THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1341/2018

In the matter between:

FORMER WAY TRADE & INVEST (PTY) LTD **APPLICANT**

and

BRIGHT IDEA PROJECTS 66 (PTY) LTD **RESPONDENT**

Neutral citation: *Former Way Trade & Invest (Pty) Ltd v Bright Idea Projects 66 (Pty) Ltd* (Case no 1341/2018) [2020] ZASCA 118 (1 October 2020)

Coram: WALLIS, ZONDI and MOCUMIE JJA, GOOSEN and MABINDLA-BOQWANA AJJA

Heard: 26 August 2020

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 09h45 on 1 October 2020.

Summary: Application for reconsideration of refusal of leave to appeal in terms of s 17 (2) (*f*) of Superior Courts Act 10 of 2013 – applicant conducting business as retailer of petroleum products - respondent obtained order evicting applicant from premises owned by it on expiry of franchise agreement – High Court found no new franchise agreement concluded and refused stay of proceedings pending arbitration – Leave to appeal refused by high court and this court on petition - On reconsideration no need to vary this court's order refusing leave to appeal – Order confirmed.

ORDER

On application: Reconsideration of application for leave to appeal from KwaZulu-Natal Division of the High Court, Pietermaritzburg (D Pillay J, sitting as court of first instance):- judgment reported *sub nom Bright Idea Projects 66 (Pty) Ltd v Former Way Trade and Invest (Pty) Ltd* 2018 (6) SA 86 (KZP); [2018] ZAKZPHC 29.

1. The order of this court dismissing the application for leave to appeal is confirmed.
2. The applicant is ordered to pay the costs of the application for leave to appeal and its reconsideration, such costs to include those consequent upon the employment of two counsel.

JUDGMENT

Goosen AJA (Wallis, Zondi and Mocumie JJA and Mabindla-Boqwana AJA concurring)

[1] The respondent Bright Idea Projects 66 (Pty) Ltd, trades as a wholesaler of petroleum products under the name All Fuels. It is the owner of a property situated at 238 Albert Luthuli Street, Pietermaritzburg. Since about February 2015, the applicant, Former Way Trade & Invest (Pty) Ltd ('Former Way'), has conducted business on the property as a Caltex service station under the name Premier Service Station. When the franchise agreement under which it was operating expired on 31 December 2017 Former Way refused to vacate the property and it has since then continued to operate the service station business. The endeavours by All Fuels to evict Former Way give rise to the present application.

[2] All Fuels launched an application to evict Former Way from the property on 15 January 2018. Former Way filed a counter-application in which it sought to enforce an agreement extending its tenure, alternatively an order staying the high court proceedings pending arbitration pursuant to s 12B of the Petroleum Products Act, 120 of 1977 ('the Act'). The matter came before D Pillay J who, on 19 July 2018, dismissed the counter-application and granted an eviction order directing Former Way to vacate property. She refused leave to appeal.

[3] An application for leave to appeal was dismissed by two judges of this court. Former Way then applied for reconsideration of that order in terms of s 17 (2) (*f*) of the Superior Courts Act, 10 of 2013. Navsa AP referred that refusal of leave to appeal to this court for reconsideration and, if necessary, variation. Upon reconsideration the court hearing the application is required to consider afresh whether leave to appeal should be granted as provided for by s 17 (1) of the Superior Courts Act.[1] The merits of the appeal accordingly only fall to be considered for purposes of determining whether prospects of success are established to meet the requirements for granting leave to appeal.

The facts

[4] On 1 January 2003, Caltex Oil SA Pty Ltd ('Caltex Oil') entered into a franchise agreement in terms of which it, as franchisor, granted Readyform 1030 CC ('Readyform') the right to operate a Caltex service station on the premises situated at 238 Albert Luthuli Street, Pietermaritzburg ('the premises'). In terms of this agreement Caltex Oil leased the premises to Readyform and undertook to supply it with petroleum products for retail to consumers. The agreement was for a period of five years but included two renewable option periods each of five years duration.

