THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 209/2020

In the matter between:

ENGEN PETROLEUM LIMITED **Appellant**

and

RISSIK STREET ONE STOP CC t/a RISSIK STREET ENGEN **First Respondent**

KNOESEN, WILLEM JOHANNES **Second Respondent**

Neutral citation: *Engen Petroleum Limited v Rissik Street One Stop CC and Another* (Case no 209/2020) [2021] ZASCA 63 (26 May 2021)

Coram: ZONDI, MOCUMIE and DLODLO JJA and KGOELE and UNTERHALTER AJJA

Heard: 16 March 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. It has been published on the

Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 26 May 2021.

Summary: Appeal against order staying eviction proceedings pending finalisation of arbitration requested by fuel retailer in terms of s 12B of the Petroleum Products Act 120 of 1977 in order to challenge refusal to consider and consent to an offer to purchase filling station business ─ lease agreement expired by effluxion of time ─ referral of dispute to arbitration does not give retailer a right to continue occupying premises pending a sale of fuel retail business ─ appeal upheld.

ORDER

On appeal from: Limpopo Division of the High Court, Polokwane (Kganyago J sitting as court of first instance):

1 The appeal succeeds with costs.

2 The orders of the court a quo are set aside and substituted by the following orders:

'(a) The counter-application is dismissed.

(b) The first and second respondents and all those occupying the property through or under the first respondent, alternatively, the second respondent are ordered to vacate within 30 (thirty) days from the date of this order, the immovable property comprised of:

1.1. Portion 1 of Erf 324, Pietersburg Township, Registration Division LS, Province of Limpopo, in extent 714 square meters held under Deed of Transfer T 3390/2016;

1.2. Portion 3 of Erf 324, Pietersburg Township, Registration Division LS, Province of Limpopo, in extent 699 square meters held under Deed of Transfer T 3390/2016; and

1.3. Remainder of Erf 324, Pietersburg Township, Registration Division LS, Province of Limpopo, in extent 729 square meters held under Deed of Transfer T 3390/2016, with street address at 48 Rissik Street, Polokwane.

(c) The Sheriff of Court is authorised and directed to take such steps as are necessary in order to give effect to para (b) above.

(d) The first and second respondents are ordered to pay the applicant's taxed costs of this application, on the attorney and client scale.'

JUDGMENT

Zondi JA (Mocumie and Dlodlo JJA and Kgoele and Unterhalter AJJA concurring)

[1] This is an appeal against the judgment and order of the Limpopo Division of the High Court, Polokwane (per Kganyago J) in terms of which it granted the stay of the eviction proceedings against the respondents and an order interdicting the appellant from taking any steps that would affect the operations of the service station business pending the outcome of the arbitration processes in terms of s 12B of the Petroleum Products Act 120 of 1977 (the Act). The appeal is with the leave of the court a quo.

[2] The issue is whether it was competent for the court a quo to order the stay of the eviction proceedings instituted against the respondents and grant an interim interdict against the appellant on the basis that the respondents had submitted a request to the Controller of Petroleum Products (the Controller) to refer the dispute to arbitration in terms of s 12B of the Act. The relevant provisions of the section 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.'

[3] The facts which gave rise to the proceedings are largely common cause. The appellant, Engen Petroleum Limited (Engen) carries on business as a manufacturer, marketer and bulk distributor of petroleum, diesel and chemical products. It is a lessee of Portions 1, 3 and Remainder of Erf 324, Pietersburg Township, Limpopo Province (the premises) in terms of a notarial deed of lease it concluded with the owner of the premises. In terms of the notarial deed of lease, Engen has the right to sublease the premises.

[4] The first respondent is Rissik Street One Stop CC t/a Rissik Street Engen. It conducts a fuel retail business from the premises in terms of the agreement of lease and operation of service station (lease agreement) it concluded with Engen. Mr Knoesen, the sole member of Rissik Street Engen, is the second respondent.

[5] Rissik Street Engen has occupied the premises since 1998 in terms of the lease agreement which has been renewed from time to time. The lease that was in place at the time of the dispute was concluded by the parties on 30 March 2015, commencing on 1 April 2015 and ending on 30 June 2018. There are eight Schedules attached to the lease agreement and these Schedules form part of the agreement.

