THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 20513/2014

In the matter between:

ENGEN PETROLEUM LIMITED	**APPELLANT**
and	
THE BUSINESS ZONE 1010 CC t/a EMMARENTIA CONVENIENCE CENTRE	**FIRST RESPONDENT**
THE CONTROLLER OF PETROLEUM PRODUCTS	**SECOND RESPONDENT**
THE MINISTER OF MINERALS AND ENERGY	**THIRD RESPONDENT**

Neutral citation: *Engen Petroleum Limited v The Business Zone 1010 CC t/a Emmarentia Convenience Centre* (20513/2014) [2015] ZASCA 176 (27 November 2015)

Bench: Ponnan, Leach, Theron, Majiedt and Swain JJA

Heard: 18 November 2015

Delivered: 27 November 2015

Summary: Arbitration in terms of Petroleum Products Act 120 of 1977 - section 12B - interpretation of.

ORDER

On appeal from Gauteng Division of the High Court, Pretoria (Prinsloo J, sitting as court of first instance):

1. The appeal is upheld with costs, including those of two counsel, save that the costs of the preparation, perusal and copying of the record shall be limited to fifty per cent of the costs incurred in those tasks.
2. The order of the court below is set aside and replaced by the following order:

   'The application is dismissed with costs including those of two counsel.'

JUDGMENT

Ponnan JA (Leach, Theron, Majiedt and Swain JJA concurring):

[1] This appeal concerns the review of a decision by the Controller of Petroleum Products (the Controller) not to refer a dispute to arbitration under s 12B of the Petroleum Products Act 120 of 1977 (the Act). The appellant, Engen Petroleum Limited (Engen), a licenced wholesaler of petroleum products, as contemplated by the Act, and the first respondent, The Business Zone 1010 CC t/a Emmarentia Convenience Centre (Business Zone), are parties to agreements for the lease of a commercial property on which an Engen branded service station is located and for the supply of inter alia petroleum products.

[2] Engen is the registered owner of Erf 1117 Emmarentia Extension 1 Township (the site). In March 2005, Business Zone purchased an existing service station business which was then operating at the site and shortly thereafter it concluded its first lease agreement with Engen (the first lease). The terms of the first lease, which ran with effect from 1 April 2005 until 31 March 2008, are not presently relevant. A second lease agreement (the second lease), which was to endure until 31 March 2015, was thereafter concluded between the parties with effect from 1 April 2008. Both the agreements, when originally concluded, extended over the entire site. Since then the site has been re-developed. A Quickshop and Kentucky Fried Chicken (KFC) outlet were built during the course of this redevelopment, which was completed around August 2010. The site now consists of a service station area consisting of the petrol station forecourt, and adjacent thereto, an Engen branded Quickshop convenience store within which a Woolworths' outlet is housed. An adjacent but separate area to the west contains the KFC outlet. There is also a common area through which members of the public can gain access to the service station area and the KFC area.

[3] On 16 February 2010 and prior to completion of the redevelopment, the parties concluded a first addendum to the second lease (the first addendum). The first addendum, to the extent here relevant provided:

(a) In terms of Clause 3.1, Engen undertook responsibility, at its own cost, for the construction of certain new works on the site, which works were identified on plans initialled by Business Zone.

(b) Engen's obligation to conduct the new works was subject to the suspensive conditions in Clause 4.1 which related to the necessary approvals and consents being granted by the relevant planning authorities.

(c) Clause 7.1 extended the second lease until 31 July 2022.

(d) Clause 11.1 amended the extent of the premises which were subject to the second lease. It no longer covered the site in its entirety, but was now reduced to just the service station area. This reduction of the premises was also reflected in a second addendum to the lease concluded between the parties on 17 August 2010 (the second addendum).

(e) Clause 11.2 recorded that the KFC area would be 'sub-let to a third party for the operation of a chicken franchise business' and made clear that the KFC area and common area would not form part of the leased premises for the purposes of the second lease.

(f) In terms of Clause 5.1, the dealer had to pay a lease premium amount of R2.16m, and in terms of Clause 6.2, the dealer became liable for various franchise and licensing fees relating to the Woolworths shop, Quickshop and bakery franchise, all of which were to be run from the service station area.