[5] On 30 August 2005, the franchise agreement between Caltex Oil and Readyform was ceded and assigned to Shantyrien Service Station CC ('Shantyrien'), which thereafter operated the retail business as franchisee. In October 2005 Caltex Oil changed its name to Chevron South Africa (Pty) Ltd ('Chevron').

[1] See *Notshokovu v S* [2016] ZASCA 112 para [2].

[6] On 1 February 2011, the franchise agreement between Chevron and Shantyrien was ceded and assigned to Tomdia Service Station CC ('Tomdia'). Tomdia thereafter traded as the franchisee under the style Premier Service Station.

[7] On 23 December 2011, Chevron and All Fuels concluded an agreement, referred to as a Retail Assignment Agreement in terms of which All Fuels purchased the immovable properties owned by Chevron, on which a number of retailers conducted retail businesses as retailers of petroleum products. This agreement also ceded and assigned the agreements in terms of which these retailers operated from the properties to All Fuels. Chevron and All Fuels also concluded a Branded Marketer Agreement which conferred upon All Fuels the right to market and sell Chevron products as wholesaler in the Southern Kwa-Zulu Natal region. The effect of these two agreements was that All Fuels effectively stepped into the shoes of Chevron in relation to the retailers of Chevron products in that region. It is common cause that one of the properties acquired by All Fuels was the premises from which Tomdia conducted business as Premier Service Station. It is also common cause that the original franchise agreement concluded between Caltex Oil and Readyform was extended for each of the two renewal periods at the option of the relevant retailer. The date of termination of the franchise agreement was 31 December 2017.

[8] In February 2015, Tomdia sold the Premier Service Station business to Former Way. The sale was conditional upon the written approval of All Fuels as provided for in the franchise agreement. It is common cause that on 26 February 2016 Tomdia, All Fuels and Former Way signed a cession and

assignment agreement in respect of the franchise agreement. The effective date of the agreement was 1 March 2015, from which date Former Way had occupied the premises. The franchise agreement conferred no right or option to renew upon Former Way. It was scheduled to terminate on 31 December 2017.

[9] Clause 11 of the franchise agreement provided, inter alia, that:

'Upon termination of this Contract, for whatever reason:-

11.1.1 the licence / franchise herein granted together with the right of occupation of the Premises will cease to be of any force and effect;

11.1.2 the FRANCHISEE and its permitted assigns, heirs and executors will forthwith surrender possession of the Premises to the FRANCHISOR, which Premises shall be in such repair and condition as prescribed in the lease agreement and, if applicable, the Retail Outlet Standards manual;'

[10] Clause 8 of the cession contained a 'whole agreement' clause which provided that it was the entire agreement between the parties and that,

'None of the parties relies in entering into this agreement upon any warranties, representations, disclosures, or expressions of opinion which have not been incorporated into this agreement;'

[11] On 30 June 2017 All Fuels forwarded to Former Way a notice of termination of the franchise agreement outlining the consequences of termination as set out in clause 11 of the franchise agreement. Mr Lee Bentz, on behalf of Former Way, acknowledged receipt of the notice on 4 July 2017. Former Way failed to vacate the premises upon expiry of the franchise agreement.

The eviction proceedings

[12] All Fuels commenced eviction proceedings on 15 January 2018. They were opposed on two related grounds. The first was that Former Way had concluded an enforceable 'renewal agreement' with All Fuels. This was a misnomer as the agreement described in the replying affidavit was unrelated to the franchise agreement between All Fuels and Tomdia that had been ceded and assigned to Former Way on 26 February 2016. It was an agreement allegedly concluded between December 2014 and 27 February 2015 for a new franchise agreement to replace that agreement, and to endure for five years, with an option to renew thereafter for a further five years. The second contention was that the failure by All Fuels to provide Former Way with this franchise agreement as agreed had been the subject of a request for arbitration in terms of s 12B of the Act. Since the envisaged arbitration would deal with All Fuels' failure to honour its obligation to provide Former Way with a franchise agreement, the high court proceedings ought to be stayed pending such arbitration. By the time the eviction application was heard in the high court there had been a referral to arbitration pursuant to the request. It was contended before us that this resulted in a complete ouster of the high court's jurisdiction.

