CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 290/20

In the matter between:

SEEBED CC t/a SIYABONGA CONVENIENCE CENTRE Applicant

and

ENGEN PETROLEUM LIMITED Respondent

Neutral citation:	*Seebed CC t/a Siyabonga Convenience Centre v Engen Petroleum Limited* [2022] ZACC 28
Coram:	Madlanga J, Majiedt J, Mhlantla J, Pillay AJ, Rogers AJ, Tlaletsi AJ, Theron J and Tshiqi J
Judgment:	Mhlantla J (unanimous)
Decided on:	20 July 2022
Summary:	Petroleum Products Act 120 of 1977 — Section 12B Arbitration Referral — Stay of Proceedings Termination of Lease Agreement — Eviction Proceedings — True Discretion — Concession of Facts

ORDER

On appeal from the High Court of South Africa, Gauteng Local Division, Johannesburg:

1. Leave to appeal is refused.
2. The applicant must pay the respondent's costs in this Court.

JUDGMENT

MHLANTLA J (Madlanga J, Majiedt J, Pillay AJ, Rogers AJ, Tlaletsi AJ, Theron J 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, Gauteng Local Division, Johannesburg (High Court),[1] which evicted the applicant from its retail premises. The application concerns the question whether the High Court was entitled to grant the eviction order, notwithstanding a pending dispute between the parties which had been referred to trial.

Background

[2] The applicant is Seebed CC, trading as Siyabonga Convenience Centre (Seebed), a licenced retailer, which operates an Engen filling station in Robertville, Johannesburg. The respondent is Engen Petroleum Limited (Engen), a licensed wholesaler of petroleum products, as contemplated by the Petroleum Products Act[2] (Act).

[1] *Engen Petroleum Limited v Seebed CC t/a Siyabonga Convenience Centre* unreported judgment of the High Court of South Africa, Gauteng Local Division, Johannesburg, Case No 37883/2016 (28 July 2018) (High Court judgment).

[2] 120 of 1977.

During 2009, Seebed purchased a fuel and service station business located on premises owned by Engen. Seebed then concluded a written lease and operation of a service station agreement (lease agreement) with Engen to enable it to operate an Engen filling station from the leased premises. In terms of the lease agreement, the initial period of the lease was from 1 April 2008 to 31 May 2010. The lease period was subsequently extended, in writing, to 31 July 2017. On 24 August 2011, a written agreement was concluded in terms of which the extension period was reduced to 31 July 2015. Seebed alleges that this was done pursuant to an oral agreement that the lease period would thereafter be extended for a further five years, to 31 July 2020. However, the written lease agreement, set to expire on 31 July 2015, had a "whole contract" clause, which, in the ordinary course, would preclude reliance on an oral agreement.

[3] During 2010, Engen decided to introduce additional facilities at the leased premises and brought in a Corner Bakery franchise, with Retsol Stores (Pty) Limited (Retsol) being franchisor. Seebed took issue with aspects of the franchise agreement and requested that certain changes be made to it. Engen refused to do so and, consequently, Seebed did not sign the franchise agreement with Retsol. Thereafter, Engen purported to cancel the lease agreement and demanded that Seebed vacate the leased premises. Seebed refused and challenged Engen's entitlement to cancel the lease agreement based on its refusal to sign the franchise agreement with Retsol. Following Seebed's refusal to vacate the premises, Engen instituted eviction proceedings against Seebed.

Litigation history

High Court

First eviction proceedings

[4] In September 2012, Engen launched proceedings in the High Court for the eviction of Seebed from the premises (first eviction proceedings). The application was opposed on the grounds that: (a) Seebed had the right to elect whether it wished to establish the Corner Bakery; (b) Engen and Retsol had made fraudulent

misrepresentations about the profitability of the Corner Bakery; and (c) no feasibility studies had been conducted on the introduction of the Corner Bakery concept at Engen service stations. Seebed's defence was that, due to Engen's fraudulent misrepresentations, Engen could not rely on a breach of the extension agreement as a basis for cancellation and eviction. It must be noted that, in its affidavits filed in June 2014 and supplemented in August 2015, Seebed did not allege that it had a reasonable or legitimate expectation that the lease would be extended to 31 July 2020, nor did it allege that Engen had been guilty of unfair or unreasonable contractual practices, as contemplated in section 12B of the Act.[3]

[5] The matter came before Meyer J in May 2016.[4] During the hearing, the High Court explored with Seebed's counsel the implications of the contention that the alleged fraudulent misrepresentations precluded Engen from relying on a breach of the extension agreement as a basis for cancellation. Seebed's counsel responded that the

[3] Section 12B concerns referral of an alleged unfair contractual practice to arbitration and provides:

> "(1) The Controller of Petroleum Products may on request by a licensed retailer alleging an unfair or unreasonable contractual practice by a licensed wholesaler, or vice versa, require, by notice in writing to the parties concerned, that the parties submit the matter to arbitration.
>
> (2) An arbitration contemplated in subsection (1) shall be heard—
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> (a) by an arbitrator chosen by the parties concerned; and
>
> (b) in accordance with the rules agreed between the parties.
>
> (3) If the parties fail to reach an agreement regarding the arbitrator, or the applicable rules, within 14 days of receipt of the notice contemplated in subsection (1)—
>
> (a) the Controller of Petroleum Products must upon notification of such failure, appoint a suitable person to act as arbitrator; and
>
> (b) the arbitrator must determine the applicable rules.
>
> (4) An arbitrator contemplated in subsection (2) or (3)—
>
> (a) shall determine whether the alleged contractual practices concerned are unfair or unreasonable and, if so, shall make such award as he or she deems necessary to correct such practice; and
>
> (b) shall determine whether the allegations giving rise to the arbitration were frivolous or capricious and, if so, shall make such award as he or she deems necessary to compensate any party affected by such allegations;
>
> (5) Any award made by an arbitrator contemplated in this section shall be final and binding upon the parties 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."

[4] High Court judgment above n 1 at para 2.4.

extension agreement was tainted with misrepresentation and, consequently, invalid. Seebed's counsel further stated that, since the extension agreement was invalid, the original lease agreement, which subsisted between 1 April 2008 and 31 May 2010, was applicable. In terms of the original lease agreement, if the parties failed to agree on the extension of the lease agreement, the agreement would remain in operation on a month-to-month basis, terminable on one month's written notice. Seebed's counsel contended that, since the agreement that subsisted between the parties was on a month-to-month basis, it was up to either of the parties to make an election to continue with the agreement or to terminate it. However, the implications of that election would be a "fight on its own".

[6] On 26 May 2016, the High Court referred the application to trial because of the factual disputes regarding the alleged fraudulent misrepresentations.

[7] Five days after the Court's decision to refer the application to trial, that is on 31 May 2016, Engen gave Seebed one month's notice to vacate. Seebed refused to do so.

[8] After the referral to trial, Seebed decided to amplify its case in the pleadings. On 24 August 2016, it filed a counterclaim, wherein it alleged that the extension of the lease period to July 2017, for which Seebed had already paid R1 995 000, had been truncated to July 2015, based on Engen's oral undertaking that the lease period would be extended for another period of five years ending in 2020. On these grounds, Seebed contended that it had a reasonable expectation that the lease agreement would be extended to 31 July 2020. Seebed thus alleged that it had a right to remain in occupation of the leased premises until July 2020.

[9] In October 2016, Engen launched the second eviction proceedings, relying on the concessions made on Seebed's behalf that the right to terminate was on one month's notice. I will revert to what happened in the second eviction proceedings later.

[10] The trial in the first eviction proceedings was set down for hearing on 15 May 2019. However, and presumably because judgment at that time was pending in the second eviction proceedings, which had been heard on 19 March 2019, the parties agreed that the first eviction proceedings be postponed *sine die*.

Second eviction proceedings

[11] Seebed opposed the second eviction proceedings on the grounds that: (a) the first eviction proceedings were pending and had been referred to trial; (b) there were material disputes of fact between the parties and, therefore, the second eviction proceedings should be referred to trial and consolidated with the first eviction proceedings; (c) in the first eviction proceedings, Seebed had filed a counterclaim, in which it asserted its right to remain in occupation of the leased premises until July 2020; and (d) the concessions made by Seebed, upon which Engen relied to institute the second eviction proceedings, were concessions of law and not fact, and thus were not binding.

[12] On 25 April 2017, Seebed made a request to Engen for its consent to stay the second eviction proceedings, pending a referral of the dispute to arbitration in terms of section 12B of the Act. This request was refused. Following this, on 30 June 2017, Seebed referred alleged unreasonable or unfair contractual practices to the Controller of Petroleum Products (Controller) in terms of section 12B. This was the first instance where Seebed made allegations of unfair or unreasonable contractual practices. On 23 August 2017, Seebed filed an application to stay the second eviction proceedings, pending the section 12B arbitration.

[13] Seebed's rationale for launching the application to stay the second eviction proceedings was based on its assertion that the arbitrator's powers were wide enough to include a determination on its right to occupy the leased premises until 2020. Seebed contended that the High Court was not required to decide a claim in terms of section 12B, and therefore was not in a position to assess the prospects of success of the section 12B referral. Engen opposed the application to stay the second eviction proceedings.

[14] The second eviction proceedings were set down for hearing on 4 December 2017, but were postponed, presumably, to allow the stay application to be adjudicated.

[15] On 5 July 2018, the stay application came before Victor J. On the next day, this application was dismissed on the basis that the High Court's jurisdiction to assess the fairness, reasonableness and equitability of a petroleum contract or part thereof is not ousted by a section 12B referral. The High Court further held that it was well-placed to hear and decide the second eviction proceedings, in the light of its inherent jurisdiction to interpret contracts and the need to bring the matter to finality without further delay.