[6] Clause 22 of Schedule 2 recognises Mr Knoesen's right as a dealer to sell the service station business at any time during the currency of the lease agreement and the procedure for the sale is regulated by Schedule 3. Clause 1.3 of Schedule 3 provides the following:

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

[7] In terms of clause 1.4 of Schedule 3 the dealer wishing to sell the business, is not constrained to determine the selling price. But such sale is subject to Engen being able to conclude an operating lease with the purchaser or successor.

[8] The dealer's rights to sell the business on termination of the lease is regulated by clause 44 of Schedule 2, which provides the following:

'44.1. Subject to any provisions of the contrary, where the Dealer's tenure is prematurely terminated by the Company in terms of this Agreement, for whatever reason, the Dealer shall not have the right to any compensation in respect of his loss of the Business. The Company shall have the right to appoint a new Dealer, and the Dealer shall be entitled to negotiate with such new Dealer the terms of any take-over of stock and/or equipment belonging to the Dealer on the Premises; alternatively, the Dealer shall have the right to remove such stock or equipment owned by itself.

44.2. If the Company intends or elects for any reason not offering the Dealer a further opportunity to lease the Premises from the Termination Date of this Agreement, the Company shall endeavour to advise the Dealer in writing at least twelve months prior to the Termination Date of this Agreement. If such advice is not provided at least twelve months prior to the Termination Date of this Agreement, the Company may still provide such advice at any time prior to the Termination Date of this Agreement provided that the Dealer's tenure at the Premises will then be extended for a period beyond the Termination Date of this Agreement to ensure that the Dealer will have received at least twelve months' notice that the Company intends or has elected not offering the Dealer a further opportunity to lease the Premises from the Termination Date of this Agreement extended as aforesaid. Any extension as aforesaid will be on the terms and conditions of the Company's operating leases at such time. Should the Company advise the Dealer that it does not intend renewing the lease between the parties, the Dealer shall be entitled to attempt to sell the Business during the remaining period of the lease, and the Company shall not unreasonably withhold its consent to such sale. Should the Dealer not have sold the Business prior to the expiry of the lease, the provisions of sub-clause 44.1 of this Schedule 2 shall apply and the Dealer shall not have the right to any compensation in respect of his loss of the Business.

44.3 Should the Company terminate this Agreement pursuant to sub-clauses 5.4 or 8.3 of the First part, the Dealer shall be entitled to attempt to sell the Business during the remaining nine month period of the lease, and the Company shall not unreasonably withhold its consent to such sale. Should the Dealer not have sold the Business prior to the end of that nine month period, the provisions of sub-clause 44.1 of this Schedule 2 shall apply and the Dealer shall not have the right to any compensation in respect of his loss of the Business.

44.4. Should the Company terminate this Agreement pursuant to paragraphs 24.1(a) or 24.1(b) of this Schedule 2, the Dealer (or his/her/its successors in title) shall be entitled to attempt to sell the Business during the nine month period referred to in paragraphs 24.1(a)

and 24.1(b) of this Schedule 2 (whichever may be applicable), and the Company shall not unreasonably withhold its consent to such sale. Should the Dealer not have sold the Business prior to the end of that nine month period, the provisions of sub-clause 44.1 of this Schedule 2 shall apply and the Dealer shall not have the right to any compensation in respect of his loss of the Business.'

[9] When the lease period was about to expire, the parties endeavoured to negotiate its extension, but those endeavours failed, as they could not agree on the new terms. In particular, Engen demanded an upfront payment of R3 million from Rissik Street Engen as a condition for the renewal of the lease agreement. Rissik Street Engen refused to pay it, because it could not afford to do so and it was something that had never been demanded in the past.

[10] It would appear that Engen had paid R3 million to the property owner to secure the renewal of the notarial deed of lease in respect of the premises, which was due to expire in June 2018. In turn, Engen sought to recoup this amount from Rissik Street Engen.

[11] In terms of clause 44.2 of Schedule 2 Engen was obliged to give Rissik Street Engen at least twelve months' notice if it intended not to renew the lease. When Mr Knoesen failed to pay the sum of R3 million, on 2 October 2017, Engen informed him that it would not renew the lease. In reply, Rissik Street Engen's attorneys addressed a letter dated 8 January 2018 to Engen stating the following:

'4. Your notice of non-renewal letter dated 2 October 2017 does not indicate that negotiations between the parties have failed and does not indicate the reason for non-renewal.

