE STOP CC
t/a RISSIK STREET ENGEN First Applicant

WILLEM JOHANNES KNOESEN Second Applicant

and

ENGEN PETROLEUM LIMITED Respondent

Neutral citation:	*Rissik Street One Stop CC t/a Rissik Street Engen and Another v Engen Petroleum Ltd* [2023] ZACC 4.
Coram:	Zondo CJ, Baqwa AJ, Kollapen J, Madlanga J, Majiedt J, Mbatha AJ, Mhlantla J, Rogers J and Tshiqi J
Judgment:	Kollapen J (unanimous)
Heard on:	4 August 2022
Decided on:	1 February 2023
Summary:	Petroleum Products Act 120 of 1977 — section 12B —stay of eviction proceedings — pending outcome of section 12B arbitration — continued occupation after the expiry of an operating lease permissible — purpose of the Act — transformation of the petroleum industry — specific relief sought need not be specified in request to Controller of Petroleum Products

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Limpopo Division, Polokwane) the following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Supreme Court of Appeal is set aside and replaced with the following:
   "a) Subject to (b) below the appeal is dismissed with costs.
   b) The stay granted in paragraph 23.1 of the High Court's order will endure pending the final outcome of any process arising from the applicants' request to the Controller of Petroleum Products (Controller) in terms of section 12B of the Petroleum Products Act 120 of 1977.
   c) The respondent is interdicted from taking any steps that will adversely affect the operations of the first applicant pending the final outcome of the process referred to the Controller."
4. The respondent is to pay the costs of the applicants in this Court, including the cost of two counsel.
5. The Registrar of this Court is directed to forward a copy of this judgment to the Minister of Mineral Resources and Energy, the Director-General of the Department of Mineral Resources and Energy and the Controller and to draw their attention to [85] to [88] of the judgment.

JUDGMENT

KOLLAPEN J (Zondo CJ, Baqwa AJ, Madlanga J, Majiedt J, Mbatha AJ, Mhlantla J, Rogers J and Tshiqi J concurring):

Introduction

[1] Section 12B of the Petroleum Products Act[1] (PPA) was introduced in recognition of the deep inequality within the retail fuel industry and with the objective of transforming that industry. It introduced a normative framework of fairness and reasonableness that would apply to all contracts in the industry. It also created an arbitral mechanism to ensure that unfair or unreasonable contractual practices were capable of being identified and corrected. This case presents compelling evidence of the contours of that inequality while at the same time representing a searching test of the scope and efficacy of the legislative promise that section 12B heralded.

[2] In *Business Zone CC*,[2] this Court expressed the importance of transforming the petroleum industry to ensure that unequal bargaining power in the industry was addressed for those doing business in that industry, as well as empowering historically disadvantaged South Africans in the petroleum and liquid fuels industry. Mhlantla J explained:

> "One of the purposes of the [Petroleum Products] Amendment Act is set out in its preamble and is, amongst others, 'to promote transformation of the South African petroleum and liquid fuels industry'. Schedule 1 of the Amendment Act goes on to introduce an industry charter 'on empowering historically disadvantaged South Africans in the petroleum and liquid fuels industry'. Unequal bargaining power

[1] 120 of 1977.

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

> in the petroleum industry is pervasive even in more developed countries such as our common law comparator, England, whose history of inequality pales in comparison with our own."[3]

Parties

[3] The first applicant, Rissik Street One Stop CC, is a retailer of petroleum products and has since 1998 leased premises from Engen in terms of an operating lease agreement (operating lease). The second applicant is Mr Willem Johannes Knoesen, the sole member of the first applicant (collectively Rissik Street). The respondent, Engen Petroleum Limited (Engen), carries on business as a manufacturer, marketer and bulk distributor of petroleum, diesel and chemical products. It is the lessee of Portions 1, 3 and the Remainder of Erf 324, Pietersburg Township (premises) in terms of a notarial deed of lease (notarial lease) it concluded with the owner of the premises. Engen sublet the premises to Rissik Street.

Factual background

[4] The operating lease that was in place at the time of the dispute between the parties was concluded on 30 March 2015. It commenced on 1 April 2015 and was scheduled to end on 30 June 2018.

[5] In terms of the operating lease, Engen was obliged to furnish Rissik Street with at least 12 months' notice if it intended not to renew the operating lease. The operating lease recognised Rissik Street's right to sell the business in the event of the non-renewal of the lease, in which event Rissik Street would have a period of 12 months prior to the termination of the lease within which to sell the business. The operating lease provided that Engen could not unreasonably withhold its consent to any proposed sale. This was presumably in recognition that Rissik Street had an "entrenched value" in the business, which it was entitled to realise in the event of the termination of the operating lease.

[3] Id at para 47. In the context of English law, see the cases of *Alec Lobb (Garages) Ltd v Total Oil GB Ltd* [1985] 1 All ER 303 (CA) and *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1967] 1 All ER 699 (HL).

[6] Prior to the termination of the notarial lease and the operating lease, the landowner required a R3 million payment from Engen as a condition to renew the notarial lease. Engen agreed to pay the R3 million and the notarial lease was extended for 20 years. Engen in turn sought to recover the R3 million paid to the landowner from Rissik Street by requesting it to pay the R3 million as a condition for renewing the operating lease. The parties were unable to reach agreement in relation to the R3 million payment, resulting in the operating lease not being renewed.

[7] When the parties were unable to reach agreement on the renewal of the operating lease, Engen gave notice of termination on 2 October 2017 and advised Rissik Street that the operating lease would terminate on 31 October 2018. This was to accommodate the 12-month period within which Rissik Street had the right to sell, as provided for in the operating lease. Engen further advised Rissik Street of their right to seek a purchaser for the business.

[8] On 25 May 2018, Rissik Street introduced a potential purchaser to Engen and sought Engen's approval.[4] Engen refused to give its approval. When Rissik Street requested reasons for the refusal, Engen, purporting to rely on clause 10.1 of Schedule 3 to the operating lease, took the position that its refusal constituted an "absolute and unfettered" discretion as provided for in the operating lease and that it need not furnish Rissik Street with any reasons for the decision. This was on 22 June 2018.