[4] After the second lease was amended, a dispute arose between the parties allegedly flowing from Business Zone's construction of unauthorised alterations to the leased premises in breach of clause 8.1 of the second lease.[1] On 10 August 2010 Business Zone acknowledged, in an email to Engen, that it was not entitled to make such alterations to the leased premises without the prior written consent of Engen. The dispute was settled in the second addendum, which was signed on 17 August 2010. To that end, clause 7 of the second addendum provided:

'7.1. On or before 17 August 2010, Engen shall procure that an inspection of the Partitions shall be effected and it shall thereafter notify the dealer whether it approves or does not approve of the Partitions or any of them;

7.2. In the event that Engen does not approve of the Partitions or any of them, the dealer shall, at its own cost and as directed by Engen, remove the Partitions which have not been approved as aforesaid alternatively, subject to Engen's consent and subsequent approval, cause the Partitions to conform to Engen's reasonable requirements.

7.3. Without prejudice to anything elsewhere contained, the dealer shall not effect any installations at the Premises (including any security cameras) nor effect any alterations thereto, without Engen's prior written consent.'

[1] Clause 8.1 provided:
'The Dealer [Business Zone] shall not make any alteration or addition to the Premises, whether structural or otherwise, without the prior written consent of the Company [Engen]. Should the Company grant such consent, the Dealer shall not be entitled to any compensation whatsoever for any such alteration or addition, regardless of the reason therefore, and shall, if so required by the Company upon termination of this Agreement, forthwith remove such alteration or addition and reinstate the Premises to their previous condition, at the Dealer's own cost.'

[5] According to Engen, notwithstanding Business Zone's undertakings in the email of 10 August 2010 and the second addendum, over the next two months the latter continued to make alterations to the premises without its consent. As a result, on 12 October 2010, Engen's attorney addressed a letter to Business Zone noting that new unauthorised alterations had been made and giving notice under Clause 34.5 of Schedule 2 to the second lease that unless the unauthorised alterations were removed within seven days Engen reserved its right to cancel the second lease.[2] In response to that notice, Business Zone's attorney addressed a letter dated 15 October 2010 in which it was conceded that the alterations in question had been effected and that it had not sought, much less obtained, Engen's written consent for the alterations as required by the second lease. In that letter, Business Zone's attorney sought to motivate the need for the alterations, by contending that they were 'not only reasonable but necessary in the circumstances to ensure safety and security at the premises and also allowing our client to ensure that it complies with its obligations to always have sufficient stock on hand' and, *ex post facto*, requested Engen's consent thereto. That letter continued:

'To date your client has still not complied with its obligations of providing two additional access entry points, and as such is in breach of the lease addendum. The foresaid breach is resulting in a lack of traffic flow to our client's premises which invariably is resulting in a lack of turnover to our clients business. This will necessarily result in our client being unable to achieve its target in respect of turnover. We hereby formally place your client on terms in respect of the aforementioned breach and your client is expected to remedy same within 7 days of receipt of this notice. Should your client fail to do so, our client reserves its rights to approach the

[2] Clause 34.5 reads: 'Subject to the other provisions of this Agreement (including but not limited to sub-clauses 34.1, 34.2 and 34.3 of this Schedule 2), should the Dealer breach any of his other obligations in terms of this Agreement (i.e. other than those mentioned in, or contemplated by the provisions of, sub-clauses 34.1, 34.2 and 34.3 of this Schedule 2), the Company shall be entitled to give notice to the Dealer in writing to remedy the breach concerned within a reasonable period commensurate with the breach concerned: Provided that if such breach is not reasonably capable of being remedied within the period concerned or should circumstances have arisen or arise during the period of the notice concerned and which, being partly or entirely beyond the control of the Dealer, prevent it from so remedying such breach within the period concerned, then the Dealer shall be allowed such additional period as may reasonably be required therefore. Without detracting from the right of the Company to give any notice period commensurate for a breach concerned to be remedied, in the case of a dispute or uncertainty as to what is a reasonable period, the parties agree that a period of seven days is reasonable for a breach to be remedied unless the foresaid proviso applies. Should the Dealer fail to remedy the breach within the period allowed therefore the Company shall be entitled at any time thereafter to cancel forthwith this Agreement on written notice to the Dealer.'

appropriate High Court for the necessary relief without prejudice to any of its other rights which it has in law.'

