CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 19/20

In the matter between:

CROMPTON STREET MOTORS CC
t/a WALLERS GARAGE SERVICE STATION Applicant

and

BRIGHT IDEA PROJECTS 66 (PTY) LIMITED
t/a ALL FUELS Respondent

Neutral citation: *Crompton Street Motors CC v Bright Idea Projects 66 (Pty) Ltd* [2021] ZACC 24

Coram: Mogoeng CJ, Jafta J, Khampepe J, Madlanga J, Majiedt J, Mhlantla J, Theron J, Tlaletsi AJ and Tshiqi J

Judgment: Mhlantla J (unanimous)

Heard on: 9 March 2021

Decided on: 3 September 2021

Summary: Petroleum Products Act 120 of 1977 — Section 6 of the Arbitration Act 42 of 1965 — stay of proceedings — referral to statutory arbitration — section 12B does not oust the High Court's jurisdiction

ORDER

On appeal from the High Court of South Africa, KwaZulu-Natal Division, Pietermaritzburg:

1. Leave to appeal is granted.
2. The appeal is dismissed.
3. Crompton Street Motors CC must pay the costs of Bright Idea Projects 66 (Pty) Limited, including the costs of two counsel.

JUDGMENT

MHLANTLA J (Mogoeng CJ, Jafta J, Khampepe J, Madlanga J, Majiedt J, Theron J, Tlaletsi AJ and Tshiqi J concurring):

Introduction

[1] This is an application for leave to appeal against a judgment and order of the High Court of South Africa, KwaZulu-Natal Division, Pietermaritzburg.[1] It concerns the question whether the High Court was entitled to refuse a request by the applicant to stay proceedings pending a referral of the dispute to arbitration in terms of section 12B of the Petroleum Products Act.[2] In terms of that section, licensed retailers and wholesalers are entitled to request the Controller of Petroleum Products to refer a dispute to arbitration where there are allegations of unfair or unreasonable contractual practices.

[1] *Bright Idea Projects 66 (Pty) Ltd v Crompton Street Motors* CC 2019 JDR 1102 (KZP) (High Court judgment).

[2] 120 of 1977.

Background facts

[2] In February 2003, in terms of a written franchise agreement, Chevron South Africa (Pty) Limited, formerly known as Caltex Oil (SA) (Pty) Limited, granted the applicant, Crompton Street Motors CC, t/a Wallers Garage Service Station, the right to operate a Caltex Service Station on its premises.[3] The franchise agreement was operative for an initial period of five years, with an option to renew the agreement for two further periods of five years each. Both options were exercised, and the third period expired on 28 February 2018. The franchise agreement included a written lease agreement for the same period.

[3] In December 2011, Chevron ceded and assigned its rights and obligations in terms of the franchise agreement to the respondent, Bright Idea Projects 66 (Pty) Limited t/a All Fuels. The respondent acquired the immovable property on which the service station is situated. The deed of transfer in respect of the immovable property was registered on 14 January 2013. The applicant was informed of these new developments in writing, and an appropriate addendum to the franchise agreement was signed by the parties.

[4] On 25 August 2017, the respondent's attorney wrote to the applicant and stated that the agreement between the parties would terminate by effluxion of time on 28 February 2018. The applicant was informed that the respondent had decided not to grant any further extensions of the franchise and lease agreements and that the applicant would, therefore, be required to vacate the premises on or before 28 February 2018. No response was forthcoming from the applicant.

[5] On 6 February 2018, the respondent's attorney wrote another letter to the applicant, requesting an unequivocal written undertaking that it would vacate the premises. On 14 February 2018, the applicant responded by stating that it was in the

[3] High Court judgment above n 1 at para 3.

process of drafting an application for arbitration and would not be vacating the premises.

Litigation history

High Court

[6] On 16 February 2018, the respondent launched an application for the ejectment of the applicant from the premises. Since this was done before the expiry of the franchise and lease agreements, the respondent sought a declarator that the lease agreement would terminate on 28 February 2018 as well as an order directing the applicant to vacate the premises by that date.

[7] On 27 February 2018, the applicant filed its notice to oppose as well as a conditional counter-application. That application indicated that in the event the High Court declined to stay the main application in terms of section 12B of the Petroleum Products Act, or alternatively clause 20 of the original franchise agreement, the applicant would seek an order directing the respondent to provide it with a new franchise agreement for signature. It also sought an order declaring that the applicant was entitled to conduct business on the premises for a further period of five years, commencing on 1 March 2018.

[8] The applicant also filed an answering affidavit setting out its defence against the eviction application. In the answering affidavit, the request for a stay was dealt with upfront, followed by the substance of its defence. In response to the eviction application, the applicant submitted that the respondent had verbally undertaken to renew the franchise agreement until 28 February 2023. The alleged verbal agreement was based on a conversation between Mr Bester, the applicant's representative, and Mr Naidoo, the regional manager of Chevron at the time, who had advised him that after the cession "nothing would change, and the respondent would treat the applicant as Chevron treats its retailers".

[9] The High Court relied on section 6 of the Arbitration Act[4] when it considered the application for a stay. It held that the applicant had failed to follow the correct procedure in that it did not apply for a stay in the manner prescribed by section 6(1).[5] This was because the application should have been filed after delivery of its notice of intention to oppose, but before it took any further steps in the proceedings.[6] Instead, the applicant delivered its answering affidavit in which it dealt with the merits of the application, as well as the application to stay the proceedings.[7] The High Court thus held that the application was not properly before it.