[9] Engen's letter in response to Rissik Street's request to approve the sale reads:

> "1 We refer to your correspondence of even date.
>
> 2 As you are no doubt aware, in terms of clause 10.1 of Schedule 3 to the Agreement of Lease and Operation of Service Station between the parties:
>
> > 'The exercise of any discretion by [Engen] contemplated by the provisions of this Schedule 3 shall be absolute and

[4] Rissik Street says it introduced two purchasers in May 2018, but Engen claims there was only one.

unfettered, and [Engen] need not furnish the [Rissik Street] with its reasons for any such exercise.'

3 Our rights remain strictly reserved."

Rissik Street's request for arbitration

[10] On 25 July 2018, Rissik Street submitted a request for arbitration to the Controller of Petroleum Products (Controller), in terms of section 12B of the PPA alleging an unfair or unreasonable contractual practice on the part of Engen. Rissik Street's owner, Mr Knoesen, complained that, among other things, he had introduced two potential purchasers with the requisite supporting documents in May 2018, but Engen had refused to sell to either of them and refused to provide reasons. This left Rissik Street unable to exercise its right in terms of the operating lease. If it did not know why particular buyers were not approved, it was unable to remedy the defect or determine whether Engen's consent had been unreasonably withheld. Mr Knoesen complained:

"3.3 I am now faced with the situation at the end of the franchise period where my business will be terminated on 31 October 2018.

3.4 Although I have a clear contractual right to sell the business and to the proceeds thereof, Engen has, without providing any reasons thereto, refused to authorise the purchase by any party."

[11] Rissik Street concluded its request to the Controller by asserting that it wished to sell the business and to be afforded the opportunity to do so without being frustrated by Engen at every turn.

[12] On 7 September 2018, Rissik Street wrote an email to the Controller enquiring as to when they could expect a response to their request for arbitration submitted on 26 July 2018. No response was received. On 17 October 2018, Rissik Street sent a further email to the Controller requesting an urgent update regarding their section 12B arbitration request. This was followed by further emails to the Controller on 28 February 2019 and 5 March 2019, neither of which elicited any response.

[13] On 17 January 2019, and while waiting for the decision of the Controller, Rissik Street introduced another potential purchaser of the business to Engen. The proposed purchaser was willing to pay both the purchase price and the R3 million premium. Engen adopted the stance that it did not need to consider the application as the operating lease between itself and Rissik Street had terminated by effluxion of time on 31 October 2018.

[14] On 22 January 2019, Engen gave Rissik Street written notice to vacate the premises. Rissik Street refused to vacate the premises and in March 2019, Engen instituted eviction proceedings against Rissik Street in the High Court of South Africa, Limpopo Division, Polokwane.

[15] Rissik Street opposed the eviction application, filed an opposing affidavit and brought a counter-application for the proceedings to be stayed pending the decision of the Controller. In July 2019, the Controller acting in terms of section 12B, referred the matter to arbitration. The specific issues referred to arbitration were:

> "5.1. By requesting an amount of R3 million for 'goodwill' in order to renew their lease agreement. [Rissik Street] had never been required to pay such an amount previously when renewing the lease, as the Franchisee of the Rissik Street Engen for the past twenty years, the goodwill generated towards [Rissik Street] would have been due to the action of the [Rissik Street] and its employees not Engen;
>
> 5.2. By not engaging with [Rissik Street] in trying to resolve the matter and serving [Rissik Street] with a notice of non-renewal in terms of 44.2 Schedule 2 of the Operating Lease no reasons were provided; and
>
> 5.3. By refusing to authorise sale to either potential purchaser provided for by [Rissik Street] with no reasons thereof. As reasons for refusal were not provided [Rissik Street] is unable to remedy that defect or sourcing further interested buyers."

[16] At the time of the hearing of both the main application and the counter-application in the High Court in December 2019, the Controller had referred the practices complained of by Rissik Street to arbitration.

[17] Engen subsequently lodged an appeal with the Minister of Mineral Resources and Energy against the Controller's decision to refer the complaints to arbitration. This appeal still has to be decided.

Litigation history

High Court

[18] Engen argued that Rissik Street was in substance not opposing the eviction application and had no desire to remain in occupation of the premises. Instead, Rissik Street laboured under the incorrect impression that, because they had the right to sell the business, they were entitled to remain in occupation while they tried to do so. Engen's stance was that it was under no obligation, contractually or otherwise, to allow for the unlawful occupation of the premises to continue, in order to provide Rissik Street with a further opportunity to sell the business. It argued that, as the operating lease had terminated, Rissik Street's continued occupation of the premises was unlawful.[5]

[19] Rissik Street sought that the eviction proceedings in the High Court be stayed pending a decision by the Controller on their request for arbitration, which stay, they argued, should extend until the conclusion of the arbitration. They contended that section 12B of the PPA was introduced to address the imbalances in the relationship between retailers and wholesalers in the petroleum industry, and that an arbitrator was empowered to make a corrective award relating to the dispute. That corrective award could include an award allowing Rissik Street to remain in occupation of the premises on the same terms and conditions as during the period it was entitled to sell the business.

[5] *Engen Petroleum Ltd v Rissik Street One Stop CC t/a Rissik Street Engen*, unreported judgment of the High Court of South Africa Limpopo Division, Polokwane, Case No 1583/2018 (12 February 2020) (High Court judgment) at para 8.

[20] The following questions were before the High Court:

(a) Whether to stay the eviction proceedings, pending a determination by the Controller of Rissik Street's referral of a dispute to arbitration in terms of section 12B of the PPA.

(b) If the proceedings were stayed, whether to interdict Engen from taking steps that would adversely affect the operations of Rissik Street, pending the outcome of the arbitration in terms of the PPA.

(c) In the event that Rissik Street's counter-application was refused, whether an order for eviction from the premises should be granted.

[21] In its judgment, the High Court explained that during the notice period, the operating lease remained valid. During this time it was open to the parties, if either was of the view that an unfair or unreasonable contractual practice had been committed by the other party, to request the Controller to submit the matter for arbitration.[6] This, the High Court reasoned, is what Rissik Street did.

