IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.

(3) REVISED.

22/3/2018
DATE

SIGNATURE

22/3/18

Case Number: 51067/15

In the matter between:

MARNDRE BELEGGINGS CC	Applicant
and	
THE MINISTER OF ENERGY	First Respondent
ENGEN PETROLEUM LIMITED	Second Respondent
CONTROLLER OF PETROLEUM PRODUCTS	Third Respondent

JUDGMENT

POTTERILL J

[1] The Applicant [Marndre] is applying for the review and setting aside of the decision of the First Respondent [the Minister]. The Minister's decision overturned the Third Respondent's [the Controller] decision wherein the controller referred an unfair and unreasonable contractual practice to arbitration in terms of Section 12B of the Petroleum Products Act, 120 of 1977 [the Act]. Prayer 2 of the notice of motion was abandoned in argument. The Second Respondent opposed the application with a notice in terms of 6(5)(d)(iii) raising questions of law. The Minister filed a notice to abide by the decision of the Court.

[2] In argument it was submitted that the crux of the review is not that Marndre sought to set aside the Minister's decision relating to the extension of a renewal of the operating lease agreement, but the second part of the Minister's decision i.e. the Minister's decision to uphold Engen's appeal and the reversal of the Controller's decision to refer the aspect relating to the 10 year policy to arbitration.

Factual Background

2.1 With no evidence to contradict the facts put up by Marndre the following must be accepted:

2.2 Marndre purchased a fuel service station [the business] as a going concern for R2.2 million in November 2000. Marndre thereafter entered into an operating lease agreement with Zenex Oil (Pty) Limited [Zenex]. In essence this contract entailed that Marndre leased the premises from Zenex and would purchase petroleum products from Zenex.

2.3 During 2001 Engen in writing informed Marndre that Engen had purchased Zenex. Engen and Marndre then concluded an Agreement of Lease and Operation of Service Station [operating lease agreement] which was renewed from time to time.

2.4 The fuel service station was owned by Capitol Hill Investments (Pty) Limited [Capitol Hill]. Zenex had concluded a notarial lease agreement with Capitol Hill in June 1994 and sub-leased the property to Marndre. During April 2003 Capitol Hill was placed in liquidation. To secure tenure Engen had to on auction in lieu of the liquidation of Capitol Hill, purchase the property.

2.5 On 28 February 2011 at a meeting with Engen Marndre informed Engen representatives that they intended to sell the business. Marndre handed Engen two signed offers to purchase; one from Raceway CC for a purchase

price of R7.9 million and one from Mr Rawat for R7.9 million. Both agreements were subject to the suspensive condition that Engen enters into operating lease agreements with the prospective purchasers of the business.

2.6 Mr Alan Stewart of Engen informed Mr Lourens of Marndre that Engen Head Office laid down a stringent condition when purchasing the property that in future the dealership must go to an ethnic black person and that the property would not be upgraded until at least 1 May 2015.

2.7 Marndre was also informed that Engen was not willing to enter into a standard operating lease agreement with it. Engen was only prepared to enter into an amendment agreement for an indefinite period, subject to 30 days' notice, but with a proviso that-

> *"This tenancy shall, subject to the other provisions of this memorandum and the provisions of law, remain in force until the end of April 2015, whereafter there shall be no further right of renewal or extension."* [Clause 2.1]

Mandre refused to sign this agreement, but in July 2010 signed a standard operating lease agreement by Engen for the period 1 September 2012 to 1 May 2012. Engen then refused to sign this agreement.

2.8 Marndre was then telephonically informed that Engen was dissatisfied with Marndre and Engen would not extend the operating lease agreement beyond that date with Mandre or any other dealer.

2.9 Engen, despite many communications, did not attend to the offers of Rawat, Frontiers Fuel or the offer one Kugotsi.

2.10 Marndre received a letter form Engen's attorney on 21 April 2011 that the offer to enter into the amendment agreement was withdrawn because Engen wanted to make proper commercial use of the asset which it had purchased. As a businessman Marndre would be aware that since 2000 it conducted a business with limited tenure, a risk that any businessman took, and Engen could not bear the loss or subsidise Marndre who chose to conduct business with limited tenure.