[10] The High Court thereafter considered whether it could nevertheless exercise its discretion in terms of section 6(2)[8] to order a stay of the proceedings. In this regard, it held that there were sufficient reasons why the dispute should not be referred to arbitration. These included the fact that the matter had been dealt with as an opposed application and both parties presented arguments on whether the proceedings should be stayed, and on the merits.[9] Furthermore, when the respondent launched the application in February 2018, it was entitled to have the matter heard without undue delay.[10]

[11] Concerning the submission that the nature of the contractual practice was unfair or unreasonable, the Court characterised the dispute before it to be one based on the law of contract.[11] In particular, whether the respondent had bound itself contractually to

[4] 42 of 1965.

[5] Section 6(1) of the Arbitration Act provides that 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 delivery of any pleadings or taking any other steps in the proceedings, apply to that court for a stay of such proceedings.

[6] High Court judgment above n 1 at para 14.

[7] Id.

[8] Section 6(2) provides that if on any such application the court is satisfied that there is no sufficient reason why the dispute should not be referred to arbitration in accordance with the agreement, the court may make an order staying such proceedings, subject to such terms and conditions it may consider just.

[9] High Court judgment above n 1 at para 16.

[10] Id at para 17.

[11] Id at para 19.

conclude new franchise and lease agreements with the applicant.[12] It held that the dispute had nothing to do with an unfair or unreasonable contractual practice that could be corrected by an arbitrator as contemplated in section 12B of the Petroleum Products Act.[13]

[12] The High Court held that the arbitration clause set out in clause 20 of the franchise agreement did not apply as clause 20 envisaged disputes between the parties concerning the agreement.[14] The dispute before the Court did not concern the franchise or lease agreements, since both had expired through effluxion of time.[15] What was left to be decided was whether the respondent undertook to conclude new agreements after the expiry of the existing ones.[16] Furthermore, the applicant did not, in its papers, specify which issues it wished to be decided by the arbitrator in terms of clause 20, nor did its counsel indicate such during argument.[17]

[13] The High Court rejected the applicant's submission that it was entitled to remain on the premises based on an agreement between the parties that they would conclude a new franchise agreement substantially on the same terms as Chevron's standard agreement. It held that the evidence did not establish the agreements contended for by the applicant, and it could not be said that the parties agreed to enter into new agreements.[18] The High Court did not decide the constitutional issue that the respondent's refusal to conclude those agreements was contrary to the values enshrined in the Constitution and public policy, and the contention that such refusal deprived the agreement of business efficacy. It stated that none of these constitutional points raised on the papers was pursued in argument.[19] The Court further held that it was not

[12] Id.

[13] Id.

[14] Id at para 20.

[15] Id.

[16] Id.

[17] Id at para 21.

[18] Id at para 26.

[19] Id at para 30.

concerned with the question whether the respondent's refusal to conclude a new franchise agreement with the applicant was fair and reasonable, as the respondent was under no obligation to do so.[20] It saw no basis on which it could be said that the effect of section 12B was to introduce an implied term importing such an obligation. Furthermore, section 12B did not have anything to do with the respondent's right to decide who it wished to contract with, on what basis, and for how long.[21]

[14] In the result, the High Court refused to grant the application to stay the proceedings pending the conclusion of an arbitration process in terms of section 12B of the Petroleum Products Act. Instead, it upheld the application for the eviction of the applicant from the premises.[22] An application for leave to appeal was dismissed with costs.

Supreme Court of Appeal

[15] A petition to the Supreme Court of Appeal was dismissed with costs. On 22 January 2020, the President of the Supreme Court of Appeal dismissed an application for the reconsideration of the order. The applicant thereafter applied for leave to appeal in this Court.

In this Court

Issues

[16] In addition to the preliminary issues of jurisdiction and leave to appeal, this Court has to determine the following issues:

(a) Whether a section 12B referral to the Controller has the effect of ousting the High Court's jurisdiction;

(b) If not, whether the applicant's failure to comply with section 6(1) of the Arbitration Act rendered the stay application defective; and

[20] Id at para 31.

[21] Id at para 27.

[22] Id at para 34.

(c) Whether the High Court had the discretion to refuse a request to refer the matter to arbitration.

Jurisdiction and leave to appeal

[17] The applicant submits that this matter raises a constitutional issue in that the High Court did not apply the law as set out by this Court in *Business Zone*.[23] Further, in its submissions, the applicant argues that its section 34 constitutional right to access a specialist tribunal or forum (in the form of the section 12B arbitration) is limited when the High Court hears a matter notwithstanding a referral to the Controller having been instituted.[24] It adds that it would be in the interests of justice to hear this matter, as it affects not only its interests but those of the entire petroleum retail and wholesale industry.

[18] The respondent submits that this Court's jurisdiction is not engaged, because this matter does not involve any constitutional issue and none was raised before the High Court; nor does it raise any questions of law of general public importance.

[19] This Court is empowered to decide matters of a constitutional nature, and any other matter that raises an arguable point of law of general public importance that ought to be considered by it.[25] In addition, it must also be in the interests of justice to grant leave.

[20] This Court must determine the effect of a statutory provision, section 12B of the Petroleum Products Act, on an application to stay High Court proceedings pursuant to a request for a referral in terms of section 12B. We are called upon to consider the scope of the High Court's jurisdiction to refuse a stay when section 12B is implicated.