[6] Engen did not grant the *ex post facto* consent sought and, when the seven day notice period expired without Business Zone having remedied its breach, it cancelled the second lease by letter of its attorney dated 22 October 2010. In response, Business Zone's attorney took issue with Engen's cancellation of the second lease and intimated that it would ask the Controller to refer the cancellation of the second lease to arbitration under Section 12B, inasmuch as it viewed Engen's conduct 'to be an unfair and unreasonable contractual practice'. That letter was followed by an email on 25 October 2010 where Business Zone's attorney again took issue with Engen's cancellation of the second lease and threatened to apply urgently to the High Court for an order compelling Engen to continue supplying Business Zone with fuel.

[7] In response, on 26 October 2010, Engen's attorney addressed the following letter to Business Zone's attorney:

'2. In pursuance of practical considerations, our client continues supply of petroleum products, pending a proposed meeting between the parties (to be held say within the next 7 days), on the following basis:

2.1. the supply of petroleum products to your client / operation of the site by your client is on an *ad hoc* basis ("Interim arrangement"), and:

2.1.1. the Interim arrangement:

2.1.1.1. is terminable by our client on 48 hours' notice;

2.1.1.2. does not prejudice the cancellation of the Operating lease already effected / any of our client's rights;

2.1.1.3. is not to be construed as reviving the Operating lease nor as a waiver, novation or otherwise of any of our client's rights;

2.1.1.[3]. does not afford your client any expectation, claim or otherwise;

2.1.1.[4]. does not entitle your client to raise the Interim arrangement in relation to court proceedings etc / to assist your client in any manner.

2.2. throughout the duration of the Interim arrangement, your client is to comply with all the terms and conditions of the Operating lease which would otherwise have applied, had the

Operating lease not have been cancelled. Payment for petroleum products is to be effected in the usual manner;

2.3. No variation, waiver, novation or otherwise of the Interim arrangement / any provision thereof / any of our client's rights, shall be of any force or effect unless confirmed in writing by our offices and then on our client's instructions. No revival of the Operating lease / conclusion of a new Operating lease shall be of any force or effect unless reduced to writing and signed by the parties.'

[8] The interim arrangement continued for several months. However, the disputes were not resolved and on 24 March 2011, Engen's attorney addressed a letter to the Business Zone's attorney terminating the interim arrangement on 48 hours' notice. On 27 March 2011, Business Zone's attorney addressed a letter to Engen's attorney taking issue with Engen's termination of the interim arrangement and indicating that Business Zone would be seeking a referral of Engen's cancellation of the second lease to arbitration in terms of s 12B of the Act. Three days later, Engen's attorney addressed a letter to Business Zone's attorney stating that Business Zone had been storing, selling and dealing in impermissible foreign petroleum products, which conduct was prohibited under clause 4.2 of Schedule 2 to the second lease.[3] In the letter, Engen's attorney gave notice that, to the extent that the operating lease had not already been terminated,

[3] Clause 4 reads:

'4.1. Subject to clause 11 of this Schedule 2, the Dealer shall purchase exclusively from the Company or the Company's nominated or approved suppliers the Dealer's entire requirements of Automotive Fuel marketed by the Company for resale from the Premises and shall not directly or indirectly store on or sell or distribute from the Premises or through the Business any Automotive Fuel whatsoever other than that purchased from the Company.

4.2. Subject to sub-clause 4.3 of this Schedule 2, the Dealer shall purchase exclusively from the Company or the Company's nominated or approved suppliers the Dealer's entire requirements of Automotive Products (being automotive lubricants, greases, or any substitute for these products) marketed by the Company.

4.3. Should the Company or its nominated or approved suppliers be unable to deliver the required Automotive Products, the Dealer shall be permitted to purchase such supplies from other sources, provided the consent of the Company has first been obtained, which consent shall not unreasonably be withheld.