[22] The High Court refused to grant the eviction order pending the finalisation of the arbitration proceedings. The Court premised its conclusion on the following:

(a) It defeats the purpose and spirit of section 12B of the PPA, which introduces arbitration.[7]

(b) In terms of section 12B(2) of the PPA, the parties determine the rules of arbitration and are at liberty to include any dispute, which in the case at hand, may have included eviction proceedings.[8]

(c) As soon as Rissik Street were evicted, their sources of income would be diminished, which would place them in a weaker position to finance the pending litigation.[9]

[6] Id at para 13.

[7] Id at para 20.

[8] Id.

[9] Id.

(d) *Business Zone CC*[10] provides that arbitration procedures suspend the institution of court litigation.[11]

[23] The High Court explained that an arbitrator acting in terms of section 12B(4)(a) has the power to make such award as is deemed necessary to correct an unfair or unreasonable contractual practice, and that the terms of reference of the arbitration had not yet been determined. It said that Rissik Street were still at liberty to seek reinstatement of the operating lease and the arbitrator was empowered to make such an award.[12]

[24] It relied on *Business Zone CC* in concluding that the arbitrator's power to make an award as it deems necessary to correct an unfair or unreasonable contractual practice included the reinstatement of the operating lease.[13]

[25] The High Court found that as the process of referring the matter to arbitration had already been initiated, it should be given an opportunity to run its course. It said that it was in the interests of justice that the eviction proceedings be stayed, pending the outcome of the referral by Rissik Street to the Controller for a determination as to whether to submit the matter to arbitration.[14] It also interdicted Engen from taking any steps that would adversely affect the operations of Rissik Street, pending the final outcome of the process referred to the Controller.[15] The High Court made the following order:

> "23.1. That the current proceedings are stayed pending the decision by the Controller on referral by the respondents in terms [of] section 12B of the PPA.

[10] *Business Zone CC* above n 2.

[11] High Court judgment above n 5 at para 20.

[12] Id at para 21.

[13] Id.

[14] Id at para 22.

[15] Id at para 23.

23.2. The applicant is interdicted from taking any steps that will adversely affect the operations of the respondents pending the outcome of the process referred to the Controller.

23.3. The applicant to pay the respondents costs on a party and party scale."

[26] It is not clear why the order staying the eviction proceedings was made pending the decision of the Controller when, at the time the order was made, the Controller had already taken the decision to refer the matter to arbitration. The interdictory relief granted by the High Court, however, provided that the relief granted was to endure until the completion of the process determined by the Controller. If the decision of the Controller was to refer the matter to arbitration, then Engen was interdicted from taking steps that would adversely affect Rissik Street's operations until the final outcome of the arbitration process. The two components of the order are only compatible if the stay of eviction order is interpreted to mean that it endures until the decision of the Controller and the outcome of that process. This would then be consistent with the interdict, which was to endure until the conclusion of the process determined by the Controller, which could extend until the end of the arbitration process.

[27] To read the first part of the order literally and restrictively would create a disjuncture between the two components of the order and render them incompatible with each other. If regard is had to the tenor of the judgment, the High Court had in mind relief that would ensure that the process of arbitration be given the opportunity to run its course.[16] It must follow that the first part of the order must be interpreted both in the context of the judgment as a whole as well as with the purpose the order was intended to achieve.[17]

[16] Id at para 22.

[17] *University of Johannesburg v Auckland Park Theological Seminary* [2021] ZACC 13; 2021 (6) SA 1 (CC); 2021 (8) BCLR 807 (CC) at paras 66-9. See also *Eke v Parsons* [2015] ZACC 30; 2016 (3) SA 37 (CC); 2015 (11) BCLR 1319 (CC) at para 29.

Supreme Court of Appeal

[28] Engen was granted leave to appeal to the Supreme Court of Appeal. On appeal, Engen contended that the High Court had erred in finding that Rissik Street would still be at liberty to seek reinstatement of the operating lease at arbitration and that the eviction of Rissik Street prior to the arbitration would interfere with the powers of the arbitrator. Engen submitted that Rissik Street did not complain to the Controller in terms of section 12B of the PPA that the termination of the operating lease was an unfair or unreasonable contractual practice.[18]

[29] Engen also contended that the High Court had incorrectly interpreted this Court's judgment in *Business Zone CC* as authority for the proposition that a referral to arbitration in terms of section 12B automatically suspended the eviction proceedings.[19]

[30] Rissik Street contended on appeal that in terms of the operating lease, they had a right to sell the business once Engen had given notice that it would not renew the operating lease. They argued that, despite the termination of the lease agreement, they were entitled to remain in occupation of the premises and continue to trade in order to enable them to sell the business as a going concern.[20]

[31] They said that Engen could not unreasonably withhold its consent to any such proposed sale and that Engen's conduct had frustrated Rissik Street's right to sell. It was that conduct, argued Rissik Street, which the arbitrator had to deal with.

[32] The Supreme Court of Appeal upheld the appeal. It found that Rissik Street did not, in their request for a referral to arbitration, contend that the non-renewal of the operating lease constituted an unfair or unreasonable contractual practice. As a result,

[18] *Engen Petroleum Ltd v Rissik Street One Stop CC t/a Rissik Street Engen and Another*, unreported judgment of the Supreme Court of Appeal, Case No 209/2020 (26 May 2021) at para 25.

[19] Id at para 27.

[20] Id at para 31.

the notice of referral issued by the Controller did not include the non-renewal of the operating lease as one of the issues to be determined by the arbitrator to be appointed. The arbitrator could not decide on the non-renewal of the operating lease, as this was not a matter referred to arbitration.[21] On this argument there was no legal basis for Rissik Street to remain in occupation, reasoned the Supreme Court of Appeal.

[33] It also found that Rissik Street were entitled to be furnished with reasons for Engen's refusal to accept the offers to purchase the business. It said, however, that this could not give rise to a right that would allow Rissik Street to continue to occupy the premises when such right was not asserted in the request for referral to arbitration.