[23] *The Business Zone 1010 CC v Engen Petroleum Limited* [2017] ZACC 2; 2017 JDR 0259 (CC); 2017 (6) BCLR 773 (CC) (*Business Zone*).

[24] In terms of section 34 of the Constitution "[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court *or, where appropriate, another independent and impartial tribunal or forum*." (Emphasis added).

[25] Section 167(3)(b) of the Constitution.

A challenge to the High Court's jurisdiction based on the principle of legality, paired with the purported limitation of the section 34 right to access an appropriate or "specialist" tribunal or forum, raises constitutional issues.

[21] What remains for consideration is whether the interests of justice favour the granting of leave. There have been several conflicting decisions concerning the impact of a section 12B request for referral on stay applications before various divisions of the High Court.[26] It is, therefore, in the interests of justice for this Court to provide legal certainty on the issue. Leave to appeal should be granted.

Ouster of High Court's jurisdiction

[22] The applicant's primary submission is that, in light of section 34 of the Constitution and this Court's judgment in *Business Zone*, when a licensed retailer has initiated the procedure for a referral to the Controller in terms of section 12B of the Petroleum Products Act, the High Court's jurisdiction to hear a dispute on the subject matter of the arbitration is ousted. The applicant submits that the statutory arbitration mechanism in section 12B is a special procedure or forum created for the petroleum industry, and that granting the High Court jurisdiction when a request has been made to the Controller undermines its section 34 right. This is the right "to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court *or, where appropriate, another independent and impartial tribunal or forum*".[27]

[23] I disagree. The High Court's jurisdiction is located in section 169 of the Constitution. In terms of that section, the High Court "may decide any matter not

[26] See for example *KZN Oils (Pty) Ltd v Nelta (Pty) Ltd t/a Keyway Motors* [2021] ZAKZPHC 12; 2021 JDR 1261 (KZP); [2021] 2 All SA 478 (KZP); *Former Way Trade & Invest (Pty) Ltd v Bright Idea Projects 66 (Pty) Ltd* [2020] ZASCA 118; 2020 JDR 2072 (SCA); *KZN Oils (Pty) Ltd v Frenserve CC t/a John Ross Service Station* (KZD) unreported judgment of the KwaZulu-Natal High Court, Durban, Case No D2658/2018 (30 September 2020); *Engen Petroleum Ltd v Rissik Street One Stop CC t/a Rissik Street Engen* unreported judgment of the Limpopo High Court, Polokwane, Case No: 1583/2019 (12 February 2020); and *Future Phambili Petroleum (Pty) Ltd v Chamdor Service Station CC* [2017] ZAGPPHC 1206; 2017 JDR 1909 (G).

[27] Section 34 of the Constitution.

assigned to another court by an Act of Parliament".[28] The High Court's jurisdiction is, therefore, extensive in its scope and includes all matters unless they have been specifically excluded from its jurisdiction.

[24] It is an accepted rule of statutory interpretation that there is a strong presumption against the ouster of a court's jurisdiction. In *Hurley*,[29] the then Appellate Division held that "the curtailment of the powers of a court of law is, in the absence of an express or clear implication to the contrary, not to be presumed".[30] The mere fact that the Legislature has created an extra-judicial remedy is in no way conclusive of the question whether the court's jurisdiction has been restricted. It is necessary to determine whether, in light of the circumstances, a necessary implication arises that the court's jurisdiction is either wholly excluded or at least deferred until the extra-judicial remedies have been exhausted.[31]

[25] Section 12B of the Petroleum Products Act reads—

> "**12B Arbitration**
>
> (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

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[28] Section 169(1) of Constitution sets out the jurisdiction of the High Court of South Africa and provides:

> "(1) The High Court of South Africa may decide—
>
> (a) any constitutional matter except a matter that—
>
> (i) the Constitutional Court has agreed to hear directly in terms of section 167(6)(a); or
>
> (ii) is assigned by an Act of Parliament to another court of a status similar to the High Court of South Africa; and
>
> (b) any matter not assigned to another court by an Act of Parliament."

[29] *Minister of Law and Order v Hurley* 1986 (3) SA 568 (A).

[30] Id at 584A-B. See also *Millman NNO v Pieterse* 1997 (1) SA 784 (C) at 788G-J.

[31] *Welkom Village Management Board v Leteno* 1958 (1) SA 490 (A) at 502-3.

(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 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."

[26] 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.[32] In any event, it is trite that arbitration does not oust the jurisdiction of courts.[33] In light of the presumption against ouster and the wording of the Petroleum Products Act, there is no basis to find that the High Court's

[32] This can be contrasted with other statutes that require an exhaustion of the internal remedies in a statute before a court is approached. Consider for example section 96(3) of the Mineral and Petroleum Resources Development Act 28 of 2002 which provides that "[n]o person may apply to the court for the review of an administrative decision contemplated in subsection (1) until that person has exhausted his or her remedies in terms of that subsection".

[33] *Parekh v Shah Jehan Cinemas (Pty) Ltd* 1980 (1) SA 301 (D) at 305D-H citing *Rhodesian Railways Ltd v Mackintosh* 1932 AD 359 *(Rhodesian Railways)*; *Yorigami Maritime Construction Co Ltd v Nissho-Iwai Company Limited* 1977 (4) SA 682 (C); *Walters v Allison* 1922 (NPD) 238; and *Davies v South British Insurance Company* (1885) 3 S.C. 416.

ability to hear disputes of this nature has been assigned by the Petroleum Products Act exclusively to the arbitrator.