[16] On 3 August 2018, following the dismissal of the stay application, Seebed filed a second supplementary answering affidavit in the second eviction proceedings. It sought to place before the High Court its allegations on the extension of the agreement, and those relating to unfair and unreasonable contractual practices. Seebed also wanted to place before the High Court the fact that the first eviction proceedings had been referred for trial, which had not yet commenced. It submitted that, since the issues in the first eviction proceedings were inextricably linked to the issues in the second eviction proceedings, the matters should be consolidated and heard together. Further, Seebed held the view that it was pertinent for the High Court to be apprised of the issues to be decided in the first eviction proceedings, in the light of the fact that a determination that Seebed was in lawful occupation of the leased premises in the first eviction proceedings would be dispositive of the second eviction proceedings by necessary implication.

[17] Engen opposed the admission of the second supplementary answering affidavit on the following grounds: (a) the supplementary answering affidavit was filed 10 months after Engen filed its replying affidavit, and no consent was sought from

Engen;[5] (b) the supplementary answering affidavit did not raise new issues that were not already on record and before the High Court;[6] (c) there were no allegations regarding the alleged unreasonable or unfair contractual practices in Seebed's plea and counterclaim in the pending trial of the first eviction proceedings; and (d) there was no justification for accepting Seebed's supplementary answering affidavit, since the issues it raised: did not serve the interests of justice or relate to recent developments; were not conducive to the expeditious resolution of the matter; and did not constitute new information.[7] On 25 September 2018, Engen filed a reply, in the event that Seebed's affidavit was allowed.

[18] On 19 March 2019, Mosam AJ considered the second eviction proceedings and judgment was delivered on 31 July 2019. The High Court refused to grant Seebed leave to file the second supplementary answering affidavit on the basis that Seebed had not sought consent to do so from either Engen or the High Court before filing, and it had not proffered a satisfactory explanation for failing to place the information in the supplementary answering affidavit before the Court at an earlier stage.[8]

[19] On Seebed's contention that the second eviction proceedings should be referred to trial, the Court accepted that the alleged unfair and unreasonable contractual practice was an issue to be decided during the trial and best left to the section 12B inquiry.[9] However, the High Court held that the central question in the second eviction proceedings was not one of reasonableness, equity, or fairness, but rather one of enforcement of the terms of the contract.[10] The High Court held that fairness and reasonableness were not self-standing substantive rules that the Court could use to

[5] Id at para 3.

[6] Id at para 4.

[7] Id at para 5.

[8] Id at paras 9-10.

[9] Id at paras 18-9.

[10] Id at paras 23.

intervene in a contractual relationship and determine the case.[11] It held that doing so would lead to untenable legal uncertainty.[12] The High Court also rejected Seebed's *lis pendens* defence and held that the causes of action in the two eviction proceedings were distinct, in that the first one was based on a breach of contract, while the second was based on the version advanced by Seebed in the first eviction proceedings.[13]

[20] On the question whether Engen had the right to terminate the lease agreement and to evict Seebed from its premises, the High Court held that Engen was entitled to cancel the lease agreement.[14] In its reasoning, the High Court accepted Engen's submission that Seebed had made a factual concession in the first eviction proceedings that the contract that subsisted between Engen and Seebed was on a month-to-month basis.[15] Accepting Engen's reliance on this concession, the Court held that Engen had the right to terminate the agreement on one month's notice, which it had given.[16]

[21] The High Court further recalled that Seebed had raised the issue of the alleged fraudulent misrepresentation on the part of Engen, when the latter made the alleged oral undertaking that it would extend the contract to 2017, as one of the bases for asserting Seebed's right to remain in occupation of the leased premises.[17] The Court reasoned that, even if it were accepted that the oral agreement to extend the lease to 2017 was rooted in misrepresentation, the agreement would have been void *ab initio*, meaning that, at best for Seebed, its right to occupy the leased property subsisted only until 31 July 2017.[18] In the result, the High Court upheld Engen's application and granted an eviction order with retrospective effect from 31 July 2017.[19]

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[11] Id at paras 21-2.

[12] Id.

[13] Id at paras 24-6.

[14] Id at para 29.

[15] Id at paras 27-33.

[16] Id.

[17] Id at para 34.

[18] Id at paras 34-8.

[19] Id at para 40.

[22] Seebed sought leave to appeal to the Full Court of the High Court. That application was dismissed.

Supreme Court of Appeal

[23] An application for leave to appeal to the Supreme Court of Appeal suffered a similar fate. Seebed then applied to the President of the Supreme Court of Appeal for a reconsideration in terms of section 17(2)(f) of the Superior Courts Act.[20] This was refused. Seebed has now approached this Court for leave to appeal.