2.11 During October 2011 Engen adopted a new tenure policy [NTP] to de-link tenure and the valuation of a dealer's business as well as shorten tenure and stop the practice of extension of leases. In terms hereof Engen had a right to veto, but dealers would be presented with a fair business value formula.

2.12 On 16 February 2012 Engen in writing accepted its obligation to sign the operating lease agreement that Marndre had signed for the period September 2012 – May 2015. This letter also reaffirmed that Engen would not renew the agreement upon expiry but that:

"Your client is free to sell the service station business in accordance with the policy [the tenure policy] to which reference has been made. Your client may obviously not sell the business on a basis not supported by the rights attaching to the property."["R"]

2.13 On 8 May 2012 Engen signed the operating lease agreement.

2.14 Marndre attempted to sell the business but Engen did not consent to, or accept the offers made. Vithuza Investments Pty Ltd signed an agreement of sale on 15 April 2013 and made a better offer on 9 October 2013. Engen did not approve any of the agreements of sale.

Proceedings before the Controller

[3] Marndre then referred the matter to the controller for certain unfair or unreasonable contractual practices to be heard by an arbitrator. The referral read as follows:

Prayer 1 reads as follows:

"*Requesting the Controller of Petroleum Products to refer by notice in writing to the Applicant and Respondent, the matters enunciated in prayers 2 and 3 below to arbitration.*"

Prayer 3 is a request for further and alternate relief and can thus be ignored.

Prayer 2 reads as follows:

"That upon being referred to arbitration the Arbitrator decide the following issues between the Applicant and the Respondent:

1.1 That the failure on the part of the Respondent to grant to the Applicant a right to continue after 1 May 2015 with the current operating lease on the premises ... is declared to be an unfair and unreasonable contractual practise as provided for in terms of Section 12B(1) ....

1.2 That the failure on the part of the Respondent to agree to a continuation after 1 May 2015 of the current operating lease on the site ... of the filling station impairs and affects negatively the right of the Applicant to sell its operating franchise at fair value and such failure to declare it an unfair and unreasonable contractual practise, as referred to in prayer 1 above."

Engen opposed the referral based thereon that an arbitrator would not have jurisdiction to entertain the matter because it related to Engen's failure to agree to an extension of the lease of the premises.

[4] The controller found: *"... the Controller's considered view is that the arbitrator does not have the powers to stipulate the terms and conditions of a new agreement as*

this will be acting Untra [sic] Vires. In light of the foregoing, Engen is within its legal right not to extend the Lease Agreement after expiry, and as such, the Controller has no basis to refer the aforementioned matter to arbitration. [par 9].

[5] The controller did refer to the following: *"However, the Controller recorded concerns regarding Marndre's allegations on Engen's new Tenure Policy affecting its chances of selling its business at a fair business value. In this regard, the Controller could not find any reference of the NTP in the current standing Lease Agreement except for reference made in clause 12 [par11]. Clause 12 in the current standing lease Agreement under 'Amendments to Agreement', states thus: 'any changes to the agreement is to be communicated to the dealer in writing and allow him/her to terminate the Agreement if not in agreement with the changes.' The Controller could not find any such written notice to Marndre in this regard informing it of the NTP, and in so doing allowing it to indicate if it wishes to terminate the Lease Agreement or not."*

[6] The Controller then referred to arbitration the following: *"It is against the concerns recorded in paragraphs 11 and 12 that the Controller, in so exercising his discretion in terms of section 12B of the Act, refer the aforementioned concerns to arbitration for the arbitrator to "test the terms and conditions of the alleged NTP against*

implementation of the current standing Lease Agreement between the parties. This is in an attempt to assist Marndre to sell its business at fair value and thereby realise return on investment."