4.4. Should the Company market particular range/s of car care products, the Company shall be entitled by notice to the Dealer to include such car care products in the range of Automotive Products for the purposes of sub-clause 4.2 of this Schedule 2 and the provisions of sub-clause 4.2 shall then apply mutatis mutandis to such car care products.'

it was being terminated summarily as a result of Business Zone's said breach as Engen was entitled to do in terms of clause 34.1 of Schedule 2 to the second lease.[4]

[9] On 31 March 2011, Business Zone instituted urgent proceedings against Engen in the High Court. It sought an order directing Engen to continue supplying it with petroleum products and not to interfere with the supply of products to the Woolworths' outlet, pending a decision by the Controller to its request for a referral of a dispute with Engen to arbitration under s 12B, and thereafter finalisation of such arbitration proceedings. At that stage, the alleged unfair practices had not yet been formulated. The next day, namely, 1 April 2011, the high court (per Wepener J) issued the following order:

'1. Pending the determination of part B of this application:

1.1. The respondent [Engen] is directed to continue to supply the applicant [Business Zone] with petroleum products in accordance with its standard terms and conditions of sale and in accordance with the previous practice between the parties.

1.2. The Respondent is interdicted and restrained from preventing delivery of product by Woolworths (Pty) Limited to the applicant's business.'

[10] The Part B relief was formulated as follows in the notice of motion:

'1. The respondent be directed to continue to supply the applicant [Business Zone] with petroleum products in accordance with its standard terms and conditions of sale and in accordance with the previous practice between the parties:

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[4] Clause 34.1 reads:

'34.1 Notwithstanding anything to the contrary contained in this Agreement, should –

(a) the Dealer breach any of his obligations in terms of clause 4.1 of this Schedule 2 (i.e. Subject to clause 11 of this Schedule 2, the Dealer shall purchase exclusively from the Company the Dealer's entire requirements of Automotive Fuel for resale from the Premises and shall not directly or indirectly store on or sell or distribute from the Premises or through the Business any Automotive Fuel whatsoever other than that purchased from the Company); or

(b) the Dealer breach any of his obligations in terms of clause 4.2 of this Schedule 2 (i.e. Subject to sub-clause 4.3 of this Schedule 2, the Dealer shall purchase exclusively from the Company or the Company's nominated or approved suppliers the Dealer's entire requirements of Automotive Products [being automotive lubricants, greases, or any substitute for these products] marketed by the Company); or

. . .

then the Company shall, notwithstanding anything to the contrary contained in this Agreement, be entitled at any time thereafter to cancel forthwith this Agreement on written notice to the Dealer.'

1.1. pending the consideration by the Controller of Petroleum Products of the applicant's request in terms of section 12B of the Petroleum Products Act, 120 of 1977 ("the Act"), and

1.2. pending finalisation of any arbitration proceedings in terms of section 12B of the Act in the event of the Controller of Petroleum Products referring the matter to arbitration.'

The interim relief granted pending the outcome of the Part B is still in force. Business Zone is still in occupation of the premises and Engen is still supplying it with petroleum products.

[11] Business Zone lodged its request for arbitration with the Controller on 4 April 2011. It identified three claims based on alleged unfair contractual practices. Claim A alleged a contractual obligation on Engen under the first addendum to provide additional access points to the site on Barry Hertzog Avenue and Crocodile Road and contended that Engen's failure to perform this obligation amounted to an unreasonable and unfair contractual practice. Claim B took issue with Engen's failure retrospectively to grant consent for the unauthorised alterations to the leased premises, its cancellation of the second lease in October 2010 due to the alterations (the first cancellation), its alleged interference with supplies to the Woolworths' outlet and 'the conduct of Engen in totality'. Business Zone alleged that these acts of Engen all amount to unfair and unreasonable contractual practices. It also alleged that Engen has an unfair and unreasonable practice with other dealers of cancelling contracts on spurious grounds as a means of dissuading them from raising disputes with Engen. Claim C alleged that Engen's conclusion of the contract with a KFC franchisee to operate the KFC franchise from the KFC area and its subsequent collection of rental from the franchisee, all of which occurred without the consent of Business Zone, constituted an unfair and unreasonable contractual practice.