In this Court

[24] This Court issued directions instructing the parties to file written submissions on the effect of *Crompton*[21] on their application. The parties filed the written submissions, and the matter is determined without oral argument.

Issues

[25] This Court must determine whether its jurisdiction is engaged and, if so, whether leave to appeal should be granted. If leave to appeal is granted, the merits of the appeal must be determined.

Parties' submissions

Applicant's submissions

[26] On jurisdiction, Seebed raises the following grounds: (a) there are conflicting judgments on the legal issue in question; (b) this matter concerns the proper interpretation of legislation through a constitutional prism, in so far as freedom of trade is concerned; and (c) this matter requires a pronouncement on the correct application of

[20] 10 of 2013.

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

the principles of fairness and reasonableness in relation to the Act, which would promote legal certainty.

[27] On the merits, Seebed submits that the present case is distinguishable from *Crompton*, both in fact and in law. On the facts, Seebed submits that the parties in *Crompton* agreed that the franchise agreement had terminated by effluxion of time, whereas this was not the case in this matter. Instead, Engen purported to cancel the lease based on Seebed's refusal to sign a franchise agreement with Retsol. Eviction proceedings then followed but were referred to trial and a hearing has not yet been held. Seebed contends that this is distinguishable from *Crompton*, in which the eviction order had been granted. The key difference, therefore, is that in *Crompton*, the retailer's case was that section 12B ousted the High Court's jurisdiction, whereas in this case, Seebed argues that Engen's purported cancellation was, in itself, an unfair or unreasonable contractual practice. This was also the case in respect of its failure to extend the contract.

[28] Seebed also argues that the underlying cause for the eviction has fallen away as, on 31 March 2017, Engen announced its cancellation of the franchise agreement with Retsol. Seebed submits that after the first eviction proceedings were referred to trial to resolve material disputes, Engen again instituted eviction proceedings. Seebed avers that this too distinguishes the case from *Crompton*, as the dispute of fact required a referral to oral evidence. It was only during the second eviction proceedings that Seebed sought a stay of proceedings. However, it had addressed the issue of the unfair or unreasonable contractual practices in its answering papers and sought a stay for the issue to be addressed following the resolution of the factual dispute.

[29] On the law, Seebed submits that its section 12B argument is different to that advanced by the retailer in *Crompton*. Its core argument is that, in terms of the Act, the standard of reasonableness and fairness prevails, irrespective of whether the dispute between the retailer and wholesaler is subject to statutory arbitration or ordinary litigation. It submits further that the High Court erred in finding that this standard was

not applicable where a dispute emanated from a contract. This, so Seebed submits, is not in accordance with this Court's decision in *Crompton*. If the High Court accepted jurisdiction, it should have applied the correct standard of fairness and reasonableness. Seebed argues that nothing in its conduct precludes it from acting in terms of the contract and selling the franchise to recoup its losses, as it has not breached any of the terms. It emphasises the nature of unequal bargaining power between parties in the petroleum products industry. In closing, Seebed argues that there is one crucial point to section 12B, which is that it is not geared towards compelling arbitration but towards imposing a standard of equity between parties. Consequently, the High Court should not have granted the relief sought by Engen.

Respondent's submissions

[30] Engen submits that this matter does not raise any constitutional issue or arguable point of law of general public importance. Engen refutes Seebed's allegation that there are conflicting judgments, and submits that Seebed simply failed to follow precedents. Additionally, it submits that, in any event, the relief sought by Seebed has been rendered moot, on account of the fact that Seebed is no longer entitled to occupy Engen's premises on the strength of any of its versions, due to the effluxion of time.

[31] Regarding the merits, Engen submits that *Crompton*, far from supporting Seebed's argument, dismantles it. It submits that Seebed has failed to appreciate the nature of the proceedings, in that the matter referred to trial had no bearing on the second eviction proceedings. Furthermore, Seebed is seeking leave to appeal against the eviction order and, in the alternative, a stay of proceedings. The stay was brought in the second proceedings, but Victor J dismissed it, and there was no appeal against that dismissal. This means Engen was entitled to the eviction order as no stay application was pending before the High Court. Relying on this Court's decision in *Former Way Trade*,[22] Engen submits that, in any event, a request for referral to a

[22] *Former Way Trade and Investment (Pty) Ltd v Bright Idea Projects 66 (Pty) Ltd t/a All Fuels* [2021] ZACC 33; 2021 (12) BCLR 1388 (CC).

section 12B arbitration does not oust the High Court's jurisdiction. The High Court was entitled to exercise a discretion in terms of section 6 of the Arbitration Act[23] to decide whether to grant such a stay. Therefore, the outcome of the request for a stay was not a foregone conclusion. To add to this, Seebed entirely failed to meet the requirements of section 6 of the Arbitration Act for a stay. Had such an application been entertained, it would have been baseless and a waste of judicial resources. Engen highlights that the matter had been ongoing for a long time and, as such, it was entitled to finality.