Appeals to the Minister

[7] Marndre appealed the decision of the controller as a failure to negotiate, alternatively refusal to extend the lease agreement. This appeal was opposed by Engen and the Minister found as follows:

> *"The failure on the part of Engen to extend the Agreement of Lease and Operation of Service Station after 30 April 2015 which it is alleged will negatively affect your client's right to sells its business at a fair value, falls outside the scope of a "contractual practise" and therefore is not a matter that can be referred to arbitration in terms of section 12B of the Act ... It is trite that for a contract [or extension thereof] to be concluded there has to be consensus between the parties. Having regard to all the submissions made, I am of the opinion that section 12B is not a mechanism that can be utilised to demand that Engen enter into a new Agreement of Lease and Operation of Service Station."*

[8] Engen simultaneously appealed the Controller's decision to refer the allegations relating to the tenure policy and Marndre's ability to sell the business to arbitration. This appeal was not opposed by Marndre. The Minister upheld Engen's appeal. The Minister's reason for granting Engen's was. *"After careful consideration of all the information and arguments presented before me, I find that the abovementioned referral, in toto, is not a matter that can be arbitrated on. I am of the opinion that the Controller acted outside of his scope by referring the aspect of your client's New Tenure Policy for arbitration.*[1] This finding of the Minister is not the subject of this review.

The Law

[9] Section 12B of the Act provides as follows:

> *"(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 visa versa, require, by notice in writing to the parties concerned, that the parties submit the matter to arbitration.*
>
> *(2) ...*
>
> *(3) ...*
>
> *(4) An arbitrator contemplated in subsection (2) or (3)-*

[1] p1168

(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 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."

[10] The jurisdictional requirements to be met for the section 12(b)(1) are:

10.1 An allegation of an unfair or unreasonable contractual practise and;

10.2 A request for a referral of such practise.

[11] The submission made on behalf of Marndre that the referral never entailed a request to extend the lease agreement is a little astounding. As I read the referral the

unreasonable or unfair contractual practise has as its foundation Engen's refusal to renew or extend the operating lease agreement beyond the end of April 2015. Such refusal hinders the selling of the business because nobody will buy the business if known that Engen will not conclude an operating lease agreement with the new business. This submission is of course sound and would without doubt render the sale of Marndre's business improbable. It is now conceded by Marndre that this unfair or unreasonable practise cannot be referred to arbitration because an arbitrator cannot contract on behalf of parties.[2] It is probably due to this concession that there was an attempt to downplay this alleged unfair or unreasonable practise and definitive referral thereof to the Controller. The Controller decided on the practise referred to her as follows: *"In my view the alleged unfair or unreasonable contractual practices Marndre wishes to referred to arbitration is Engen's refusal to extend the Lease Agreement after its expiry" [Par 4]. This was clearly the unfair or unreasonable practise referred to the Controller.*

[12] In essence Marndre is requesting this court to reinstate the Controller's decision to refer the concerns as: *test[ing] the terms and conditions of the alleged NTP against implementation of the current standing Lease Agreement between the parties. This is in an attempt to assist Marndre to sell its business at fair value and thereby realise return on investment."* [par 11]. And;

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[2] *Business Zone 1010 CC t/a Emmarentia Convenience Centre v Engen Petroleum Limited and Others* [2017] ZACC 2

Clause 12 in the current standing Lease Agreement under "Amendments to Agreement", states thus: "any changes to the agreement is to be communicated to the dealer in writing and allow him/her to terminate the Agreement if not in agreement with the changes." The Controller could not find any such written notice to allowing it to indicate if it wishes to terminate the Lease Agreement or not. [par 12].

Therefore this letter further serves as notice in terms of section 12B of the Act to the parties concerned to submit the matter referred in paragraphs 11 and 12 to arbitration ... [par 14].

The Minister did not in Marndre's appeal make a finding on this ruling of the Controller, simply because it was not appealed against. This finding was the subject of Engen's appeal which Marndre did not oppose. The Minister's reasons for refusing Mandre's appeal were different to the reasons advanced on Engen's appeal. There is no doubt that Marndre is conflating the two appeals in bringing this review.