[13] Counsel for Former Way accepted that the ceded franchise agreement, in terms of which it had occupied the premises owned by All Fuels, had terminated on 31 December 2017. Any right of occupation beyond termination of the franchise agreement would need to be determined on the basis of whether the evidence established the existence of an agreement

conferring such right of occupation. In this respect Former Way was saddled with an onus to prove such right of occupation.[2]

A new franchise agreement

[14] Former Way's case insofar as the conclusion of a franchise agreement was concerned was the following. In 2014 when Former Way was engaged in discussions with Tomdia to purchase the business it was aware of the limited duration of the existing franchise agreement. Tomdia was then seeking payment of a purchase price of R8 million. Former Way therefore sought assurance that it would secure a further period as franchisee. When it was established that All Fuels would consider a further franchise agreement upon payment of a brand fee or royalty payment of R3.25 million, a reduction in the purchase price was negotiated.

[15] On 22 December 2014 All Fuels wrote to Former Way to confirm acceptance of its application for appointment as a retailer in substitution of Tomdia. In this letter All Fuels stipulated as a condition of such acceptance that Former Way sign a cession of the existing franchise agreement. Mr Bentz acknowledged receipt and acceptance of these stipulated terms on 31 December 2014. The letter made no reference to a franchise agreement for five years with the option to renew for a further five year period.

[16] According to Mr Bentz, however, it was agreed that a franchise agreement would be concluded for a period of five years with an option to renew and that Former Way would pay to All Fuels an amount of R3.25

[2] *Chetty v Naidoo* 1974 (3) SA 13 (A) at 20A; *Airports Company South Africa Limited v Airport Bookshops (Pty) Ltd t/a Exclusive Books* 2017 (3) SA 128 (SCA) para 25.

million plus VAT as a royalty. Former Way was required to sign a cession of the existing franchise agreement. A letter dated 27 February 2015 written by Ms Maria Watson, General Manager of All Fuels, to Mr Bentz recorded that All Fuels was prepared to conclude a franchise agreement for five years with an option to renew, upon the previously stipulated conditions which included that Former Way sign a cession of the existing franchise agreement. The letter enclosed an invoice for payment of the royalties. Mr Bentz did not sign the letter as required and did not pay the royalty fee.

[17] Upon being presented with a cession agreement on 30 July 2015 he refused to sign 'until … favoured with the contemplated franchise agreement'. He maintained this position when a further cession agreement was presented in October 2015, since it referred to a 'future franchise agreement' and made provision for a non-refundable royalty payment. In an email addressed to All Fuels on 23 November 2015 Mr Bentz explained the delay in responding to the request to sign the cession agreement on the basis that he had sought legal advice. According to the email he was advised not to sign the cession agreement. He suggested that a standard cession agreement be signed and that in due course a new franchise agreement for five years with an option to renew be signed. Upon signature, he stated, the royalty fee would be paid.

[18] On 22 February 2016 All Fuels sent a notice of termination of the franchise agreement to Former Way. This occurred prior to the signature of the cession, but when Former Way was already in occupation of the premises and trading therefrom. In a letter of the same date the circumstances giving rise to the notice of termination were set out in the following terms.

'Prior to agreeing to sign a Cession of Franchise Agreement, you requested our client to guarantee to you that it will be extending the Franchise Agreement, to be ceded and assigned to you by the

Franchisee. Our client considered this request and informed you that it was prepared to extend the Franchise Agreement subject to certain conditions.
Our client has been unable to reach an agreement with you on the aforesaid basis and we are instructed to inform you that our client hereby revokes, with immediate effect, any acceptance, agreement and / or offer of whatsoever nature, contained in any correspondence, document or communication to you and from you, our client or any third party in regard to the Cession of the Franchise Agreement and Extension of the Franchise Agreement.'