[32] Engen points out that the lapse of a contract, as in *Crompton*, cannot be considered a contractual practice for present purposes. In addition, any section 12B referral could not give the Controller authority to compel the parties to enter into a further agreement. Engen submits that the issue of Seebed's entitlement to sell the service station is raised for the first time in this Court and, on Seebed's own version, the lease was on a month-to-month basis and, as a result, the provision it seeks to rely on does not apply to it. Accordingly, Seebed is not entitled to any compensation. If anything, given the date of the expiry of the lease agreement, Seebed's counterclaim has also prescribed. Therefore, Engen submits that there are no reasonable prospects of success and the application must fail.

[23] 42 of 1965. Section 6 concerns the stay of eviction proceedings where there is an arbitration agreement and states:

> "(1) 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.
>
> (2) 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 as it may consider just."

Analysis

Jurisdiction

[33] This Court is, in terms of section 167(3)(b) of the Constitution, 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. Once jurisdiction is established, it must also be in the interests of justice to grant leave to appeal.

[34] In this matter, it is alleged that Seebed has been denied its section 34 right to access the courts, in that it has been evicted in circumstances where the issues raised in the first eviction proceedings have not yet been ventilated and determined by the High Court. This is a constitutional issue. Consequently, this Court's jurisdiction is engaged.

Leave to appeal

[35] The next question is whether it is in the interests of justice to grant leave to appeal. In order to determine whether leave should be granted, we must consider the prospects of success and whether it is in the interests of justice for this Court to entertain the matter. I will consider the merits of the case in order to answer the question whether there are prospects of success.[24]

[36] Before considering this issue, I will deal with the parties' response to the directions on the applicability of *Crompton* to their matter. It is apposite to first outline what that case was about. *Crompton* concerned a dispute about the extension and/or renewal of a franchise agreement that had lapsed and eviction proceedings that had been launched pursuant to the lapsed franchise agreement. While the eviction proceedings

[24] *Fraser v Naude* [1998] ZACC 13; 1999 (1) SA 1 (CC); 1998 (11) BCLR 1357 (CC) at para 7; *Brummer v Gorfil Brothers Investments (Pty) Ltd* [2000] ZACC 3; 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC) at para 3; *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* [2003] ZACC 19; 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333 (CC) at para 3; and *Radio Pretoria v Chairperson, Independent Communications Authority of South Africa* [2004] ZACC 24; 2005 (4) SA 319 (CC); 2005 (3) BCLR 231 (CC) at para 22.

were still pending, the retailer lodged a request for the dispute to be referred to arbitration with the Controller in terms of section 12B, and filed an application to stay the eviction proceedings, pending the outcome of the arbitration. The High Court dismissed the application for a stay and issued an order evicting the applicant from the premises. This prompted the applicant to approach the Supreme Court of Appeal and, upon refusal of that application, this Court.

[37] This Court, in *Crompton*, had to determine whether a High Court, faced with an application to stay proceedings, was obliged to stay the proceedings pending the section 12B arbitration, and whether a failure to do so was akin to usurping the functions of the Controller and denying the retailer its right to access a specialised statutory dispute resolution mechanism, and thereby infringing on its section 34 right to access of courts. This Court held that the High Court was not precluded from adjudicating a matter that had been referred to arbitration in terms of section 12B, as section 12B did not grant exclusive jurisdiction to arbitrators in such disputes. It was clarified that the parties were at liberty to elect to refer their disputes to arbitration or to litigate in the High Court. This Court further held that the High Court had a discretion to dismiss a stay application on the strength of compelling reasons and that the High Court was required to consider several factors – such as the purpose and benefits of arbitration, judicial resources, and the implications of a premature assessment of the outcome of arbitration – before refusing to stay the proceedings. Ultimately, the retailer in *Crompton* was unsuccessful in its appeal and the High Court's order of eviction was upheld.

[38] Having considered the submissions of the parties and the facts in *Crompton*, I agree with Seebed that this matter is distinguishable from *Crompton*. The first distinction is that *Crompton* was largely centred around the extension and/or renewal of a franchise agreement that had expired by the effluxion of time before the retailer invoked the section 12B arbitration, while the dispute in this matter, especially in respect of the first eviction proceedings, arose after the purported cancellation of a lease agreement before its expiry date. However, this situation is different in respect of the

second eviction proceedings, as the lease was terminated on one month's notice, long before the invocation of section 12B. Another distinction is that *Crompton* concerned a stay of proceedings pending an arbitration in terms of section 12B. The present matter is not just dealing with an application for the stay of the proceedings on account of a section 12B arbitration referral, it also involves pending High Court proceedings concerning the same parties, dealing with the operation and/or termination of the lease agreement, and the question whether Seebed has a right to occupy the leased premises. In the light of this, the cases are indeed distinct.