5. Our instructions are that a representative of Engen, Nico De Wet, had on 26 June 2017, advised our client in writing that the *"Sales department"* was prepared to renew the Operating Lease with our client on the same terms and conditions as is usually agreed upon, but that the renewal would be subject to a payment of R3m *"goodwill"*. When the payment of R3m for goodwill for its own site was questioned by our client, no further explanation was provided by Engen.

6. We have obtained a copy of the Notarial Deed of Lease for the Premises registered in favour of the Landlord and have noted that in terms of clause 3.1 thereof, Engen is to pay the Landlord a rental sum of R3m upon registration of the lease, being 22 January 2016. It is

therefore apparent that the R3m goodwill that our client has been requested to pay is in fact not for *"goodwill"*, but a payment to be made to Engen in order to recoup what it has had to pay to the Landlord for registration of the lease for the Premises.

7. We further refer to paragraph 6 and 7 of your letter dated 2 October 2017, in which our client is reminded that should it wish to sell its business, the sale will be prohibited unless Engen agrees to the sale in writing. Same is seen as a reminder to our client that any potential purchaser will not be guaranteed tenure and it is our submission that Engen's implementation of these clauses in our client's situation is unjust and unreasonable and stands to be challenged.

8. It would be unjust to expect that our client, who has run the site successfully for the past 20 years, is not to be compensated for the business value upon termination of the agreement with Engen. We also remind you that our client is the lawful holder of the Site Licence, which licence is transferrable and constitutes a merchantable merx.

9. Our aim is to achieve a "win-win" result for all parties and our client's instructions are that should he not receive a renewal which is not conditional to a payment for *"goodwill"* or compensation upon termination, we shall submit a 12B referral to the Controller of Petroleum Products with regards to Engen's unfair and unreasonable contractual practice.'

[12] On 22 January 2018, in response to Mr Knoesen's letter of 8 January 2018, Engen addressed a letter to Rissik Street Engen in which the following was recorded at paras 13 and 14:

'In addition, in view of the fact that your client is legally obliged to vacate the premises on expiration of the lease, it follows that your client would no longer be in a position to lawfully operate a service station business from the premises, which in turn means that the business is no longer a going concern, under which circumstances the retail license would *de facto* lapse, rendering the site license invalid.

Should your client however persist with its misguided intention to submit a request in terms of Section 12B to the Controller of Petroleum Products, it goes without saying that Engen will accordingly deliver a counter-application for a determination that your client's allegations are frivolous and/or capricious, and seek appropriate compensation *in lieu* thereof.'

[13] Engen's decision not to grant Rissik Street Engen a further extension of the operating lease went unchallenged and instead Rissik Street Engen elected to exercise its right to sell the business. It introduced a potential purchaser to Engen on 25 May 2018 for its consideration and to provide its consent to the proposed sale.

According to Engen the prospective purchaser failed to meet Engen's selection criteria, and, as a consequence it refused to provide its consent.

[14] On 17 January 2019 Rissik Street Engen introduced another prospective purchaser to Engen for its consideration. Engen did not consent to the proposed sale and refused to provide reasons for its decision. It claimed that in terms of the lease, it was expressly provided that it was under no obligation to provide any reasons.

[15] It is common cause that on 25 July 2018, some three months before the expiry of the lease, Mr Knoesen submitted to the Controller a request for referral to arbitration in terms of s 12B of the Act. In his request for referral, Mr Knoesen made it clear that the relationship between him and Engen had irretrievably broken down with no prospect of it being salvaged. It is implicit in this statement that Mr Knoesen did not wish to have the lease with Engen extended. He sought to be afforded the opportunity to sell the business without being frustrated by Engen.

[16] Mr Knoesen's contention that Engen had committed an unfair and/or unreasonable contractual practice entitling him to seek a remedy under s 12B of the Act, was based on the following: Engen's demand for the payment of R3 million, as a condition to renew the lease; Engine's refusal to afford him sufficient time to sell the business, as required by clause 44.2 of Schedule 2; its failure to consider the offers to purchase the business made by the two prospective purchasers; and finally, its failure to provide reasons for its refusal to authorise the sale.

[17] Mr Knoesen in his request for referral to arbitration pleaded the following contractual practices:

'2.14 It is submitted that irrespective of the interpretation afforded to the respective clause, I am left in a position where I am unable to exercise my rights in terms of clause 44.2, the underlined section in particular.