[19] The letter went on to state that in order for Former Way to continue as dealer at the Premier Service Station until termination of the franchise agreement, it was required to sign an accompanying cession of the franchise agreement. It is this cession which was signed by Former Way on 26 February 2016.

[20] This description of events demonstrates that All Fuels never provided Former Way with the proposed franchise agreement on a five plus five years basis, although it was always willing to accept a cession and assignment of the existing franchise agreement. The stumbling block appears to have been the refusal to pay the 'brand fee' or royalty payment until after the new franchise agreement had been produced and signed. The reason given was that this would be 'non-refundable' although it is difficult to see how that could ever be the case given that the *quid pro quo* for such payment was the franchise agreement. A refusal to conclude the latter would not leave Former Way without a remedy. Ordinarily the refusal to conclude the agreement would make the fee recoverable under one or other of the *condictiones.*

[21] In any event, it is apparent that the terms of the agreement contended for had not been resolved and that both parties intended that the agreement would be reduced to writing. This accorded with Former Way's frequent

demand to be provided with a franchise agreement and the terms of its request for arbitration, which was based on All Fuels' failure to provide Former Way with a franchise agreement.[3] The email Mr Bentz sent to All Fuels on 23 November 2015 after seeking legal advice is telling. In explaining why Former Way was unwilling to pay the royalty fee until the signature of the proposed franchise agreement he dealt with the protection of Former Way's interests 'if we do not agree on the next FA[franchise agreement]'. It could hardly be clearer that agreement on the terms of the new franchise agreement and signature of the document were required for any contract to come into force.[4]

[22] All Fuels' position that there was no binding agreement in relation to the proposed new franchise was made clear in correspondence before signature of the cession of the existing franchise agreement. Former Way nonetheless signed the latter and continued to occupy the premises under it, without taking any steps to establish or enforce its alleged rights under the alleged new franchise.

[23] Counsel argued that notwithstanding these difficulties confronting Former Way's case there was a sufficient dispute of fact for the judge in the high court to have been obliged to refer the case for the hearing of oral evidence on this issue. This argument does not hold water. It ignored the fact that the onus rested on Former Way to justify its continued occupation of the premises despite the expiry of the original franchise agreement. It also ignored

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[3] *Goldblatt v Freemantle* 1920 AD 123 at 129; *Wood v Walters* 1921 AD 303 at 305.
[4] See *Pillay and Another v Shaik and Others* 2009 (4) SA 74 (SCA) para 50 and the authorities cited therein.

the fact that no request had been made to the judge to exercise her discretion to refer the case for the hearing of oral evidence.

[24] Largely for these reasons the high court held that Former Way had not established a right of occupation of the premises as against All Fuels. There is no reasonable prospect of this court taking a different view of the evidence. Accordingly, there is nothing in this argument justifying a departure from the original view taken by the two judges of this court to dismiss the application for leave to appeal.

The effect of the s 12B referral

[25] The request for referral to arbitration was submitted on 22 December 2017, shortly before the expiry of the franchise agreement. It set out in some detail, by way of background, contentions in terms similar to those advanced in defence of the application before the high court. The request commenced with a reference to the agreement by which Former Way purchased the Premier Service Station from Tomdia, alleging that this agreement was subject to All Fuels entering into a franchise agreement with Former Way. It then stated that an agreement was reached between All Fuels and Former Way that upon payment of an amount of R3,25 million plus VAT All Fuels would 'give Former Way a franchise agreement for a period of 5 years from the 1st March, 2015 with an option of a further 5 years'. This was the agreement, albeit incorrectly termed a 'renewal agreement' before the high court, upon which Former way founded its right to continued occupation of the premises.