[39] Regarding the question whether it is in the interests of justice to grant leave, it must be determined whether the High Court erred in granting the eviction order. The first question is whether the High Court erred in refusing to allow Seebed to file its second supplementary answering affidavit. In this regard, the first consideration is whether this Court has the powers to interfere with the discretion of the High Court. In order to answer this question, I must determine whether the High Court's decision to reject Seebed's supplementary answering affidavit amounts to a true discretion. This question can only be answered in the affirmative, as permission to file further affidavits after the replying affidavit has been filed is always a matter for the discretion of the court.[25]

[40] It is trite that this Court has limited powers to interfere with the High Court's exercise of a true discretion.[26] This Court, in *Trencon,*[27] said the following in this regard:

> "A discretion in the true sense is found where the lower court has a wide range of equally permissible options available to it. This type of discretion has been found by this Court in many instances, including matters of costs, damages and in the award of

[25] *Sealed Africa (Pty) Ltd v Kelly* 2006 (3) SA 65 (W) at para 4.

[26] *Ferguson v Rhodes University* [2017] ZACC 39; 2018 (1) BCLR 1 (CC) at para 21.

[27] *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC).

> a remedy in terms of section 35 of the Restitution of Land Rights Act. It is "true" in that the lower court has an election of which option it will apply and any option can never be said to be wrong as each is entirely permissible. In contrast, where a court has a discretion in the loose sense, it does not necessarily have a choice between equally permissible options."[28]

[41] Having reached the conclusion that the High Court's decision amounts to a true discretion, this Court may only interfere with the High Court's discretion if it is apparent that the High Court: did not exercise its discretion judicially; was influenced by the wrong principles; misdirected itself on the facts; and/or "reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles".[29]

[42] In this case, no such basis for interference exists, as the High Court's decision was founded on the following factors: first, no preceding application was brought by Seebed to seek an indulgence from the High Court to file a supplementary answering affidavit; and, second, the supplementary answering affidavit was, in any event, filed at a considerably late stage of the proceedings, without an adequate explanation proffered by Seebed for the lateness. In *James Brown & Hammer*,[30] the Appellate Division aptly held that a party who tenders an affidavit late must seek an indulgence from the Court.[31] The affidavit cannot be filed as of right. The Court further held that such a party must "advance his explanation why the affidavit is out of time and satisfy the Court that, although the affidavit is late, it should, having regard to all the circumstances of the case, nevertheless be received".[32] Implicitly, where the Court has not been satisfied by the explanation, as is the case with the High Court in this matter, the Court has the discretion not to allow the filing of the affidavit. Therefore, there is no basis to interfere

[28] Id at paras 85-6.

[29] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 11.

[30] *James Brown & Hammer (Pty) Ltd (Previously Named Gilbert Hamer & Co Ltd) v Simmons, N.O.* 1963 (4) SA 656 (A).

[31] Id at 660E-G.

[32] Id.

with the discretion of the High Court when it refused Seebed's request to file the supplementary answering affidavit.

[43] The finding that the High Court did not err in rejecting the supplementary answering affidavit also has implications for the determination whether the High Court should have stayed the second eviction proceedings pending the determination of the first eviction proceedings. This was the crux of Seebed's *lis pendens* defence. Thus, the next issue to be determined is whether the High Court erred in rejecting Seebed's *lis pendens* defence.

[44] In *AMCU*,[33] this Court recognised that *lis pendens* is intended to prevent duplication of legal proceedings. It held—

> "once a claim is pending in a competent court, a litigant is not allowed to initiate the same claim in different proceedings. For a *lis pendens* defence to succeed, the defendant must show that there is a pending litigation between the same parties, based on the same cause of action and in respect of the same subject matter. This is a defence recognised by our courts for over a century."[34]

[45] Furthermore, in *Caesarstone*,[35] the Supreme Court of Appeal said—

> "the requirement of the same cause of action is satisfied if the other proceedings involve the determination of a question that is necessary for the determination of the case in which the plea is raised and substantially determinative of the outcome of that latter case . . . [the requirement of] the same cause of action and that the same thing be claimed, must not be understood in a literal sense and as immutable rules. There is room for their adaptation and extension based on the underlying requirement that the same thing is in issue as well as the reason for the existence of the plea."[36]

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[33] *Association of Mine Workers and Construction Union v Ngululu Bulk Carriers (Pty) Ltd (in liquidation)* [2020] ZACC 8; 2020 (7) BCLR 779 (CC).

[34] Id at para 26.

[35] *Caesarstone Sdot-Yam Ltd v World of Marble and Granite 2000 CC* [2013] ZASCA 129; 2013 (6) SA 499 (SCA).

[36] Id at para 21.