[34] The Supreme Court of Appeal found that it was not open to Rissik Street to rely on their right to sell the business as a form of security against eviction and that their right to sell the business should have been exercised during the currency of the operating lease. If it was not, then Engen had the right to appoint a new dealer, and in such event, Rissik Street would be entitled to negotiate with the new dealer the terms of any take-over of stock and/or equipment, belonging to it.[22]

[35] It also found that the High Court had granted the stay of eviction on the basis of the mistaken proposition that the arbitration procedure suspends the institution of litigation. It said that the High Court had misdirected itself in its finding, as *Business Zone CC* does not support this proposition. In its analysis of *Business Zone CC*, the Supreme Court of Appeal explained:

> "The Constitutional Court's statement in paragraph 58 of the judgment that the arbitration suspends the institution of court litigation is qualified in footnote 33 in which it is stated that the suspension will depend on the terms of the contract. Where the contract has ended and no complaint is referred to arbitration to seek its extension,

[21] Id at para 32.

[22] Id at para 37.

> the effect of the stay granted by the [High Court] is to grant a remedy in the interim that cannot be obtained by way of final relief in the arbitration."[23]

It found that a stay on this basis was not a competent exercise of the High Court's power.

[36] The Supreme Court of Appeal concluded that the High Court's exercise of its discretion to grant the stay of eviction proceedings was influenced by incorrect principles, entitling it to interfere by setting aside the order made by the High Court.[24] It upheld Engen's appeal, set aside the order of the High Court and replaced it with an order dismissing the counter-application. Rissik Street were ordered to vacate the premises within 30 days from the date of the order.[25]

In this Court

Rissik Street's submissions

[37] Rissik Street contend that this Court's jurisdiction is engaged because in several respects the case raises arguable points of law of general public importance which ought to be considered by this Court. They say that these issues relate to and define the obligations of parties in the retail fuel industry, as well as the scope of the power of an arbitrator acting in terms of section 12B of the PPA. These include:

(a) Does an arbitrator have the power to make an award to correct an unfair or unreasonable contractual practice that would allow ongoing occupation of the premises where the operating lease has expired and where the occupant has sought neither an extension nor a renewal of the lease in the request for referral to arbitration?

(b) Is it necessary that a request for a referral to arbitration made in terms of section 12B of the PPA expressly set out the relief that the requesting

[23] Id at para 38.

[24] Id at para 39.

[25] Id at para 40.

party seeks or is it sufficient for such a request to merely allege an unfair or unreasonable contractual practice, which requires correction?

(c) What powers does an arbitrator have to correct the conduct of a wholesaler who unfairly frustrates the right of a retailer to sell the business which is the subject of the operating lease?

[38] On the merits, Rissik Street submit that the Supreme Court of Appeal erred in concluding that an arbitrator, acting in terms of section 12B of the PPA, was precluded from considering an extension of the operating lease or further period of occupation when the same was not the subject of the request for arbitration submitted to the Controller. In this regard, they say that there exists no requirement in section 12B of the PPA for a requesting party to specify the relief it seeks – all that is required is the allegation of an unfair or unreasonable contractual practice.

[39] They also contend that the Supreme Court of Appeal erred in failing to have regard to the transformative objectives of section 12B of the PPA in interpreting the power of the arbitrator in the restrictive manner in which it did.

[40] Finally, Rissik Street contend that Engen had unreasonably frustrated their right to sell the business in the 12-month period provided for in the operating lease and that this constituted an unfair or unreasonable contractual practice. What they seek is to be placed back in a position that will enable them to sell their business. That will require them to retain occupation of the business during this period. They argue that, if they lose occupation of the premises, the business will cease to exist as a going concern and there will be nothing, apart from the stock and equipment, to sell.

[41] An award to correct Engen's unfair or unreasonable practice, they say, requires them to remain in occupation to enable them to sell the business. This, they say, would not be an extension or a renewal of the operating lease, which they do not seek, but simply an entitlement to occupy the premises for a time-bound period.

Engen's submissions

[42] Engen maintains that the Supreme Court of Appeal was correct in its conclusion that the failure by Rissik Street to identify the non-renewal or extension of the operating lease as an unfair or unreasonable contractual practice was fatal to their attempts to resist its eviction. It argues that if the issue of occupation is not the subject of the referral to arbitration, then the arbitrator has no power to make an award that relates to the occupation of the premises after the expiration of the operating lease. Simply put, it is Engen's case that the arbitrator cannot determine an issue that has not been raised in the request for referral to arbitration submitted to the Controller. As Rissik Street had not expressly raised the issue of their continued occupation of the premises beyond the expiry of the operating lease in their request to the Controller, that issue would not fall within the remit of the arbitrator.

[43] In addition, it is its contention that an arbitrator cannot award an extension of tenure where the operating lease has expired. Engen says that having failed to sell the business during the period provided for in the operating lease, Rissik Street has no claim to extended occupation of the premises for the purpose of further attempting to sell the business.

[44] Engen concludes by saying that there exists no basis in law for a stay of eviction pending an arbitration in terms of section 12B of the PPA. As the arbitrator will not have the power to make any award that relates to occupation of the premises, no claim for a stay is therefore triggered or justified.

The issues

[45] The following issues require determination:

(a) Is the jurisdiction of this Court engaged?

(b) Should leave to appeal be granted?

(c) Does the arbitrator have the remedial power in terms of section 12B(4) of the PPA to allow a party to an agreement, to continue in occupation

of the leased premises after the expiration of the operating lease? In particular, under circumstances where neither a renewal nor an extension of the operating lease is sought, but where the continued occupation may be necessary to correct an unfair or unreasonable contractual practice?

(d) Is a party who submits a request for a referral to arbitration in terms of section 12B of the PPA obliged, at the time of the request, to set out the nature of the relief that may ultimately be sought?

(e) Can a court grant a stay of eviction proceedings pending the determination of arbitration under section 12B of the PPA?

Jurisdiction and leave to appeal

[46] The central issue before this Court is whether the remedial power of an arbitrator in section 12B(4)(a) may extend to allowing a party to an operating lease which has expired, to continue in occupation of the leased premises. In particular, when the nature of the occupation would not be in the form of a renewal or an extension of the lease, but where the continued occupation may be necessary to correct an unfair or unreasonable contractual practice.