2.15 If I do not know the reason(s) why a particular buyer(s) has not been authorised by Engen, then I will be unable to remedy that defect when sourcing further interested buyers. This wastes not only my time but also that of interested parties. Furthermore, if no reason is provided then their own actions render it impossible for me to assess whether their consent has been unreasonably withheld in terms of clause 44.2.

2.16 Given Engen's behaviour to date I have no reason to believe that if I located a third interested buyer, that Engen would do anything other than refuse the offer to purchase, without offering any reasons for such refusal.

2.17 After further investigation, I determined that a new, notarial deed of lease had been signed by Engen with the landlord of the site occupied by Rissik Street Engen, which notarial deed of lease ("notarial lease") was signed on 18 November 2015 and duly registered on 22 January 2016.

2.18 In addition to payment of a monthly rental amount of R80 000,00, excluding VAT and subject to yearly increases, clause 3.1 states that Engen, as the lessee shall pay the sum of R3 million to the lessor. Clause 3.2 describes this sum as a "lease premium".

2.19 It is not at all clear what the payment of a "lease premium" is for, nor is it clear how payment of such sum will benefit Engen or the Applicant.

2.20 Given Engen's behaviour as described above, I strongly believe that Engen is attempting to recoup its R3 million "lease premium" from myself under a poorly disguised demand for "goodwill". Once Engen realised that I wanted a renewal but was unwilling to pay this sum, they exercised their right to not renew the Operating Lease and have sought to punish me by depriving me of my contractual right to sell the business. Once the franchise has ended Engen will be contractually entitled to sell the business and to the proceeds thereof. I will be left with nothing. Their repeated refusal to consent to the sale or provide reasons for their refusal can at best be described as obstructive. No other reasonable conclusion is possible on the facts that I have at my disposal.'

[18] On 5 July 2019, after the commencement of the eviction proceedings, the Controller issued a notice referring the dispute to arbitration. The notice identified the following allegations as constituting the dispute to be referred to arbitration:

'5.1 By requesting an amount of R3 million for "goodwill" in order to renew their lease agreement. The Requester had never been required to pay such an amount previously when renewing the lease, as the Franchisee of the Rissik Street Engen for the past twenty years, the goodwill generated towards the Franchise would have been due to the action of the requester and its employees not Engen.

5.2 By not engaging with the Requester in trying to resolve the matter and serving the Requester with a notice of non-renewal in terms of 44.2 Schedule 2 of the Operation Lease no reasons [were] provided.

5.3 By refusing to authorise sale to either potential purchaser provided by the Requester with no reasons thereof. As reasons for refusal where not provided the Requester is unable to remedy that defect or sourcing further interested buyers.'

[19] When the lease expired, Rissik Street Engen did not vacate the premises and it has since then, continued to operate the service station and when it was given notice to vacate, it refused. It claimed it had a right to remain in occupation of the premises until such time that it was able to sell the business.

[20] In consequence Engen, on 14 March 2019 brought an application in the court a quo, in which it sought to evict Rissik Street Engen and Mr Knoesen from the premises. The basis of Engen's claim was that Rissik Street Engen and Mr Knoesen's occupation of the premises had become unlawful by virtue of the fact that the lease agreement had expired by effluxion of time. Rissik Street Engen opposed the application and filed a counter-application. In the counter-application it sought a stay of the proceedings, pending a decision by the Controller in terms of s 12B, and/or a stay of the proceedings in terms of s 6 of the Arbitration Act 42 of 1965 and an interdict preventing Engen from taking any steps that would adversely affect the operations of Rissik Street Engen, pending the final outcome of the arbitration processes.

[21] In his answering affidavit, Mr Knoesen denied that Engen was entitled to evict Rissik Street Engen. In amplification of his denial Mr Knoesen alleged the following:
'30.2 [Engen] has sought to cancel the [operating lease] OL on the premise that the agreement has terminated by an effluxion of time.

30.3 The premise is nothing more than a contrived abuse of the agreement to disguise the fact that I refused to pay it R3 million for the renewal of the OL.

30.4 The Applicant's own actions defeat the *bona fides* of its cause of action in that it afforded the First Respondent 12 months' notice to find a purchaser, which I did, simply to ignore the existence of same.

30.5 From what has been stated above, the Applicant has acted *mala fides* in cancelling the agreement by manipulating the terms thereof and has unreasonably withheld and/or refused its consideration of suitable buyers.'