[46] Generally, it would have been improper for the High Court to have determined the second eviction proceedings whilst the earlier proceedings were pending if the defence was applicable. However, in the present matter, it was not. The basis for this conclusion is that Seebed's invocation of *lis pendens* was based on the submission that the issues to be determined, namely the legitimate expectation that the agreement would be extended and the unfair or unreasonable contractual practices, in the first and second eviction proceedings, were the same. This argument has no merit because Seebed had never pleaded these issues before the High Court in the second eviction proceedings during the pleading stage, and the supplementary answering affidavit, through which it sought to introduce these issues, was not accepted. On that premise, the issues to be determined in both the first and second eviction proceedings were not the same.

[47] In addition, even if Seebed had pleaded these issues during the pleading stage of the second eviction proceedings, the issues were only introduced in the first eviction proceedings through a supplementary answering affidavit, which was filed after close of pleadings had been reached in the second eviction proceedings. Thus, the High Court would still not have been seized with two cases that were premised on the same issues and based on the same cause of action. Therefore, the defence of *lis pendens* would have been inapplicable. Consequently, in the light of the facts and evidence before it, the High Court correctly rejected Seebed's *lis pendens* defence and was entitled to adjudicate the second eviction proceedings.

[48] The next question is whether the High Court erred in granting the order of eviction. In reaching its decision, the High Court effectively accepted the submission advanced by Engen, that the agreement that subsisted between Seebed and Engen at the time of launching the second eviction proceedings was on a month-to-month basis. Before the High Court, Seebed did not deny that its concession that the agreement which subsisted between it and Engen was on a month-to-month basis. However, Seebed submits that this concession, which was made during the first eviction proceedings, was a concession of law and not of fact.

[49] In *Matatiele*,[37] this Court held that "[i]t is trite that this Court is not bound by a legal concession if it considers the concession to be wrong in law".[38] In *Kruger*,[39] this Court stated that concessions of fact will generally be accepted without further deciding on the issues, as such concessions have the effect of not placing the conceded facts in dispute.[40] It further held that the "rule extends to legal concessions but only to the extent that a court is satisfied that a concession was properly made" and where legal concessions are improperly made, the Court may reject them. In *Dengetenge*,[41] this Court held that "a concession made by counsel on a point of law may be withdrawn if the withdrawal does not cause any prejudice to the other party".[42] By necessary implication, concessions of fact will be binding.

[50] In the present matter, Seebed expressly accepted that the subsequent agreement that had been entered into by the parties, to effectively truncate the lease agreement to 2015 with the intention of later concluding another agreement which would terminate in 2020, had been tainted by misrepresentation. And on that basis, the lease agreement reverted to a month-to-month arrangement between the parties, as expressly provided for in the original lease agreement. Seebed's concession that the lease was terminable on one month's notice was unqualified by the unfairness and reasonableness standard. From the wording of Seebed's concession, it is clear and unequivocal that Seebed conceded to a state of affairs that subsisted between the parties. Naturally, this constitutes a concession of fact and not of law. And it was on this very basis that a

[37] *Matatiele Municipality v President of the Republic of South Africa* [2006] ZACC 2; 2006 (5) SA 47 (CC); 2006 (5) BCLR 622 (CC).

[38] Id at para 67.

[39] *Kruger v President of Republic of South Africa* [2008] ZACC 17; 2009 (1) SA 417 (CC); 2009 (3) BCLR 268 (CC).

[40] Id at para 102. See also *S v Hadebe* [1997] ZASCA 86; 1998 (1) SACR 422 (SCA) at 426A-B, where the Supreme Court of Appeal held that "in the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong".

[41] *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd* [2013] ZACC 48; 2014 (5) SA 138 (CC); 2014 (3) BCLR 265 (CC).

[42] Id at para 55.

resolution of the allegations of fraud in the first eviction proceedings raised factual disputes requiring a referral to oral evidence. Engen's case was that Seebed's refusal to sign the franchise agreement was a breach of the extension agreement, but Seebed claimed that there was no breach because the extension agreement was vitiated by fraud, resulting in a month-to-month lease. Therefore, the High Court in the second eviction proceedings was correct in concluding that, on the strength of Seebed's version, the parties were engaged in a month-to-month contract, which Engen was entitled to terminate on a month's notice.

[51] During the second eviction proceedings, Seebed submitted that it exercised its election to stand by the agreement, notwithstanding that it was tainted by misrepresentation. It is on this basis that Seebed advances that it was, at the very least, entitled to remain in occupation of the property until 31 July 2017. Even on the strength of this version – which was a *volte face* from the basis on which it had avoided an adjudication of the first eviction proceedings on the papers – the High Court was still correct in its conclusion that, at best, Seebed may have had a right of occupation until 31 July 2017. Further, the High Court bolstered this position by making the order of eviction on 31 July 2019, with effect from 31 July 2017, as opposed to the cancellation dates stipulated by Engen in both the first and second eviction proceedings. This decision was favourable to Seebed. In the light of the cumulative factors and Seebed's conduct during the proceedings, specifically its attempt to introduce allegations of unfair and unreasonable contractual practices at a very late stage of the proceedings, the High Court cannot be faulted for its decision. On that premise, the High Court's order evicting Seebed was correct.