[27] Furthermore, in *Business Zone*, this Court unanimously confirmed that the just and equitable standard required by the Petroleum Products Act applies to High Court litigation. This Court specifically said the following–

> "The contention that two different adjudicative standards, one equitable and one not, apply based on the forum that the parties find themselves before is unsustainable. There is sufficient context and justification to accept that the equitable standard of fairness and reasonableness prevails in all petroleum contracts regardless of *whether they are subject to statutory arbitration or ordinary court litigation.*
>
> Section 12B of the Act holds no pretence to giving effect to a particular constitutional right *nor can it, by any stretch of the imagination, be seen as establishing a separate adjudicative hierarchy*.
>
> Forum-shopping between these two different systems of law applied in different institutions will disappear. Instead, *what remains is only the choice of arbitration rather than adjudication in the courts, a procedure well known to our law*."[34] (Emphasis added)

[28] Clearly, the parties have a choice between the section 12B arbitration and High Court litigation and both forums must apply the fairness standard. The claim that the High Court's jurisdiction is ousted is therefore unfounded and must fail.

Stay application

Section 6(1) procedure

[29] The applicant submits that it was not required to apply for a stay in accordance with section 6(1) of the Arbitration Act for two reasons. First, it argues that it is settled law that a stay can be applied for by way of a special plea or in terms of the procedure

[34] *Business Zone* above n 23 at paras 52 and 55-6.

required by section 6. Second, that section 6 applies to "voluntary arbitrations" which are incomparable to the "involuntary process" envisaged in section 12B.

[30] In determining the applicant's argument, I will firstly deal with its contention that the Arbitration Act was not applicable at all. Following that, it will be considered whether the failure to comply with section 6(1) was fatal to the applicant's stay application.

[31] The applicant's submission that section 6(1) is not applicable because it relied on statutory arbitration and not contractual arbitration, is without merit. This is because, in terms of section 40 of the Arbitration Act, the provisions of the Act are made applicable, *mutatis mutandis*, to arbitration proceedings under any legislation.[35] This captures the exact kind of statutory arbitration created by the Petroleum Products Act. The Arbitration Act does not apply to statutory arbitration where the legislation explicitly excludes its applicability; or if the Arbitration Act is inconsistent with the procedure recognised by the relevant law. The Petroleum Products Act in no way excludes the applicability of the Arbitration Act, nor can the provisions of the Arbitration Act be said to be inherently inconsistent with the procedure set out in the Petroleum Products Act. The High Court was, therefore, entitled to rely on the provisions of section 6 of the Arbitration Act in assessing whether to grant a stay of proceedings.

[32] What then of the manner in which the applicant applied for the stay? As a matter of fact, the applicant did not apply for a stay *before* delivering its pleadings, and, therefore, the High Court was correct to find that it did not comply with the provisions of section 6(1) of the Arbitration Act. The incorporation of the application for a stay in

[35] Section 40 of the Arbitration Act reads–

> "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: [p]rovided 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 authorised or recognised by that other law."

the applicant's conditional counter-application and answering affidavit was a step beyond entering an appearance, and therefore one of the prerequisites for a stay in terms of section 6(1) was absent. However, non-compliance with section 6(1) does not render the request for a stay invalid. There are two avenues to apply for a stay of proceedings: a substantive application in terms of section 6 of the Arbitration Act may be made, or a special plea requesting a stay of the proceedings pending the determination of the dispute by arbitration.[36] In *PCL Consulting*, the Supreme Court of Appeal put it in the following terms—

> "If a party institutes proceedings in a court despite an [arbitration] agreement, the other party has two options:
>
> (i) it may apply for a stay of the proceedings in terms of section 6 of the Arbitration Act 42 of 1965; or
>
> (ii) it may in a special plea (which is in the nature of dilatory plea) pray for a stay of the proceedings pending the final determination of the dispute by arbitration."[37]

[33] A special plea for arbitration is one of several dilatory pleas and can be included in pleadings.[38] Generally, when a special plea is raised, all the defences on which the defendant intends to rely must be raised at the same time.[39] This is so because should the special plea fail, there would be no further opportunity to plead over on the merits.[40]

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[36] *PCL Consulting (Pty) Ltd t/a Phillips Consulting SA v Tresso Trading 119 (Pty) Ltd* [2007] ZASCA 9; [2007] SCA 9; 2009 (4) SA 68 (SCA) (*PCL Consulting*) at para 7. See also *Transasia 1 (Pty) Limited v Arbitration Foundation of South Africa* [2018] ZAGPJHC (*Transasia*) 548 at para 19.

[37] *PCL Consulting* id at para 7.

[38] *Foize Africa (Pty) Ltd v Foize Beheer BV* [2012] ZASCA 123; 2013 (3) SA 91 (SCA) at para 30. See *Rhodesian Railways* above n 33 at 370-1, where the Appellate Division said the following—

> "All that section 6(1) lays down is that you cannot adopt the cheaper and speedier procedure therein provided when once you have delivered pleadings or taken any other step in the proceedings. If you have taken any step in the proceedings, then you can no longer adopt the speedier and less costly procedure of applying to the Court to stay proceedings but you must file your pleadings in the ordinary way. *In pleading, however, you can raise the defense that the case ought to be decided by arbitration; this can be done by a special preliminary plea*." [Emphasis added].

[39] *Thyssen v St. Francis Township (Pty) Ltd* 1966 (2) SA 115 (E) at 116G.