[26] The request proceeded to record Former Way's refusal to make payment of the royalty fee on the basis that the franchise agreement would

only be concluded at the expiry of the existing franchise agreement. This was unacceptable since the royalty payment was non-refundable whereas the terms of the franchise agreement to be concluded were unknown and potentially prejudicial to Former Way. The failure by All Fuels to provide it with a franchise agreement and the insistence by All Fuels upon payment of the royalty fee amounted to unfair and unreasonable contractual practices as envisaged in s 12 B of the Act. This was the principal dispute referred to arbitration, although the request outlined several related disputes.

[27] The Controller issued a notice referring the disputes to arbitration on 21 February 2017 after the eviction proceedings had commenced. The notice framed the disputes as follows:

'5.1 The failure by All Fuels to provide [Former Way] with a Franchise Agreement as agreed and their insistence on the non-refundable payment of royalties of R3,250,000 plus VAT payable upfront; and the failure to provide [Former Way] with the balance of the Franchise Agreement ceded to it, all amount to unfair and unreasonable contractual practice.

5.2 Should All Fuels contention be correct, which is disputed by [Former Way], that it is not bound by the 5 year (with 5 year renewal option) concluded with [Former Way] , then it is contended that it is obliged to treat [Former Way] as Chevron would.

5.3 The understanding that the agreement between Chevron and their Branded Marketers which includes All Fuels contains a clause which states that Branded Marketers are not allowed to treat their retailers differently from the way Chevron treats their retailers. Currently Chevron allows its retailers the opportunity to sell their businesses where there is no extension of the agreement. All Fuels allowed Tomdia to sell its business to [Former Way] but now will not allow [Former Way] to sell.

5.4 The claiming of an excessive royalty by All Fuels is also a huge departure from the norm where oil companies simply extend the retailers tenure in the business without requesting capital if they were happy with their performance. If oil companies are not

willing to renew the relationship, they allow the business to be sold by the existing retailer to the incoming retailer.

5.5 Additionally, All Fuels' failure to keep the property and relevant equipment in an optimal functioning order is contrary to Chevron standards and has caused the retailer to suffer financial loss.'

[28] The reference to arbitration was relied upon before the high court to move for a stay of the eviction proceedings. Before this court Former Way contended that the effect of a referral to arbitration was to oust the high court's jurisdiction. Before turning to the merits of this argument I wish to highlight an important concession made by counsel for Former Way, namely that Former Way was not seeking an equitable order at arbitration by which the arbitrator would fashion a franchise agreement for the parties. Instead the arbitrator would be required to make a factual determination regarding the existence of the new franchise agreement. This concession, given the discussion of the new agreement defence above, effectively disposes of reliance upon the argument for a stay of proceedings. That is so because there is little or no prospect of success of establishing the factual defence at the arbitration.

[29] What remains then is the question whether the referral to arbitration in terms of s 12 B of the Act ousted the high court's jurisdiction. In developing the argument counsel relied upon the language of s 12B and placed great store on the Constitutional Court judgment in *Business Zone 1010 CC t/a Emmarentia Convenience Centre v Engen Petroleum Limited and others* ('*Business Zone'*).[5]

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

[30] The relevant portions of s 12B read as follows:

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

…

(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.'

[31] It was submitted that the word 'shall' in subsections (4) and (5) pointed to the peremptory nature of the arbitral proceedings. In particular, the fact that an award was 'final and binding' suggested that once a matter had been referred to arbitration the arbitration outcome was definitive, to the exclusion of what may flow from court proceedings, save to the extent that the award may be subject to review. This latter was a weak point since all arbitrations under the Arbitration Act are final and binding unless set aside on review.