[52] Furthermore, Seebed has made the allegation that, since Engen had made the undertaking that the lease period would be extended for another period of five years ending in 2020, Seebed had a reasonable expectation that the lease agreement would be extended and thus had a right to remain in occupation of the leased premises until July 2020. This allegation was not raised by Seebed during the second eviction proceedings – disregarding the second supplementary answering affidavit which the

High Court refused to receive – and consequently, the High Court could not have been in a position to consider this. Even if Seebed had timeously and effectively placed its allegations of its right to remain in occupation of the leased premises until July 2020, the High Court would have not been in a position to find in favour of Seebed, as doing so would have required a resolution of the question left open in *Former Way Trade*[43] and the High Court to make a finding that is contrary to the "whole agreement" clause contained in the original lease agreement.

[53] The next issue is Seebed's submission that it is entitled to sell the service station if the eviction is granted, as provided for in clause 41 of the lease agreement. Clause 41 provides that if Engen terminates the lease agreement before its expiry, Seebed will not have the right to claim compensation. Through this clause, Engen reserves the right to appoint a new dealer, with whom Seebed may negotiate terms concerning the taking-over of property belonging to Seebed located on the leased premises. Seebed may also elect to remove such property from the leased premises when the termination takes effect.

[43] In *Former Way Trade* above n 22 at para 41, this Court held:

> "The High Court held that the arbitrator has the power to determine whether the contractual practice was unfair or unreasonable and to correct it. It said that the Petroleum Products Act, unlike the Labour Relations Act, does not grant a section 12B arbitrator the explicit power to reinstate a lapsed agreement. Although it did not determine whether the arbitrator's powers went so far as to permit them to make a new contract for the parties, it held that this was unlikely, considering the principle of freedom of contract."

See also *Crompton* above n 21 at para 52, wherein this Court held:

> "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'. 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."

[54] This issue was raised for the first time in this Court. It is not in the interests of justice for this Court to determine the issue or its implications as, in doing so, we would be a Court of first and last instance. In *Tiekiedraai*,[44] this Court said:

> "This Court cannot be taxed to consider novel points not raised before simply because of its position as a super-appellate body over all other courts. Generally speaking, apart from its power to afford direct access, this Court's appellate powers exist not to determine novel issues raised for the first time before it, but to intervene in and correct determinations by lower courts."[45]

[55] What remains is Seebed's contention that the granting of the eviction order in the second eviction proceedings has precluded it from raising any of its defences in the first eviction proceedings. This is based on the fact that a decision to reject these defences has already been taken by the High Court in the second eviction proceedings, and the common relief sought by Engen has already been granted. In essence, the order of eviction effectively extinguishes the basis and cause of the first eviction proceedings, thereby rendering the referral to trial and any order granted thereof meaningless.

[56] This Court would not be in a position to take the matter any further, considering the finding that the High Court did not err in granting the eviction order effectively renders the first eviction proceedings moot. Any further finding on this aspect would, in earnest, be purely academic. In truth, the question whether Engen lawfully cancelled the lease for breach in November 2011, being the subject of the first eviction proceedings, was rendered academic once Engen instead relied on a termination on notice in May 2016, and once the High Court – in a decision which Engen has not challenged – chose to order eviction only retrospective to 31 July 2017.

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[44] *Tiekiedraai Eiendomme (Pty) Limited v Shell South Africa Marketing (Pty) Limited* [2019] ZACC 14; 2019 (7) BCLR 850 (CC).

[45] Id at para 24. See also *Mans v Mans* [2020] ZACC 9; 2020 (8) BCLR 903 (CC) at paras 36-8; *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* [2011] ZACC 30; 2012 (1) SA 256 (CC); 2012 (3) BCLR 219 (CC) at para 50; *Bruce v Fleecytex Johannesburg CC* [1998] ZACC 3; 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC) at para 8; and *Transvaal Agricultural Union v Minister of Land Affairs* [1996] ZACC 22; 1997 (2) SA 621 (CC); 1996 (12) BCLR 1573 (CC) at para 18.

Conclusion

[57] For all these reasons, the application must fail on the basis that it is not in the interests of justice to grant leave to appeal. The ordinary principle that costs follow the result applies.

Order

[58] The following order is made:

1. Leave to appeal is refused.
2. The applicant must pay the respondent's costs in this Court.

For the Applicant:	N Redman SC and F Bezuidenhout instructed by Ayoob Kaka Attorneys
For the Respondent:	P L Carstensen SC instructed by Lanham Love Attorneys