[13] The point in law that Engen is taking is that the Controller was not requested to decide on the NTP, but did so *mero motu*. This jurisdictional requirement of s12B was thus not fulfilled. In the application to the Controller, prayers 1,2, 2.1, 2.2 and

2.3, there is categorically no reference to the NTP or the cancellation clause of the Lease Agreement between Engen and Marndre.

[14] On behalf of Marndre it was submitted that in the affidavits attached to the request there was reference to the NTP and the effect it had on Marndre's ability to sell the business and at fair value. Because s12B is an equitable remedy available to lay persons a Controller has a flexible approach when exercising his or her discretion. Reliance was placed on the Business Zone judgment wherein it was found:

> *"[61] The only jurisdictional requirement for the Controller to make a referral under section12B(1) is an allegation by a retailer that a wholesaler, or vice versa, has committed an unfair or an unreasonable contractual practice. The Controller need only satisfy himself to the existence of such allegation and must accordingly limit his interrogation of the merits of the dispute to the extent required to establish the allegation's existence. The Controller should then refer the matter to arbitration."*

[15] The jurisdictional requirement was not fulfilled when the Controller referred paragraph 12 of her finding, the amendment of the contract, to an arbitrator, simply because there was no allegation based on the cancellation clause.

[16] As for the allegations relating to the NTP reliance was placed on paragraphs in the affidavit reading as follows: *"... Secondly any possible yield has no relevance whatsoever to the new 10 year policy that the dealer can exit the Engen retail network at fair business value. This decision by Engen is not contrary to their own policy adopted in October 2011 but also an attempt to circumvent Section 2A(5)(a) & (b) of the Petroleum Products Act ..." "By preventing Marndre Beleggings from selling at fair business value Engen will effectively attach the retail licence held by Marndre Beleggings and inter alia perform the role of business broker in transferring the business to a new dealer. This attempt to will be accompanied by compensation to Engen and not to the dealer selling the business.....nobody in his/her right mind would invest in a business without any reasonable prospect of eventually alienating the dealership at a profit or at least recuperate the investment."*[3]

"... The new policy not only acknowledges the principle referred to as "Fair Business Value", it clearly states that a dealer can exit the network at fair business value irrespective of the length of the remaining lease. For this, I refer the reader to the content of the last page of the "Change in strategy in regard to Tenure and selling of sites: October 2011 ..."[4]

[3] p334 par 41
[4] p328 par 26

In the affidavit reference was also made that Marndre expected Engen to execute the NTP fairly and not compromised. In the supplementary affidavit reference was also made to the NTP that would entitle Marndre to sell the business.

In oral argument the submission is made, based on these excerpts, that what must be referred to an arbitrator is the NTP and the way it affected Marndre's ability to sell its business and Engen's unreasonable or unfair contractual practice of withholding its consent to Marndre to sell the business.

[17] The Minister failed to take these allegations into consideration and therefore the decision was not rationally connected to the purposes of s12 of the Act and the reasons provided. The Minister in dismissing the appeal was thus materially influenced by an error of law.

Discussion of the law

[18] The Minister's reasons for granting Engen's appeal is in this review application used as review grounds for Marndre's appeal to the Minister that was dismissed. At the risk of repeating myself; Engen's appeal was not opposed. One cannot take a point in law that the Minister did not act rationally when Marndre did not appeal the referral of the concerns relating the NTP to the Minister; the Minister was not requested to adjudicate thereon, the Minister has a duty to only adjudicate that

which Marndre is appealing. The Minister did so and the dismissal of the extension/renewal of the lease agreement is not the subject of review before me. The Minister did thus not err in law and the decision was rationally connected to the purpose of s12B in that the section is not a mechanism whereby an arbitrator can force parties to enter into a new lease agreement.