[22] Engen opposed the counter-application. It contended that Mr Knoesen's insistence on remaining in occupation of the premises until he had sold the business was misconceived to the extent that there was no intrinsic value to the business without there being a valid and binding lease in place. Engen argued that the right to sell the business lapsed when the lease expired on 31 October 2018. It contended further that, in any event, the sale of business was not dependent on Mr Knoesen's continued occupation of the premises.

[23] As I have already stated, the matter came before Kganyago J, who, on 12 February 2020, granted an order staying the proceedings and interdicting Engen from taking any steps that would adversely affect the operation of the service station business, pending the outcome of the arbitration process referred to the Controller in terms of s 12B.

[24] The court a quo rejected Engen's contention that the referral of the dispute to the Controller by Mr Knoesen did not bar it from proceeding with the eviction application after the expiry of the lease by effluxion of time. It held that the fact that the lease had expired by effluxion of time and that Rissik Street Engen and Mr Knoesen had been served with a notice to vacate the premises, provided no bar to its grant of the stay of the eviction proceedings. The court a quo, relying on the Constitutional Court judgment in *Business Zone,* reasoned as follows:[1]

'[20] I do not agree with the applicant's contention. Firstly this will defeat the purpose and spirit of section 12B which introduces arbitrations. Arbitration[s] are much quicker and . . . cost effective. Secondly in terms of section 12B (2) the parties determine the rules of arbitration and they are at liberty to include any dispute which in the case at hand may include eviction. Thirdly, once the respondents are evicted their sources of income will be diminished which will place them in a weaker position to finance the pending litigation. Fourthly as held in **The Business Zone 1010 CC** arbitration procedures suspend the institution of court litigation.

[21] In terms of section 12B (4) (a) an arbitrator has the powers to make such award as he or she deems necessary to correct such practice. The terms of reference of the arbitration has not yet been determined. The respondents are still at liberty to seek reinstatement of the operating licence and the arbitrator will be empowered to order that. In **The Business Zone 1010 CC** *supra*, it was held that regardless of the second cancellation, the arbitrator may have

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

power to grant relief for the intervening period. In the case at hand even though the notice period has expired on the 31st October 2018, that does not preclude the arbitrator to make an award as he/she deems necessary to correct such alleged unfair and/or unreasonable contractual practice, which may include reinstatement of the operating lease agreement.'

[25] In its grounds of appeal Engen challenged the findings and the conclusions of the court a quo on various grounds. It contended, first, that the court a quo erred in finding that Rissik Street Engen would still be at liberty to seek reinstatement of the operating lease at the intended arbitration, as an appropriate remedy, and as such, that an eviction of Rissik Street Engen, prior to the conclusion of the intended arbitration, would interfere with the powers of the arbitrator at such arbitration. This was because, so it was contended, Rissik Street Engen did not complain to the Controller in terms of s 12B of the Act about the termination and/or cancellation of the lease as having constituted an unfair and/or unreasonable contractual practice.

[26] Secondly, Engen contended that the court a quo erred in holding that Rissik Street Engen had raised in issue and established that its eviction would diminish its resources to finance the present litigation when the potential financial consequences of an eviction order were not raised by Rissik Street Engen in support of the stay application.

[27] Thirdly, Engen contended that the court a quo incorrectly interpreted the Constitutional Court's judgment in *Business Zone* as authority for the proposition that a referral to arbitration in terms of s 12B automatically suspended the eviction proceedings.

[28] The correctness of Engen's contention depends on the interpretation of s 12B and its application to the facts of this case. The section has caused considerable difficulty and is the source of conflicting judgments in the high courts.[2] The provisions of s 12B were extensively considered by the Constitutional Court in *Business Zone*, which concerned the review of a decision by the Controller and the Minister of Minerals

[2] *Future Phambili Petroleum (Pty) Ltd v Chamdor Service Station CC* [2017] ZAGPPHC 1206; *Engen Petroleum Limited v Eagle Investors (Pty) Ltd t/a Meyerspark Convenience Centre and Another* (Gauteng Division Pretoria case no 54736/2018); *Bright Idea Projects 66 (Pty) Ltd t/a All Fuels v Former Way Trade and Invest (Pty) Ltd t/a Premier Service Station* 2018(6) SA 86 (KZP).

and Energy not to refer an alleged unfair or unreasonable contractual practice by Engen to arbitration in terms of s 12B of the Act. After a comprehensive analysis of the provisions of the section, the Constitutional Court had this to say:[3]

'The purpose of the Act is not only to transform the petroleum industry but "to provide for appeals and arbitrations". Section 12B introduces an equitable standard in the framework of the statutory arbitration mechanism under section 12B. If the same adjudicative standard can be relied on in section 12B arbitration proceedings and court litigation alike, would that detract from the purpose of the Act to provide for arbitrations? I think not.