[47] A further issue is whether a party who alleges an unfair or unreasonable contractual practice is obliged to set out the relief it seeks in its request for a referral to arbitration. Arising from that is the question of whether an arbitrator would be precluded from considering such relief in any award if it was not sought as part of the request for the referral.

[48] Both issues relate to the powers of an arbitrator and raise arguable points of law of general public importance, which ought to be considered by this Court. The scope and powers of an arbitrator acting in terms of section 12B is an issue affecting the industry as a whole.

[49] The issues raised are novel in the context of the evolution of section 12B of the PPA and the interests of justice warrant determinative pronouncements in order to bring clarity to contractual practices within the retail fuel industry. Rissik Street have also demonstrated reasonable prospects of success. Leave to appeal should therefore be granted.[26]

Legal framework

[50] Section 12B of the PPA, headed "Arbitration", states:

> "(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.
>
> (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;

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

(5) Any award made by an arbitrator contemplated in this section shall be final and binding upon the parties concerned and may, at the arbitrator's discretion, include any order as to costs to be borne by one or more of the parties concerned."

Operating lease

[51] The relevant provisions of the operating lease provide:

(a) Clause 22 of Schedule 2 recognises Rissik Street's right to sell the service station business at any time during the currency of the operating lease.

(b) The procedure for the sale is regulated by Schedule 3. Clause 1.3 of that Schedule provides:

"Should [Rissik Street] wish to sell the Business, it may suggest a proposed purchaser/successor to [Engen], and [Engen] will generally consider that proposed successor as a candidate for a new operating lease of the Premises, subject to the provisions of this Schedule 3. If the prospective successor . . . meets all of [Engen's] selection criteria for a Dealer at the Premises, then in the absence of any reason to the contrary, [Engen] will generally be willing to prefer that prospective successor above others wishing to operate the Business at the Premises."

(c) Clause 1.6 of Schedule 3 further stipulates that it has:

"become [Engen's] policy and [Engen] has now agreed that the price that an incoming Dealer is willing to pay for access to the premises concerned may accrue to the outgoing Dealer [i.e. Rissik Street] as a sale of the business rather than to [Engen] as consideration for the conclusion of the operating lease. Accordingly, [Engen] has agreed that the Dealer has an 'entrenched value' in the Business and is entitled to realise such entrenched value in the event of the Dealer wishing to sell the Business or being required to sell the Business pursuant to this Agreement. However it is specifically recorded that the aforesaid entrenched value of the Dealer is subject to the provisions of this Schedule 3 and to the provisions of clause 44 of Schedule 2 of this Agreement."

(d) Clause 44.2 of Schedule 2 to the operating lease confers upon Rissik Street the right to attempt to sell the business during the 12-month

period preceding the termination of the agreement. It provides (in the relevant part) as follows:

> "If [Engen] intends or elects for any reason not offering [Rissik Street] a further opportunity to lease the Premises from the Termination Date of this Agreement, [Engen] shall endeavour to advise [Rissik Street] in writing at least 12 months prior to the Termination Date of this Agreement. If such advice is not provided at least 12 months prior to the Termination Date of this Agreement, [Engen] may still provide such advice at any time prior to the Termination Date of this Agreement provided that [Rissik Street's] tenure at the Premises will then be extended for a period beyond the Termination Date of this Agreement to ensure that [Rissik Street] will have received at least 12 months' notice that [Engen] intends or has elected not offering [Rissik Street] a further opportunity to lease the Premises from the Termination Date of this Agreement extended as aforesaid. Any extension as aforesaid will be on the terms and conditions of [Engen's] operating leases at such time."

(e) Clause 44.2 then goes on to provide as follows:

> "Should [Engen] advise [Rissik Street] that it does not intend renewing the lease between the parties, [Rissik Street] shall be entitled to attempt to sell the Business during the remaining period of the lease, and [Engen] shall not unreasonably withhold its consent to such sale. Should [Rissik Street] not have sold the Business prior to the expiry of the lease, the provisions of sub-clause 44.1 of this Schedule 2 shall apply and [Rissik Street] shall not have the right to any compensation in respect of his loss of the Business."

(f) Clause 44.1 of Schedule 2 (mentioned in the final sentence of clause 44.2 quoted above) provides that Engen has the right, on premature termination, to appoint a new dealer. Rissik Street is entitled to negotiate with such new dealer in respect of any takeover of stock and equipment belonging to Rissik Street on the premises, alternatively that Rissik Street have the right to remove stock and equipment on the premises belonging to it.

Stay of proceedings

[52] Section 6(1) of the Arbitration Act[27] provides:

> "If any party to an arbitration agreement commences any legal proceedings in any court (including any inferior court) against any other party to the agreement in respect of any matter agreed to be referred to arbitration, any party to such legal proceedings may at any time after entering appearance but before delivering any pleadings or taking any other steps in the proceedings, apply to that court for a stay of such proceedings."

[53] While the parties proceeded on the assumption that section 6(1) of the Arbitration Act is applicable, I have doubts about its applicability. The dispute before the High Court relates to the attempt by Engen to evict Rissik Street from the leased premises. It cannot be said that the parties agreed to refer the dispute regarding the eviction to arbitration – something that section 6(1) contemplates as a requirement for a stay application.

[54] Firstly, the arbitration under section 12B does not arise by agreement between the parties but is rendered obligatory by statute. Secondly, the subject matter of the High Court application and the arbitration is different, even though tangentially related. In the High Court, the relief sought was an order for eviction, while in the arbitration the issue is a complaint that Engen has unreasonably frustrated Rissik Street's right to sell their business. An award arising out of the arbitration may influence the ongoing occupation of the premises, but these are not the same issues in substance. It is for these reasons I conclude that section 6(1) of the Arbitration Act cannot be called in aid.

[55] Is there another basis upon which the High Court was empowered to stay the eviction proceedings? Section 173 of the Constitution provides that Superior Courts have the inherent jurisdiction to regulate their own processes in the interests of justice. Section 173 provides:

[27] 42 of 1965.