[40] *David Beckett Construction (Pty) Ltd v Bristow* 1987 (3) SA 275 (W) at 280E.

There is no objection to pleading a special defence in the course of the plea, with or without a special heading.[41]

[34] Therefore, the inclusion of the request for a stay of proceedings in the applicant's conditional counter-application and as part of the answering affidavit did not render the application defective. The High Court erred when it considered the first option and omitted to consider the second one as set out in *PCL Consulting*.

[35] Fortunately for the applicant, the High Court did not regard its finding that the application did not comply with section 6(1) as the end of the matter, as it went on to consider the merits of the stay application in terms of section 6(2).[42] Therefore, what must now be considered is the scope of the High Court's discretion when considering whether to grant a stay pending arbitration and whether the High Court in this matter exercised that discretion judicially.

Discretion to stay proceedings

[36] The applicant submits that the High Court's discretion to refuse to stay proceedings is limited where there has been a referral to the Controller. In such a case, so the argument goes, the High Court *must* exercise its discretion in favour of a stay. To do otherwise would defeat the purpose of the section 12B arbitration mechanism and undermine the applicant's right to access a specialist tribunal.

[37] In addition, it states that the discretion exercised by the High Court refusing to stay the proceedings was influenced by the premise that an arbitrator acting in terms of section 12B does not have the power to create contracts for parties and that, in any event, refusal to extend a contract does not constitute an unfair contractual practice. In the applicant's view, this was an incorrect premise and the High Court erred in finding that a referable contractual practice only arises from an existing contract.

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[41] Harms and Hugo, 9 ed *Amler's Precedents of Pleadings* (Butterworths 2018) at 5.

[42] High Court judgment above n 1 at paras 14-9.

[38] The respondent submits that the applicant is occupying the property without its consent; and it is common cause that the franchise agreement, forming the basis of the applicant's occupation, terminated by effluxion of time on 28 February 2018. In terms of this agreement, it was agreed that upon termination, the applicant would vacate the premises; and the parties did not conclude any further agreements for the period beyond 28 February 2018. Therefore, the respondent was entitled to evict the applicant from the premises and courts and arbitrators do not and cannot make contracts for parties against their will. The respondent adds that the arbitrator is not given any power to override the ownership rights of a wholesaler, which include the right to evict persons occupying property against the owner's will. In addition, *Business Zone* is wholly distinguishable from the relevant facts in this application, and that the matter did not address the position of agreements that have already expired after a fixed period.

[39] The respondent denies the allegation that it committed an unfair contractual practice by refusing to extend the franchise and lease agreements. It submits that, as an autonomous party, and in line with the principle of freedom of contract, it was entitled to exercise its full contractual freedoms in its dealings and interactions with its franchisees within the framework of the law.

[40] The determination of this issue requires the consideration of the question whether the effect of a section 12B request to the Controller is to curtail the High Court's discretion such that it is *required* to stay the proceedings pending the outcome of the arbitration. This requires an examination of the relationship between section 6 of the Arbitration Act and section 12B of the Petroleum Products Act and the principles set out by this Court in *Business Zone*. I now proceed to consider that issue.

[41] Section 6(2) of the Arbitration Act allows a court to stay proceedings "if [upon application in terms of section 6(1)] the court is satisfied that there is no sufficient reason why the dispute should not be referred to arbitration in accordance with the agreement". The language of section 6(2) directs a court acting under that section to

stay proceedings where such an application is made unless sufficient countervailing reasons exist for the dispute not to be referred to arbitration. The words "no *sufficient* reason why the dispute *should not* be referred to arbitration" denotes that the standard position is that a stay should be granted upon request. The onus of satisfying the Court that the matter *should not* be referred to arbitration and instead heard by the High Court is on the party who instituted the legal proceedings.[43] In *Universiteit van Stellenbosch*,[44] the then Appellate Division held that when a court is faced with a stay application, the discretion to refuse arbitration in the circumstances should be exercised judicially, and only when a "very strong case" has been made out.[45] This high threshold for refusal is because the party who does not want the matter referred to arbitration "is seeking to deprive the other party of the advantage of arbitration to which the latter is entitled".[46]

[42] As I see it, the above requirements that there must be substantial grounds proffered against a stay, are imperative in the context of a stay application for the purposes of section 12B arbitration. The very creation of the arbitral mechanism in the Petroleum Products Act was an attempt by the Legislature to address the unequal bargaining power between wholesalers and retailers in the petroleum industry.[47] As was stated in *Business Zone*, 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".[48]

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[43] *Kathmer Investments (Pty) Ltd v Woolworths (Pty) Ltd* 1970 (2) SA 498 (A) at 504H; *Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd* 1971 (2) SA 388 (W) at 391C-E; and *Rhodesian Railways* n 33 above at 361.

[44] *Universiteit van Stellenbosch v JA Louw (Edms) Bpk* 1983 (4) SA 321 (A).

[45] Id at 327C-D. See also *Transasia* above n 36 at para 19 where the High Court said—

> "Where a party to an arbitration agreement commences legal proceedings against the other party to that agreement, the defendant is entitled either to apply for a stay of the proceedings pursuant to section 6 of the Arbitration Act 42 of 1965 or to deliver a special plea relying upon the arbitration clause. *Whichever course it adopts the onus then rests on the claimant to persuade the court to exercise its discretion to refuse arbitration. This requires a very strong case to be made out*." (Emphasis added).

[46] *Body Corporate of Via Quinta v Van der Westhuizen N.O.* [2017] ZAFSHC 215 at para 41.