[19] The essence of the request to the Controller is summarised in Marndre's appeal to the Minister as follows:

> *"In this instant case Marndre has alleged an unfair or unreasonable contractual practice on the part of Engen, namely its failure to negotiate or renew the lease agreement. The consequences of Engen's conduct are dire and will result in Marndre suffering substantial and irreparable prejudice. Marndre will be unable to dispose of its business for a fair value in that it will be unable to provide a prospective purchaser with security of tenure"* [para 27 of Marndre's notice of appeal].

Marndre simply did not attack the provisions of the NTP, in fact in the affidavits Marndre expressed that the NTP conferred on it a favourable right to sell its business at fair value. It now surprisingly latched onto the concerns of the Controller expressing a contra view of the NTP; *"However, the Controller recorded concerns regarding Marndre's allegations on Engen's new Tenure Policy affecting its*

chances of selling its business at a fair business value [my highlighting]. There never was, and simply could not be a referral by Marndre in these terms, as an alleged unfair or unreasonable contractual practice to arbitration. This referral by the Controller was irrational and simply wrong and, although not before me, *obiter* the Minister was correct in upholding Engen's appeal on this finding.

[20] The second concern raised by the Controller was to *"test the terms and conditions of the alleged NTP against implementation of the current standing Lease Agreement between the parties. This is in an attempt to assist Marndre to sell its business at fair value and thereby realise return on investment."* The concern is raised to assist Marndre to sell its business. If regard is had to prayer 2.2 of the referral to the Controller there is simply no reference to the NTP, or that its application or adoption constituted an unfair or unreasonable contractual practice. The Controller was thus not requested to test or refer any aspect of the NTP as an alleged unfair or unreasonable contractual practice to arbitration. Even if an arbitrator can test the NTP against the lease Agreement, to what end? The arbitrator cannot conclude a renewal or extension of the lease agreement, that is the heart of the complaint, and no buyer will at fair value buy the business with no licence to do business.

[21] S12B(1) requires a request and allegations of an unfair or unreasonable contractual practice. The request of Marndre is not reconcilable with what the Controller referred to arbitration. I agree with the submission that the Controller did not refer the concerns to arbitration at Marndre's request, despite the Controller not suffering from any misapprehension that Mandre had not made such a request. The Controller thus acted *mero motu* without jurisdiction and the referral is unlawful. Mandre's reliance on the Business Zone matter is misplaced, because therein the specific request to the Controller was referred to arbitration. The Constitutional Court made findings pertaining to the second jurisdictional requirement of s12B, in that as long as there is an allegation, the Controller must refer; the Controller must not look for proof or decide the merits of the allegation.

[22] But, even I should be wrong and the approach in terms of s12B should be such as to facilitate referrals to arbitration and to transform this industry by introducing a fairness standard, thus allowing a Controller to *mero motu* refer issues to an arbitrator then the applicant's review still has no prospects of success.

[23] On behalf of Marndre much atmosphere was created that Marndre, through its layman representative, referred to the Controller and much emphasis was placed thereon that the Controller's discretionary threshold is a low one. This Court was

urged to against this backdrop evaluate and exercise discretion. The affidavits were drafted by a layman, but the referral to the Controller and the Appeal to the Minister were drafted by attorneys with standing. But, even if this Court should lean back and grasp onto a sentence of the Minister's decision in the Marndre appeal as constituting the subject of review[5] and the Minister's reason therefor in the Engen appeal[6] **without Marndre appealing against this decision or opposing the Engen appeal,** then the NTP referred to in the affidavits of Marndre is not the solution to the problem. The NTP is used as justification for the contention that the lease had to be renewed or extended. This is so because reliance is placed on the NTP allowing for a dealer to exit the network at any time at fair business value, irrespective of the length of the remaining lease period. The obvious problem is that no arbitrator can force Engen to conclude an operating lease agreement with the purchaser of the business. Thus even if a fair business value can be determined, as rightly stated by Marndre *"Nobody in his or right mind will purchase this business when one of the conditions is that there is no prospect that an Operating Lease will be extended beyond 30 April 2015."*[7] Referring the NTP to an arbitrator is a *brutum fulmen*; determining a fair business value or finding an unfair or unreasonable business practice, to what end? With no prospects of securing a buyer and no authority for an arbitrator to extend or renew the contract no remedy is forthcoming. Thus even if