> "The Constitutional Court, the Supreme Court of Appeal and the High Court each has the *inherent power* to protect and regulate their own process, and to develop the common law, taking into account the interests of justice." (Emphasis added.)

[56] In *South African Broadcasting Corp Ltd*,[28] the nature of the inherent power of the Superior Courts under section 173 is described as follows:

> "The power in section 173 vests in the judiciary the authority to uphold, to protect and to fulfil the judicial function of administering justice in a regular, orderly and effective manner. Said otherwise, it is the authority to prevent any possible abuse of process and to allow a Court to act effectively within its jurisdiction."[29]

[57] In *Mokone*,[30] Madlanga J referred to section 173 as providing the basis for the courts mentioned in the section to regulate their own processes taking into account the interests of justice. This Court then invoked its inherent power and, after being satisfied that it was in the interests of justice to do so, stayed proceedings for the eviction of the applicant pending the finalisation of associated proceedings.

[58] Rissik Street submit that Engen's refusal to consent to the sale of the business, without providing reasons for the refusal, constitutes an unfair or unreasonable contractual practice, which the arbitrator needs to correct. They argue that the correction of the practice may well entail an order that will require them to remain in occupation of the business pending attempts to sell it without being unreasonably impeded by Engen in their attempts to do so. They say that it is an award of that scope that will correct the unfair contractual practice that Engen has committed by declining to provide reasons for its refusal for the sale of the business.

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[28] *South African Broadcasting Corp Ltd v National Director of Public Prosecutions* [2006] ZACC 15; 2007 (1) SA 523 (CC); 2007 (2) BCLR 167 (CC).

[29] Id at para 90.

[30] *Mokone v Tassos Properties CC* [2017] ZACC 25; 2017 (5) SA 456 (CC); 2017 (10) BCLR 1261 (CC) at para 67.

[59] It is not in dispute that Rissik Street acquired the right to sell the business as from 2 October 2017 and that they had 12 months to do so. Schedule 3 of the operating lease records that Engen recognises that Rissik Street have an "entrenched value" in the business and is entitled to realise such entrenched value. It is not in dispute that this entrenched value has been built up over the 20 years that Rissik Street have initiated, operated, and grown the business.

[60] In asserting their right to sell the business, Rissik Street sought consent for the sale of the business and presented several offers made by potential buyers to Engen. The first offers were submitted in May 2018 during the currency of the lease, while another offer was submitted in January 2019, after the expiry of the lease. The latter offer appears to have been triggered by a request from Engen to Rissik Street to submit an offer.

[61] Engen declined to give its consent in respect of the May 2018 offers. It adopted the stance that it did not need to consider the January 2019 offer, except to point out to Rissik Street that the operating lease had expired and that it was required to vacate the premises. In respect of the May 2018 offers, it took the position that it was not obliged to give reasons for its refusal. It is this refusal without accompanying reasons that Rissik Street take issue with and allege is an unfair or unreasonable contractual practice.

[62] Whether it is in fact so is a matter for the arbitrator to determine, but what the enquiry posits is the proper interpretation of the operating lease against the backdrop of section 12B of the PPA. On the one hand, Rissik Street rely on clause 44.2, which provides that Engen may not withhold its consent unreasonably. On the other hand, Engen placed reliance on clause 10.1 of Schedule 3 to the operating lease, which says that any discretion it exercises is absolute and unfettered and that it need not furnish reasons for it.

[63] In this interpretative exercise the maxim *generalia specialibus non derogant*[31] (general provisions do not derogate from special ones) finds application. Rissik Street's entitlement not to have the consent to a proposed purchaser unreasonably withheld is contained in clause 44.2 of Schedule 2 and is specific in addressing the terms of Rissik Street's right to sell the business upon termination of the agreement. Engen's reliance on the clause affording it the discretion to refuse giving such reasons is a general term contained in clause 10.1 of Schedule 3 of the operating lease. In Schedule 2 – the same Schedule that contains clause 44.2 – there is a separate clause dealing with discretion. Clause 36.1 of Schedule 2 provides that any consent from Engen shall not be unreasonably withheld unless it is expressly stated to be within Engen's discretion, "in which event [Engen] shall not be liable to give any reasons". This may well imply that where a provision in Schedule 2 stipulates that consent shall not be unreasonably withheld (clause 44.2 is such a provision), Engen is obliged to give reasons. The maxim may require the general provision in clause 10.1 of Schedule 3 to yield to the special provisions of Schedule 2, in particular, clause 44.2 read with clause 36.1 of Schedule 2.

[64] Whether Engen's refusal to consent to the proposed sale of the business was reasonable is not possible to discern in the absence of any reasons being furnished by Engen. This is at the heart of the complaint by Rissik Street and their request to the Controller. If Engen has an absolute and unfettered discretion to refuse to consent and not furnish reasons, then it would not be possible for Rissik Street to properly exercise their right to sell the business when they remain unaware of what factors Engen takes into account in deciding to grant or refuse consent to a proposed sale. This is, however, a matter that the arbitrator will be required to consider in determining whether

[31] Christie and Bradfield *Christie's Law of Contract in South Africa* 8 ed (LexisNexis, Johannesburg 2022) at 276-7 states that —

> "This maxim has regularly been used in interpreting statutes, has been used in interpreting the articles of association of a company, and given that there is no difference in approach to interpreting legal documents, it could be used in interpreting contract."

This position was confirmed in *Consolidated Employers Medical Aid Society v Leveton* [1998] ZASCA 114; 1999 (2) SA 32 (SCA) at 41A - C and in *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd* [2007] ZASCA 85; 2007 (6) SA 87 (SCA) at para 11.

Engen's conduct in this respect constitutes an unfair or unreasonable contractual practice.

[65] It, however, cannot be rejected as a reasonable possibility that the arbitrator may determine that the refusal to provide reasons constitutes an unfair or unreasonable contractual practice. In addition, even if it is found that clause 10.1 of Schedule 3 applies, whether such a stance is unfair or unreasonable would still require consideration and again it cannot be rejected as a reasonable possibility that the arbitrator may find that reliance on clause 10.1 is an unfair or unreasonable contractual practice.