[32] The Act contains no provision which, in unequivocal terms, ousts the jurisdiction of a court of law. Whether it does indeed oust the court's jurisdiction is therefore a matter of construction and interpretation. In deciding whether the legislative provision ousts the court's jurisdiction, all

circumstances must be considered to determine whether the necessary implication arises that its jurisdiction is either wholly or partially excluded.[6]

[33] The circumstance relied upon in this instance related to the purpose of the provision and the general purpose of the Act, namely to foster transformation of the petroleum products industry. It was submitted that the Act fostered transformation of the petroleum industry by introducing a standard of reasonable and equitable conduct in dealings between wholesalers and retailers of petroleum products. This equitable standard was to be applied in the resolution of disputes via arbitration. When viewed in this light, so it was argued, the machinery for dispute resolution created by the Act applied exclusively. It was suggested that this was the *ratio* of the judgment in *Business Zone.*[7]

[34] *Business Zone* however, concerned a problem quite different to the matter before this court. In that matter the Controller had refused a request to refer a dispute regarding the cancellation of an agreement to arbitration. What was at issue was whether a single act of cancellation could constitute an unfair contractual practice within the meaning of s 12B. The court was accordingly called upon to interpret the section having regard to the purpose sought to be achieved thereby and by the Act in general. The Constitutional Court found that an act of cancellation could constitute an unfair contractual practice. The Controller could therefore refer the termination of an agreement to arbitration and should have done so.

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[6] *South African Technical; Officials' Association v President of the Industrial Court and Others* 1985 (1) SA 597 (A) at 613A-E.
[7] *Business Zone* (above fn 5).

[35] That finding is not itself relevant to the present case, but the Constitutional Court's view of what constitutes a contractual practice for the purpose of the Act is important. It made it clear that although the arbitrator in an arbitration under s 12B applies a standard informed by fairness and reasonableness, which foreshadows the possibility that they may invalidate conduct that strictly speaking is permitted by the contract, their jurisdiction does not extend to making a contract for the parties other than the one they actually concluded. This emerges from the following passage in the judgment:[8]

'… the arbitrator's remedial powers can go no further than correcting the contractual practice in question. The interests of third parties are protected in the section 12B arbitration process, the subject matter of which is limited to a "contractual practice". This presumes that remedying the dispute lies squarely within the contractual rights and obligations of the parties to the contract.'

[36] This finding no doubt informed the concession referred to above and disposed of an issue that was unclear from the request for arbitration and the reference itself, as well as the heads of argument. This was whether Former Way was contending that the arbitrator could in the exercise of their jurisdiction order All Fuels to conclude a franchise agreement on terms determined by the arbitrator, if as a matter of fact the parties had not concluded such an agreement, but had a non-binding understanding or arrangement falling short of a binding contract.[9] Whether or not that was what Former Way and its advisers had in mind when the request for arbitration was made, the Constitutional Court has made it clear that the powers of an arbitrator are to

[8] *Business Zone* para 92.
[9] Cf. *Consolidated Frame Cotton Corporation Ltd v Minister of Manpower and others* 1985 (1) SA 191 (D) at 197H-199H.

be exercised within the framework of the contractual relationship between the parties and do not extend to making a contract for them.

[37] Counsel's reliance on the judgment was based on the Constitutional Court's treatment of the introduction of a normative equitable standard in arbitral proceedings under s 12B of the Act. The reliance was misplaced. The Constitutional Court dealt with the notional 'conflict' between court adjudication of disputes and arbitral dispute resolution based on an equitable standard with reference to an assessment of similar developments under the Labour Relations Act 66 of 1995 and Rental Housing Act 50 of 1999. The Constitutional Court concluded that no such conflict arises since there is no reason why a normative equitable standard should not also apply to court adjudication.[10]

[38] This conclusion militates against a finding that arbitration proceedings provided for in s 12B of the Act serve as an exclusive forum for the adjudication of disputes arising between wholesalers and retailers of petroleum products. That such arbitral proceedings do not constitute an exclusive mechanism for dispute resolution appears from the following passage in the Constitutional Court's judgment.