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 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.

The purpose of the Amendment Act "to provide for appeals and arbitrations" through section 12B cannot be overlooked. The inherent value of section 12B enabling a party to resolve a dispute through arbitration rather than court proceedings must be recognised. Arbitration offers an expedient, specialised and procedurally flexible forum to resolve disputes. It is no wonder that Business Zone would want to benefit from its statutory right under section 12B to access such a forum. A purposive interpretation of section 12B must give effect to this right.' (Footnotes omitted.)

[29] Section 12B(2) allows the parties to a s 12B arbitration to determine the rules in accordance with which the arbitration will be conducted, as well as the arbitrator before whom the arbitration will proceed. As regards the remedial action which the arbitrator appointed under s 12B can impose, the Constitutional Court made it clear at para 92 of the judgment that 'the arbitrator's remedial powers can go no further than correcting the contractual practice in question'.

[3] *Business Zone* paras 57 to 59.

[30] It is common cause that the lease agreement in terms of which Rissik Street Engen and Mr Knoesen occupied the premises, expired by effluxion of time on 30 June 2018, and was extended by agreement to 31 October 2018. A notice of an intention not to renew the lease was given to Rissik Street Engen and Mr Knoesen as required by clause 44.2 of Schedule 2 to the lease. Ordinarily, Engen was entitled to seek the eviction of Rissik Street Engen and Mr Knoesen from the premises, if they continued to occupy the premises after the expiry of a notice period.

[31] Rissik Street Engen and Mr Knoesen refused to vacate the premises when the lease expired on 31 October 2018. They challenged Engen's right to evict them on the ground that Engen had acted 'mala fide in cancelling the agreement . . . and unreasonably withheld and/or refused its consideration of suitable buyers'. Mr Knoesen, as I have explained, in turn, requested the Controller to refer certain disputes between him and Engen to arbitration. It is this request for referral which formed the basis of Mr Knoesen and Rissik Street Engen's counter-application for the stay of the eviction proceedings. They contended that, in terms of the lease agreement, they had a right to sell the business, once Engen had given a notice that it would not renew the lease. They argued that, despite the termination of the lease agreement, they were entitled to remain in occupation of the premises and to continue to trade thereon until they sold the business as a going concern.

[32] There is a fundamental problem with this contention and it must be rejected. In Mr Knoesen's request for a referral to arbitration, he did not contend that the non- extension of the lease agreement constituted an unfair contractual practice. It is for this reason that, when the Controller issued a notice of referral, he did not include the non-extension of the agreement as one of the issues to be determined by the arbitrator to be appointed. This means that the arbitrator to be appointed, cannot decide what has not been referred to him or her.[4] This is so, because the scope of the arbitrator's jurisdiction is fixed by his or her terms of reference and he or she has no power to alter its scope by his or her own decision.[5] Section 12B(4)*(a)* requires the arbitrator to make a factual determination whether the alleged contractual practices

[4] P Ramsden *The Law of Arbitration: South African and International Arbitration* 2 ed (2018) at 203.
[5] *Radon Projects (Pty) Ltd v N V Properties (Pty) Ltd and Another* [2013] ZASCA 83; 2013 (6) SA 345 (SCA) para 28.

are unfair or unreasonable and, if so, make such award as he or she deems necessary to correct such practice.

[33] The contractual practice complained of by Mr Knoesen, and which he requested to be referred, was Engen's failure to consider offers to purchase the business he submitted to Engen for approval in terms of clause 44.2 of the lease and its refusal to furnish reasons for their rejection or Engen's failure to consider them. He contended that Engen's failure to furnish reasons made it impossible for him to assess the reasonableness of its withholding of consent. These complaints, upon referral to the arbitrator, vest no remedial power in the arbitrator to permit Rissik Street Engen or Mr Knoesen to remain in occupation, pending the sale of the business.

[34] Whilst it is correct that s 12B(4) imposes the equitable standard and that the arbitrator may, acting under such standard, override the terms of the contract of the parties to ensure that fairness and reasonableness prevail, the arbitrator may not in the exercise of his or her powers, impose a remedial award, which may amount to reinstatement of the lease agreement for the simple reason that such remedy is not prescribed under the Act. The lease in this matter expired by effluxion of time, which meant that the parties had to negotiate and agree on the new terms. They failed to agree and as a result the lease agreement ended.