[66] On that basis, Rissik Street maintain that they should have the proper opportunity to sell the business, which has not happened thus far. They go on to argue that they require to remain in occupation of the business in order to sell it and that, if evicted, all that they will be capable of selling will be the stock and the equipment of the business. In addition, they only seek to remain in occupation for the period provided for in the lease in order to sell the business. They say that they were deprived of the opportunity to sell the business because Engen unfairly or unreasonably frustrated their attempts to do so.

[67] Rissik Street say eviction will bring to an end its ability to sell the business. While Engen disputed this assertion in its affidavits in the High Court, at the hearing of the matter in this Court, it conceded that this was in fact so. This was an important and appropriate concession in the matrix of this application. In doing so, Engen accepts that Rissik Street's entrenched value in the business will dissipate in Rissik Street's hands if they were evicted. Despite the concession, Engen persisted in its stance that Rissik Street's right to sell cannot survive the currency of the operating lease.

[68] Again, and while the arbitrator will have to determine the scope of any award that may be made, Rissik Street have built up a business with a substantial value (R6 million to R8 million). They acquired the right to sell the business within a limited time-frame of 12 months and made bona fide attempts to do so. Regard being had to

Engen's stance in refusing to consent to the sale without providing reasons, it cannot be rejected as a reasonable possibility that the arbitrator will find that Engen frustrated Rissik Street's 12-month window of opportunity to sell the business.

[69] Rissik Street say that they seek a fair opportunity to sell the business which they did not have previously. As a reasonable possibility, the arbitrator might make an award granting Rissik Street a further period of occupation to compensate it for as much of the 12-month selling period as they were deprived of due to the unfair or unreasonable contractual practice.

[70] The occupation of the premises may therefore be significant in the scheme of any corrective award that may arise in terms of section 12B. If Rissik Street were evicted, they would not be able to sell the business including the goodwill that they have built up. In that event, Engen will be at liberty to acquire a new tenant without recourse to Rissik Street and the goodwill will be a factor in Engen's favour in the rental consideration any new tenant would be willing to pay. The operating lease refers to this as the "entrenched value" of the business but, in substance, it is the goodwill of the business.

[71] The consequence of all of this is that Rissik Street would, without having had the proper opportunity to do so, have lost their right to recoup the entrenched value in the business they have built up over more than 20 years. Engen, which has no equitable claim to that goodwill, would reap the benefits of it in the consideration it will be able to garner from a potential new tenant. This is inequitable. It runs counter to the transformational objectives of the PPA and only entrenches the inequality in the fuel industry between wholesalers and retailers, by providing Engen with an undue benefit that it was never entitled to in the form of the goodwill to the business.

[72] Such an outcome would be inimical to bringing about change in power relations in the fuel industry, to which the PPA is committed. Courts must, in the pursuit of these legitimate constitutional imperatives, interpret the PPA and the contracts in the industry

through the lens of the transformative commitment that the PPA seeks to achieve. This, of course, does not mean that courts are at liberty to make and impose contracts for the parties in the name of transformation and beyond what the parties may have intended for themselves. However, section 12B enjoins the parties to look beyond the written terms of their contracts in recognising the normative framework of fairness and reasonableness that the section introduced as an overarching framework that governs all contracts in the retail fuel industry.

[73] Arising from that, the interpretative question that presents itself cannot be confined to whether or not the terms of the contract permit a particular contractual practice, but whether such a practice conforms to the requirements of fairness and reasonableness. If it does not, the terms of the contract cannot prevail. It, therefore, cannot be a case where reliance on contractual terms is dispositive of a dispute between the parties. Rather, section 12B of the PPA requires that all contractual practices in the retail fuel industry be interrogated against the standard of fairness and reasonableness. It represents, in many respects, a seismic but necessary shift in the framework of contractual relationships in the retail fuel industry in the quest to transform that industry.

[74] Reverting to the dispute before this Court, occupation of the premises may well be key to how the arbitration unfolds and the choice of a necessary corrective award, if one is required. Engen resists the ongoing occupation of the premises and any attempt by Rissik Street to have a court-sanctioned occupation in place as interim relief. It relies on common law grounds for the eviction of Rissik Street and says that, absent a claim for renewal or reinstatement of the operating lease, there exists no legal basis for Rissik Street to continue in occupation after the expiry of the operating lease.

[75] This line of reasoning, which is also what the Supreme Court of Appeal embraced, is premised on the assumption that Rissik Street would require the lease to be renewed in order to ground a claim to remain in occupation. This, however, has never been the case for Rissik Street nor is that the complaint put before the Controller. Rissik Street contend that the relationship with Engen has broken down, and they do

not seek the renewal or reinstatement of the operating lease. The position taken by the Supreme Court of Appeal leads, with respect, to an illogical outcome. If Rissik Street were required to seek the renewal of the lease to secure their ongoing occupation, then they would not have acquired the right to sell the business. A renewal of the operating lease for five years would have precluded any sale of the business, as a sale is only permitted in the 12-month period before the expiration of the operating lease. A renewal of the operating lease would not have achieved that outcome. To that extent, the Supreme Court of Appeal erred in relying on this reasoning and introducing this conditionality to Rissik Street's claim in upholding the appeal.

[76] What Rissik Street seek is not the extension or the renewal of the operating lease, but rather the opportunity to sell its business in accordance with the terms of the operating lease. In addition, they seek the acknowledgement that the sale of the business is inextricably linked to their ability to remain in occupation in order to do so.

[77] The Supreme Court of Appeal, however, concluded that even if Rissik Street's complaint was found to be an unfair or unreasonable practice, it will not vest any remedial power in the arbitrator to permit Rissik Street to remain in occupation pending the sale of the business.

[78] I disagree with this conclusion. Section 12B vests wide remedial powers in the arbitrator, which are "necessary to correct such practice". If the arbitrator finds in favour of Rissik Street on this aspect, then it may well follow that the corrective award necessary would be one allowing Rissik Street the opportunity to sell the business. If that is only possible while Rissik Street remain in occupation, then under those circumstances, occupation of the premises may well be a necessary part of any remedial award. The pleadings in the arbitration are still to be filed, and Rissik Street may well, in those pleadings, seek the relief of ongoing occupation pending the sale of the business. This would be consistent with the complaint they had submitted.