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[5] "Consequently, I am overturning the Controller's decision to refer the aspect relating to the New Tenure Policy to arbitration"

[6] I am of the opinion that the Controller acted outside of his scope by referring the aspect of your clients New Tenure Policy for arbitration

[7] Affidavit par 35

I am wrong in all my findings any referral to an arbitrator will afford Marndre no remedy.

[24] Mr Redman submitted that an arbitrator has corrective jurisdiction and could as remedy award damages. For this submission reliance was placed on par 63 of the Business Zone matter. I cannot find that par 63 is authority for the submission that an arbitrator can order damages in lieu of Engen's refusal to renew or extend the lease agreement or any other finding of an unfair or unreasonable contractual practice. The arbitrator has no jurisdiction to decide the merits and can afford Marndre no remedy in lieu of their refusal to extent or renew the lease. Even if the arbitrator finds that the NTP gives some other form of relief to Marndre, or that termination of the lease was unreasonable or unfair, then upon a reading of par 63 I can find no support for the submission that the relief can be damages awarded by the arbitrator. In context par 63 allays fears that due to the Controller's low discretionary threshold *"that any piece of paper purporting to be an allegation would trigger a referral to arbitration."*[8] If that were to happen, *"the arbitrator wields the big stick of a compensatory costs award should he or she determine that the allegation is frivolous or capricious."*[9] The Constitutional Court is referring to rule 12 B(4)(b) and in par 63 this statement is confirmed with: *"Indeed, the arbitrator is not only mandated to determine frivolity and capriciousness, but is empowered to make*

[8] Par 64
[9] Par 67

a compensator award, which imposes remedial and punitive costs beyond that of an ordinary costs award." Reference is then made to ***Minister of Police v Kunjana*** **[2016] ZACC 21** at para 43 wherein costs are referred to as follows: *"Regarding the first leg, the applicants did not appeal against the High Court's costs order. This left the costs order safely in the respondent's pocket ... Costs on the other hand, follows a different logic. The purpose of the costs order is to indemnify the successful party and to refund expenses actually incurred. A costs order is not intended to compensate for the risk to which one has been exposed."* There is no reference to a damages award and an arbitrator's jurisdiction to award a punitive costs order is not support for an arbitrator to award damages on the merits. In any event the finding of the Supreme Court of Appeal in ***Engen Petroleum Limited v The Business Zone 1010 CC t/a Emmarentia Convenience Centre*** **[2015] ZASCA 176** that: *"But an award of damages is not competent under a corrective remedial jurisdiction – it requires the existence of a compensatory remedial jurisdiction"* is binding and an arbitrator cannot award damages when a contract has come to an end.

[25] In view of the above I do not find it necessary to decide whether there has to be an existing dispute between the parties for a matter to be referred to arbitration.

[26] I accordingly find that the Minister's decision was not materially influenced by an error of law or not rationally connected for the purpose it was taken or to the purpose of s12B. The administrative action was taken lawfully, reasonably and fair. The result may be seen as unfair, but Marndre had other remedies available to it.

[27] I accordingly make the following order:

28.1 The review application is dismissed with costs.

28.2 The costs, including such costs attendant upon, the employment of two counsel and the preparation of both sets of Second Respondent's heads of argument.

S POTTERILL

JUDGE OF THE HIGH COURT

CASE NO: 51067/15

HEARD ON: 12 October 2017

FOR THE APPLICANT: ADV. N.P.G. REDMAN SC

INSTRUCTED BY: Couzyn Hertzog & Horak

FOR THE SECOND RESPONDENT: ADV. J.G. DICERSON SC

ADV. H. DU TOIT

INSTRUCTED BY: Kritzinger & Co

DATE OF JUDGMENT: 22 March 2018