'Section 12B arbitration presents an additional route for licensed retailers and wholesalers alike to have their disputes adjudicated quicker within rules and processes of their own design. Section 12B offers a statutory guarantee of a mechanism that has become ubiquitous in contract, which may otherwise not exist possibly due to the unequal bargaining position retailers vis a vis wholesalers find themselves in. Reliance on the section 12B arbitration procedure can more accurately be understood as arbitration is

[10] *Business Zone* para 52.

ordinarily in contract: it suspends the institution of court litigation. In turn the section 12B arbitral mechanism is insulated from becoming a mere preliminary, strategic step to court litigation in that section 12B (5) speaks to the finality of such an award.' [11]

[39] Counsel for Former Way sought to suggest that the reference to arbitration 'suspend(ing) the institution of court litigation' pointed to an ouster of jurisdiction. This contention was unsound. The footnote to that passage in the judgment of Mhlantla J refers to s 6 of the Arbitration Act 42 of 1965 and the power of a court to stay judicial proceedings in favour of arbitration. Those provisions are applicable to statutory arbitrations by virtue of s 40 of the Arbitration Act. It is therefore apparent that Mhlantla J had in mind the conventional situation where a party may seek a stay of litigation pending arbitration, not an automatic stay of litigation in favour of arbitration under s 12B. That is also clear from the following statement in para 56 of that judgment:

'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.'

[40] There are accordingly no circumstances which warrant a finding that a referral to arbitration under s12B of the Act ousts the court's jurisdiction to adjudicate a dispute. Where, as in this instance, the referral to arbitration occurred after commencement of the litigation it fell within the discretion of the court below to stay proceedings pending the arbitration. The judge in the high court exercised her discretion in refusing a stay. It was not argued that she misdirected herself in doing so or that her decision was so patently flawed

[11] *Business Zone* para 58.

that we were free to depart from it. There was no basis for a stay pending the arbitration under s 12B. The issue in the arbitration turned out to be the very same issue as that before the high court, namely whether the parties had concluded a binding agreement in regard to a new franchise agreement for a period of five years from 1 March 2015, with an option of renewal for a further five years. That was an issue where Former Way bore the onus in the high court and failed to discharge it. In essence they were seeking to reargue the same issue in another forum. That was the very kind of forum shopping that the Constitutional Court said did not arise under s 12B.

[41] Other than the issue relating to the alleged new franchise agreement none of the issues raised in the arbitration concerned Former Way's entitlement to remain in occupation of the premises. In the high court it failed to discharge the onus of proving a right to remain in occupation enforceable against All Fuels. Its continued occupation without a legal right to do so infringed All Fuels' constitutionally protected right not to be deprived of property except in terms of a law of general application. The reference to arbitration under the Act did not alter that situation or give it a right that it did not otherwise enjoy. There is accordingly nothing in the referral to arbitration argument justifying a departure from the original view taken by the two judges of this court to dismiss the application for leave to appeal.

Conclusion

[42] As noted at the outset this matter concerned the reconsideration of a refusal, on petition, to grant the applicant leave to appeal the order of the high court. The merits of the appeal were considered only for purposes of

determining whether there was a reasonable prospect of success. For the reasons set out no such reasonable prospect exists. There are also no compelling circumstances why leave to appeal should be granted. It follows therefore that after reconsideration of this court's decision to refuse leave to appeal there is no need to vary it and it should be confirmed.

[43] In the result:

1. The order of this court dismissing the application for leave to appeal is confirmed.
2. The applicant is ordered to pay the costs of the application for leave to appeal and its reconsideration, such costs to include those consequent upon the employment of two counsel.

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GOOSEN AJA

ACTING JUDGE OF APPEAL

Appearances

For appellant: B G Savvas

Instructed by:
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Honey Attorneys, Bloemfontein

For respondent: G D Harpur SC (with him D Ramdhani SC)

Instructed by:
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