[35] Engen's contention that it was not obliged in terms of the agreement to give reasons for rejecting the offers to purchase the business, must be rejected. Clause 44.2 imposed an obligation on Engen to notify Mr Knoesen and Rissik Street Engen a year before the expiry of the term of the lease if it did not intend to renew the lease. This was necessary because in terms of the agreement Mr Knoesen had a right to sell the service station business (subject to Engen giving consent which it could not unreasonably withhold) within the remaining period. It follows therefore that Engen was obliged in terms of clause 44.2 to furnish Mr Knoesen and Rissik Street Engen with its reasons as to why it rejected the offer to purchase of the first prospective purchaser which it received before the expiry of the lease. Mr Knoesen was entitled to know why the sale was rejected to enable him to submit offers, which would have met Engen's requirements and to determine whether Engen's rejection was based on valid grounds.

[36] The reasons to which Mr Knoesen was entitled were therefore necessary for the purpose of his exercise of his right arising from clause 44.2. But that said, there is no reason why Engen's failure to consider and consent to the sale would give rise to a right that would allow Rissik Street Engen and Mr Knoesen to continue to occupy the premises when such right was not sought in the request for referral to arbitration.

[37] In my view, in the circumstances of this case it is not open to Mr Knoesen to rely on the right to sell the business as a form of security against eviction. It is implicit in the provisions of clause 44.2 of Schedule 2 that the right to sell the business should be exercised during the currency of the lease and should Mr Knoesen not have sold the business before the expiry of the lease, the provisions of clause 44.1 of the same Schedule, apply. In terms of this sub-clause Engen has a right to appoint a new dealer and Mr Knoesen will be entitled to negotiate with such new dealer the terms of any take-over of stock and/or equipment, belonging to him on the premises, alternatively, he can keep same.

[38] The court a quo granted the stay of the eviction on the basis of the proposition that the arbitration procedure suspends the institution of court litigation and relied on *Business Zone* for this proposition. The court a quo misdirected itself. *Business Zone* does not provide support for this proposition. The Constitutional Court's statement in para 58 of the judgment that the arbitration suspends the institution of court litigation is qualified in footnote 33 in which it is stated that the suspension will depend on the terms of the contract. Where the contract has ended and no complaint is referred to arbitration to seek its extension, the effect of the stay granted by the court a quo is to grant a remedy in the interim that cannot be obtained by way of final relief in the arbitration. A stay granted on this basis is not a competent exercise of the court's power.

[39] From what has been set out in the preceding paragraphs, it is clear that the court a quo's exercise of its discretion to grant the stay and the interdict was influenced

by wrong principles. The court a quo improperly exercised its discretion and this Court is entitled to interfere.[6] In the circumstances, its order must be set aside.

[40] In the result, I make the order in the following terms:

1 The appeal succeeds with costs.

2 The orders of the court a quo are set aside and substituted by the following orders:

'(a) The counter-application is dismissed.

(b) The first and second respondents and all those occupying the property through or under the first respondent, alternatively, the second respondent are ordered to vacate within 30 (thirty) days from the date of this order, the immovable property comprised of:

1.1. Portion 1 of Erf 324, Pietersburg Township, Registration Division LS, Province of Limpopo, in extent 714 square meters held under Deed of Transfer T 3390/2016;

1.2. Portion 3 of Erf 324, Pietersburg Township, Registration Division LS, Province of Limpopo, in extent 699 square meters held under Deed of Transfer T 3390/2016; and

1.3. Remainder of Erf 324, Pietersburg Township, Registration Division LS, Province of Limpopo, in extent 729 square meters held under Deed of Transfer T 3390/2016, with street address at 48 Rissik Street, Polokwane.

(c) The Sheriff of Court is authorised and directed to take such steps as are necessary in order to give effect to para (b) above.

(d) The first and second respondents are ordered to pay the applicant's taxed costs of this application, on the attorney and client scale.'

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ZONDI JA
JUDGE OF APPEAL

[6] *Trencon Construction (Pty) Ltd v Industrial Development of South Africa Ltd and Another* [2015] ZACC 22; 2015 (5) SA 245 (CC) para 88.

Appearances:

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