[47] The Petroleum Products Amendment Act (Amendment Act) amended the Petroleum Products Act in 2004. Arbitral dispute resolution mechanisms were introduced by the insertion of sections 12A, 12B and 12C of the Amendment Act respectively. Licensed retailers and wholesalers were, in terms of section 12B(1), entitled to request that the Controller refer a dispute to arbitration rather than resolving the dispute through court litigation.

[48] *Business Zone* above n 23 at para 58.

[43] When the Arbitration Act is being applied in terms of a statutory right to arbitration as opposed to a contractual right, section 6(2) must be read to require that a court may stay proceedings if there is no sufficient reason to refer the dispute to arbitration *in accordance with the applicable statute or legislation* (in this case section 12B) as opposed to the terms of an agreement. Therefore, a Judge considering whether to stay proceedings where there has been an application to stay in light of section 12B, must find that there are compelling reasons to refuse the stay despite the purpose of section 12B and all its numerous benefits for retailers and wholesalers. The court is, therefore, required to engage with section 12B, its purpose and benefits when weighing up whether there are sufficient reasons that warrant refusing to send the dispute to the section 12B arbitration.

[44] In addition to the industry-specific benefits, the general benefits of arbitration have been considered by this Court. In *Lufuno*,[49] for example, this Court expressed the advantages as follows:

> "Some of the advantages of arbitration lie in its flexibility (as parties can determine the process to be followed by an arbitrator including the manner in which evidence will be received, the exchange of pleadings and the like), its cost-effectiveness, its privacy and its speed (particularly as often no appeal lies from an arbitrator's award, or lies only in an accelerated form to an appellate arbitral body). In determining the proper constitutional approach to private arbitration, we need to bear in mind *that litigation before ordinary courts can be a rigid, costly and time-consuming process and that it is not inconsistent with our constitutional values to permit parties to seek a quicker and cheaper mechanism for the resolution of disputes*."[50] (Emphasis added).

[45] 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

[49] *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews* [2009] ZACC 6; 2009 (4) SA 529 (CC); 2009 (6) BCLR 527 (CC) (*Lufuno*).

[50] Id at para 197.

understood as arbitration ordinarily is in the law of contract.[51] 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;[52] the arbitrator has wide remedial powers to remedy the unfair or unreasonable contractual practice and make compensatory awards;[53] and, the arbitrator's award is final and binding,[54] which avoids the ordinary appellate processes applicable to litigation, and thus saves time and resources. This is particularly beneficial for retailers who have fewer resources and bargaining power than wholesalers. These benefits require that there should be legitimately compelling reasons to refuse a stay of proceedings.

[46] Section 6(2) confers a discretion upon the courts to grant or refuse a stay. Ordinarily, appellate courts do not interfere in the exercise of discretion by other courts, and may do so only when it is shown that the discretion has not been exercised judicially. That is, where the court takes into account irrelevant considerations or the discretion has been exercised based on a wrong appreciation of the facts or wrong principles of law.[55] However, even if the discretion exercised is not a "true" or "strict" one, appellate courts will still show restraint.[56] In *SA Broadcasting*,[57] this Court said:

> "Where the discretion is a discretion in the strict sense, in that the court had a range of legal choices open to it, an appellate court will ordinarily interfere with the exercise of that discretion only in narrow circumstances. However, this Court has also recognised that there will be occasions where a decision made by another court which does not

[51] *Business Zone* above n 23 at para 58.

[52] Section 12B(2) of the Petroleum Products Act.

[53] Id at section 12B(4).

[54] Id at Section 12B(5).

[55] *Giddey N.O. v J C Barnard and Partners* [2006] ZACC 13; 2007 (5) SA 525 (CC); 2007 (2) BCLR 125 (CC) at para 22.

[56] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Limited* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) at paras 88-9.

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

> involve the exercise of a discretion in the strict sense, will also be interfered with only in narrow circumstances."[58]

[47] This Court has explained that "[t]his principle of appellate restraint preserves judicial comity. It fosters certainty in the application of the law and favours finality in judicial decision-making."[59]

[48] Here, the Arbitration Act requires that a court *satisfy itself* that in the circumstances, sufficient *reasons* exist not to refer the dispute before it to arbitration. The type of reasons that must be given and considered are not specified in the Arbitration Act. To be satisfied or persuaded that sufficient reasons exist, a court can therefore have regard to several disparate and incommensurable factors when considering the reasons proffered by the parties for and against a stay, and these will invariably differ from case to case. While the reasons must be compelling to sway a court against a stay, any number of factors could influence a court to exercise its discretion in one way or the other.

[49] In this matter, the High Court considered several factors in concluding that there were "sufficient" reasons provided to refuse to stay the proceedings. The first reason was one of judicial resources. The High Court held that staying proceedings would be a waste of judicial resources as the merits of the applications were fully argued before it and that the matter was on the opposed roll.[60] This was primarily because the application for a stay was included in the answering papers that also addressed the merits. Second, the High Court was of the view that the respondent (the applicant before it) was "entitled to have the matter heard without undue delay".[61] Third, the High Court did not consider the refusal to extend the lapsed franchise and lease

[58] *SA Broadcasting* id at para 39.

[59] *Florence v Government of the Republic of South Africa* [2014] ZACC 22; 2014 (6) SA 456 (CC); 2014 (10) BCLR 1137 (CC) at para 113.

[60] High Court judgment above n 1 at para 16.