[12] On 19 April 2011, Engen gave notice of its opposition to the request for referral. On 21 July 2011, it filed its answering affidavit in part B of the urgent application and brought a counter-application for the ejectment of Business Zone. In October 2011, Engen filed with the Controller its response to the request for referral, in which it took issue with the allegations by Business Zone made in support of the request for referral

and drew attention to the counter-application which it had launched in the High Court. That counter-application sought an order confirming the cancellation of the lease, inter alia on the grounds of dealing in foreign product in breach of the second lease, which did not form part of Business Zone's request for a referral to arbitration. Engen also raised a series of legal objections to the referral.

[13] In turning down Business Zone's request, the Controller wrote to its attorney on 27 February 2012:

'I have been advised of the matter between the above parties and after careful consideration of the request for arbitration, our position on the matter is as follows:

Section 12B of the Act states thus –

"the Controller of Petroleum Products may on request by a licensed retailer alleging unfair or unreasonable contractual practise (sic) by a licensed wholesaler, or vice versa, require, by notice in writing to the parties concerned, that the parties submit the matter to arbitration."

Before a matter can be referred to arbitration, the Controller of Petroleum Products (hereinafter referred to as "the Controller") must be satisfied that the reason(s) for the request is as a result of the alleged unfair or unreasonable contractual practice by a licensed retailer or wholesaler in the performance of an existing valid contractual agreement in an ongoing business relationship.

The information we have before us is that there is no longer a valid agreement between Emmarentia and Engen. The agreement forming the basis of Emmarentia's allegations of unfair or unreasonable contractual practice have been cancelled. Further, Emmarentia's allegations of unfair or unreasonable contractual practice are centered around the agreements which are currently under consideration by the South Gauteng High Court and as such, the matter is therefore *sub-judice* and can no longer be considered for arbitration.

In the light of the aforegoing, it is our considered view that in the absence of an existing valid Agreement of Lease and Operation of Service Station, Emmarentia's request for arbitration does not satisfy the minimum requirements in terms of section 12B of the Act. As such, the Controller has no basis for referring this matter to arbitration because of the requirements in the regulatory framework.

In the spirit of facilitating a speedy resolution to the dispute we urge parties to allow the South Gauteng High Court to give a determination on the validity of the agreements before the matter can be taken further.

We also encourage parties to use other dispute resolution forums which dispose of disputes promptly as opposed to protracted court proceedings.
It will be in the best interest of all parties concerned if the matter is resolved promptly and amicably.'

[14] Business Zone took the Controller's decision on appeal to the then Minister of Minerals and Energy (the Minister) in terms of 12A of the Act. The appeal, which was opposed by Engen, failed. In a letter dated 6 November 2012 the Minister informed Business Zone's attorney:

'1. I have, in terms of the provisions of section 12A of the Petroleum Products Act, 1977 (hereinafter referred to as the "Act"), considered the appeal lodged on behalf of your client, The Business Zone 1010 CC t/a Emmarentia Convenience Centre, against the decision of the Controller of Petroleum Products to refuse your request for the referral of the matter to arbitration in terms of section 12B of the Act.

2. After careful consideration of all the facts and arguments presented before me, I hereby confirm the decision made by the Controller of Petroleum Products refusing the submission of the matter to arbitration in terms of section 12B of the Act.

3. The reason for my aforementioned decision is that, in my opinion section 12B of the Act may only be applied in cases where there is an existing or continuing contract between the parties. Since the validity of the termination of the contract by Engen Petroleum Limited is disputed by your client, and the matter is currently before a competent court, we believe that the arbitration under section 12B of the Act would not be proper. I am advised further that a single juristic act (the exercise of a legal right to cancel a contract) intended to terminate an agreement cannot, in law, constitute or be characterised as "an unfair or unreasonable contractual practice" for purposes of section 12B of the Act. Therefore, an arbitrator would not have jurisdiction to determine the validity or otherwise the cancellation of the agreement.

4. I am also mindful of the fact that the Controller's powers to refer a matter to arbitration in terms of section 12B of the Act is a discretionary power and I believe that, having considered the circumstances and arguments submitted by both parties, the decision of the Controller of Petroleum Products to refuse to submit the matter to arbitration was justified in the circumstances.'