[79] Section 12B does not require an aggrieved party to specify the relief that it seeks at the time it requests a referral to arbitration. While the terms of the arbitration must mirror the complaint, the relief that is considered and ultimately granted is not required to be spelt out in the request to the Controller, and the relief in the form of an award is, in any event, a matter for the arbitrator to determine. It cannot be that an aggrieved party must set out the relief it seeks in its request and that it may in future be barred from doing so if it does not. This narrow approach is inconsistent with what has been described as the wide remedial power of an arbitrator acting in terms of section 12B.

[80] It therefore follows that section 12B would not stand in the way of an arbitrator having such powers. For clarity, it is not the power to renew or reinstate which I find to exist, but to make an award that enables Rissik Street to continue to occupy the premises pending the sale of the business. The source of that power is not in the common law, but in the provisions of section 12B that oblige an arbitrator to make an award to correct an unfair or unreasonable practice. Such a wide power is consistent with the transformative objects of the PPA and the need to address the inequalities in the fuel industry.

[81] The Supreme Court of Appeal erred in the conclusions it reached regarding both the failure to raise the non-renewal of the operating lease in the request for arbitration and in the limited manner in which it interpreted the remedial power of the arbitrator. It also incorrectly characterised the issue before it by its failure to make the connection between the unfair or unreasonable contractual practice and the ongoing occupation of the premises by Rissik Street.

[82] It follows that the appeal must succeed. Rissik Street acquired the right to sell the business, which will not be possible if they cease to be in occupation. If evicted, Rissik Street will suffer irreparable harm in the loss of the business, there is no other remedy, and the balance of convenience favours the granting of the relief sought. Rissik Street occupy and continue to pay “rental” so there is limited prejudice, if any, for Engen, but an eviction will redound to the permanent prejudice of Rissik Street.

[83] The interests of justice present a compelling argument for the invocation of this Court's inherent power to stay the eviction proceedings pending the finalisation of the section 12B arbitration. Paramount amongst those interests is the right of Rissik Street to seek effective relief in the section 12B arbitration in respect of Engen's alleged unfair or unreasonable contractual practice. An eviction will render nugatory Rissik Street's right to seek effective relief in the section 12B arbitration.

Referral to arbitration and the Controller's conduct

[84] One of the worrying features in the timeline relating to the dispute before the Court is the period of one year that passed between the request by Rissik Street to the Controller to refer the matter to arbitration and the decision ultimately taken by the Controller. In addition, no less than four emails were addressed to the Controller during this time enquiring as to when a decision would be made. There was no response to any of those emails and the decision was only taken when the parties were already deep into litigation.

[85] In *Business Zone CC*, this Court in reflecting on the value of the arbitral mechanism said:

> "The purpose of the [Petroleum Products] Amendment Act 'to provide for appeals and arbitrations' through section 12B cannot be overlooked. The inherent value of section 12B enabling a party to resolve a dispute through arbitration rather than court proceedings must be recognised. Arbitration offers an *expedient*, specialised and procedurally flexible forum to resolve disputes."[32] (Emphasis added.)

[86] A delay of one year undermines the attraction of an expedient arbitral mechanism that section 12B introduced. If the decision to refer the matter to arbitration was taken timeously, the real possibility exists that the arbitration could have been finalised before

[32] *Business Zone CC* above n 2 at para 59.

the expiration of the operating lease and the parties could have avoided the spectre of lengthy and costly litigation.

[87] If section 12B is to achieve its objective of providing the parties to a dispute with an expedited arbitral mechanism, there must be a more efficient turnaround time between the submission of a request for arbitration and a decision on that request. To that end, I intend to direct that a copy of this judgment be submitted to the Controller of Petroleum Products as well as the Minster of Mineral Resources and Energy and the Director-General of the Department of Mineral Resources and Energy for their consideration.

Remedy

[88] The appeal must succeed and the order of the Supreme Court of Appeal falls to be set aside. The result is that the order of the High Court must prevail. I made reference earlier in this judgment to the High Court order and my view that the order must be interpreted in the context of the judgment of the High Court and the purpose that the order sought to achieve.

[89] That being the case, it must follow that the order staying the eviction and found in paragraph 23.1 of the order of the High Court, should as a matter of caution read as follows:

> "That the current proceedings are stayed pending the decision by the Controller and the final outcome of any process arsing therefrom."

[90] Apart from that being consistent with the judgment and the order of the High Court read as a whole, it was also evident from the proceedings in the Supreme Court of Appeal, as well as in the hearing before this Court, that the parties proceeded on the assumption that the order granted by the High Court was a stay of eviction pending the final outcome of the section 12B arbitration. There can

accordingly be no prejudice to any of the parties if the High Court order is interpreted to give proper effect to its purpose.

Conclusion

[91] I am satisfied that a proper case was made out for the interim relief in the form of a stay of eviction that Rissik Street seek. Leave to appeal must be granted and the appeal must be upheld. The order of the Supreme Court of Appeal must be set aside and substituted with the order of the High Court.

Order

[92] The following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Supreme Court of Appeal is set aside and replaced with the following:
   "a) Subject to (b) below the appeal is dismissed with costs.
   b) The stay granted in paragraph 23.1 of the High Court's order will endure pending the final outcome of any process arising from the applicants' request to the Controller of Petroleum Products (Controller) in terms of section 12B of the Petroleum Products Act 120 of 1977.
   c) The respondent is interdicted from taking any steps that will adversely affect the operations of the first applicant pending the final outcome of the process referred to the Controller."
4. The respondent is to pay the costs of the applicants in this Court, including the cost of two counsel.
5. The Registrar of this Court is directed to forward a copy of this judgment to the Minister of Mineral Resources and Energy, the Director-General of the Department of Mineral Resources and Energy, and the Controller and to draw their attention to [85] to [88] of the judgment.

For the First and Second Applicants:	G Quixley and M De Beer instructed by Seton Smith and Associates
For the Respondent:	S Aucamp instructed by Mathopo Moshimane Mulangaphuma Incorporated t/a DM5 Incorporated