[61] Id at para 17.

agreements, or the refusal to conclude new ones, to be "contractual practices" that could be corrected by an arbitrator in terms section 12B.[62] Fourth, clause 20 of the franchise agreement (the arbitration clause) dealt with disputes "concerning the agreement", and because the agreement had expired through effluxion of time, the dispute did not "concern the agreement", and in any event, the applicant (respondent in the High Court) did not specify the issues it wished to be decided in terms of clause 20.[63]

[50] In my assessment, the High Court was entitled to consider factors such as the voluminous application and the judicial resources that had been expended by the time the stay application was made. We must take cognisance of the "critical need for prudence and frugality in the deployment of court time and its other resources".[64]

[51] The High Court also considered the fact that the agreement had lapsed to be a significant factor against granting a stay, because, as it was held, the arbitrator would not have the power to extend the lapsed agreement or force the parties to conclude a new agreement.

[52] In this matter, this Court is not required to make a definitive finding on the precise scope of the corrective powers of a section 12B arbitrator and whether she may extend a lapsed agreement in making an "award as she *deems necessary* to correct such [unfair or unreasonable] practice".[65] I do, however, caution courts against making stay decisions based on premature assessments of what the section 12B arbitrator (or any arbitrator) would or would not decide. Prospects of success, so to speak, before the arbitrator should not be given undue weight in the analysis.

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[62] Id at para 18.

[63] Id at paras 20-1.

[64] *Economic Freedom Fighters v Minister of Justice and Correctional Services* [2020] ZACC 25; 2021 (2) SA 1 (CC); 2021 (2) BCLR 118 (CC) at para 23.

[65] Section 12B(4)(a) of the Petroleum Products Act.

[53] Nevertheless, considering the facts, the High Court was entitled to consider the fact that the agreement had lapsed. I say so for the following two reasons. First, in this matter, the franchise and lease agreement had a fixed termination date. The agreement was ceded to the respondent in 2011, six years before its expiry. The applicant may have taken the view then that, due to industry practice or its previous relationship with Chevron, the termination date ought to have been extended. Alternatively, that there ought to have been a clause to the effect that the agreement would only terminate if it breached any of the contractual provisions. In either event, it ought to have approached the Controller *at that time* to arbitrate on the reasonableness or otherwise of the duration of the agreement or its terms. It ought not to have done so shortly before the expiry of the lease agreement. This would have allowed the section 12B process to unfold well before the lease agreement (which entitled the applicant to remain on the property) expired.

[54] Second, it must be repeated that the respondent informed the applicant by way of a letter on 25 August 2017 that it would not be renewing the agreement. And it pertinently pointed out that the applicant would, in the circumstances, be required to *vacate the premises* on or before the termination date. This letter came some five months before the applicant referred the request to the Controller on 22 February 2018. This was a mere *six days* before the agreement was set to lapse and after the eviction proceedings had been launched. I can think of no good reason why the applicant would wait until the life of the agreement was to imminently expire to seek the relief. It is particularly confounding considering that a clear consequence of termination is set out in clause 11.1.2 of the agreement, which provides that upon the termination of the agreement "the franchisee and its permitted assignees, heirs and executors will forthwith *surrender possession of the premises* to the franchisor". The applicant would have been well aware of this and should have acted expeditiously if it believed that the refusal to extend the agreement was an unfair or unreasonable contractual practice. The respondent gave the applicant sufficient notice of its intention, and was, therefore, well within its rights to seek the eviction of the applicant and vindicate its ownership rights. The High Court was entitled to consider the applicant's

delay in acting, and weigh this set of facts in its assessment whether sufficient reasons existed not to grant a stay.

[55] It is also important to remember that before the High Court, the applicant primarily argued that there had been an oral agreement between the parties which extended the life of the franchise agreement beyond 28 February 2018. This claim could not be sustained on the facts. Indeed, this argument was abandoned by the applicant on appeal. This also explains why the High Court considered the dispute to be one of contract and not of unreasonable or unfair contractual practices. It was requested to determine, amongst other things, whether *as a matter of fact* there had been an agreement to extend the life of the franchise and lease agreements (had there been, the eviction of the applicant would have been a non-starter).

[56] The final issue for consideration is whether the High Court was influenced by a wrong principle of law in finding that the respondent's refusal to extend the lapsed franchise and lease agreements or to conclude new ones did not amount to a "contractual practice" that could be corrected by an arbitrator in terms of section 12B, and therefore rendering the section inapplicable. The applicant submits that the High Court failed to understand the nature and content of a "contractual practice" as defined and explained in *Business Zone*. Is this so?

[57] In considering the merits of this submission, it is important to have regard to what this Court held in *Business Zone*.[66] That matter concerned the *cancellation* of a franchise agreement and operational agreement as a result of alleged breaches by the retailer operating the franchise business.[67] The cancellation by the franchisor was challenged as constituting an unfair contractual practice within the meaning of section 12B, hence the application to the Controller to refer the matter to arbitration in terms of section 12B(1). *Business Zone* is authority for the proposition that a single act

[66] *Business Zone* above n 23.

[67] Id at para 8.

may amount to a contractual practice under the Act and, if that is so, the Act provides for arbitration to determine whether the practice is just and equitable. In this context, this Court said the following:

> "I therefore conclude that a single act of cancellation may amount to a contractual practice under section 12B. Like any other contractual practice, it is susceptible to arbitral correction under section 12B(4)(a). The arbitrator's corrective relief would extend to the terrain of setting aside the unfair or unreasonable act of cancelling the underlying agreement and directing that the parties reinstate their agreement. It follows that Engen's argument that the arbitrator's corrective power under section 12B presumes the backdrop of an ongoing contractual relationship that can be subject to such correction must fail."[68]

[58] This finding was made in the context of a contract cancelled before the termination date. The single act of premature *cancellation* of the agreement was the "contractual practice" that was alleged to be unfair or unreasonable and which the arbitrator could reinstate.[69] Here, the respondent did not *cancel* the franchise agreement. Rather, it terminated on the agreed date. On this issue, *Business Zone* is distinguishable. It did not create a binding precedent for courts regarding the question whether the refusal to extend a *lapsed* agreement or enter into a new agreement was a contractual practice. That issue was not before this Court. Therefore, it cannot be said that the High Court, in its assessment whether a "contractual practice" existed, ignored a legal principle established by this Court. While the Act provides that the arbitrator may make such award as she deems necessary to correct such practice, it is silent on whether this includes the power to reinstate lapsed agreements. The High Court's finding on this point was therefore not in conflict with *Business Zone* or the Petroleum Products Act. It cannot be said that, in the exercise of its discretion, the High Court was influenced by the wrong principles of law.

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[68] Id at para 76.

[69] Id.

[59] Accordingly, the High Court exercised its discretion judicially when it refused to stay the proceedings and there is no basis for this Court to intervene.

Interplay between section 6(2) of the Arbitration Act and section 12B of the Petroleum Products Act

[60] Having said that, I do wish to emphasise that when the Arbitration Act is applied and section 12B is implicated, section 6(2) of the former must be read to require that a court must stay proceedings if there is no sufficient reason *not to refer the dispute to arbitration in terms of section 12B* (and not the contract governing the parties). It is, therefore, necessary in these matters, where section 12B and section 6(2) of the Arbitration Act are at play, for a court to seriously consider whether there are ample reasons not to refer the dispute for statutory arbitration in terms of section 12B of the Petroleum Products Act in light of the broader legislative scheme. This requires engagement with the legislative purpose of the section 12B arbitration. In considering that issue, it is important to have regard to what this Court held in *Business Zone* regarding the proper interpretation of section 12B. In that matter, this Court considered the purpose of the Petroleum Products Amendment Act which introduced the section 12B arbitration and said:

> "One of the purposes of the 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 to 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 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."[70]

[61] That context is crucial when considering a stay application. This is so because the purpose of the Petroleum Products Amendment Act[71] was "to provide for appeals

[70] Id at para 47.

[71] See above n 47.

and arbitrations" and that purpose cannot be overlooked.[72] It is worth re-iterating what this Court held—

> "[T]he 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*. It is no wonder that Business Zone would want to benefit from its statutory right under section 12B to access such a forum."[73] (Emphasis added).

[62] In addition to considering the larger context of the petroleum industry and the purpose of the Act when considering a stay application, courts ought to guard against treating these disputes as purely contractual. They must bear in mind that the Legislature intended that a fairness standard be imposed on contractual relationships between retailers and wholesalers in the petroleum industry.[74] The equitable standard of fairness and reasonableness prevails in all petroleum contracts.[75] This fairness standard does not exist in all commercial contracts and, therefore, a High Court cannot treat those disputes as regular contractual disputes when they are considering whether to stay the proceedings. To do so would be to ignore the Legislature's transformative goals in the petroleum industry in light of the unequal bargaining power between retailers and wholesalers.

[63] A court assessing a stay must consider all the benefits of section 12B, and the broader power dynamics of the petroleum industry when weighing up whether to grant a stay in favour of either a retailer or a wholesaler. Of course, that is not to say that a court must always grant stay applications when applied for. That will depend on the facts of each case.

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[72] *Business Zone* above n 23 at para 59.

[73] Id.

[74] This is clear from section 12B permitting "unfair" or "unreasonable" contractual practices to be corrected. See *Business Zone* above n 23 at para 56.

[75] *Business Zone* id at para 52.

Conclusion

[64] This matter is a cautionary tale to both retailers and wholesalers in the petroleum industry to approach the Controller without undue delay once a party suspects that there are unfair or unreasonable contractual practices. In this case, while the High Court's analysis failed to consider the importance of the section 12B arbitral process in light of *Business Zone*, it cannot be said that the High Court's exercise of discretion fell outside the ambit of section 6(2) of the Arbitration Act and the "sufficient reasons" requirement such that the discretion was not exercised judicially. It is not for this Court to say whether the High Court came to a right or wrong conclusion when exercising its discretion, but whether it was influenced by wrong principles of law or fact. The High Court used the "sufficient reasons" test in section 6(2). It considered countervailing factors based on the facts before it, which in its assessment amounted to sufficient reasons to refuse a stay. The countervailing factors were sufficient. Accordingly, there is no basis to set aside the decision of the High Court to refuse the stay application. It follows that the appeal must be dismissed.

Costs

[65] On costs, there is no reason to depart from the general rule that costs should follow the result.

Order

[66] In the result, the following order is made–

1. Leave to appeal is granted.
2. The appeal is dismissed.
3. Crompton Street Motors CC must pay the costs of Bright Idea Projects 66 (Pty) Limited, including the costs of two counsel.

For the Applicant:	B Savvas instructed by K Swart and Company Incorporated
For the Respondent:	GD Harpur SC and D Ramdhani SC instructed by Norton Rose Fulbright Incorporated