[15] Aggrieved, Business Zone took the decisions of both the Controller and Minister on review. The Controller was cited as the first respondent, the Minister as the second, and Engen as the third. Whilst Engen opposed the application, neither the Controller, nor the Minister, took any part in the proceedings in the court below. Business Zone sought an order, the material part of which read:

'1. Reviewing and setting aside the decision delivered by the first respondent [the Controller] on 27 February 2012 in terms of which the applicant's [Business Zone's] request to refer an alleged unfair or unreasonable contractual practice to arbitration pursuant to section 12B of the Petroleum Products Act, 120 1977 was refused.

Alternatively to prayer 1

2. Reviewing and setting aside the decision delivered by the second respondent [the Minister] on 6 November 2012 in terms of which the applicant's request to refer an alleged unfair or unreasonable contractual practice to arbitration pursuant to section 12B of the Petroleum Products Act, 120 1977 was refused and the first respondent's decision was confirmed.

3. Directing the first respondent, *alternatively* the second respondent, to refer the applicant's request relating to an unfair or unreasonable contractual practice to arbitration in terms of section 12B of the Act and to appoint an arbitrator to adjudicate over such dispute.

Alternatively to paragraph 3

4. Directing that the first respondent, *alternatively* the second respondent, reconsider the applicant's request for referral to arbitration attached to the founding affidavit as annexure "O", subject to such directions as this Honourable Court deems meet.'

[16] The application succeeded before Prinsloo J, who issued the following order:

'1. The decision delivered by the first respondent on 27 February 2012 in terms of which the applicant's request to refer an alleged unfair or unreasonable contractual practice to arbitration in terms of Section 12B of the Petroleum Products Act, NO 120 of 1977, was refused, is reviewed and set aside.

2. The decision delivered by the second respondent on 6 November 2012, in terms of which the decision of the first respondent, described in 1 above, was confirmed, is reviewed and set aside.

3. The applicant's request for referral of an alleged unfair or unreasonable contractual practice (as set out in annexure "O" to the founding affidavit) is referred to arbitration in terms of

Section 12B of the Petroleum Products Act, 120 of 1977. The first and second respondents are ordered to facilitate this referral, in terms of Section 12B, as a matter of urgency.

4. The costs of the application, including the costs of two counsel, are to be paid by the third respondent save for the costs referred to in 5 hereunder.

5. The costs of 1 397 pages of the record (being the duplicated pages) are disallowed.'

Engen appeals with the leave of the court below. The Controller and Minister have filed a notice with the Registrar intimating that they abide the decision of this court.

[17] Having reviewed and set aside the decisions of both the Controller and the Minister, the court below held that it was at liberty to substitute its own decision for those decisions because of the delay in the matter and it accordingly referred all the matters in Claims A, B and C to arbitration itself.

[18] Section 12B of the Act reads:

'Arbitration –

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

(2) An arbitration contemplated in subsection (1) shall be heard –

(a) by an arbitrator chosen by the parties concerned; and

(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 an order as to costs to be borne by one or more of the parties concerned.'

[19] In refusing Business Zone's request for arbitration, the Controller appeared to rely on the decision of *Engen Petroleum Ltd v Tlhamo Retail (Pty) Ltd.*[5] In *Tlhamo*, Boruchowitz J concluded that s 12B conferred jurisdiction on an arbitrator only over ongoing practices that took place within the context of the existing agreement. The court below held that the *Tlhamo* decision was clearly wrong and that the Controller and the Minister had acted under a mistake of law by following it. Prinsloo J took a particularly narrow view of the discretion vested in the Controller under s 12B holding that (para 58):

'I accept, because of the use of the word "may", that the controller has a discretion whether or not to grant the request but the only jurisdictional requirement for this process to be activated appears to be an allegation by the retailer (or the wholesaler for that matter) of an unfair or unreasonable contractual practice by the other one and a request by the aggrieved party for the matter to be referred to arbitration.

All that is required of the Controller is to determine whether the applicant has alleged an unfair or unreasonable contractual practice. It seems to me that a 12B request ought only to be refused by the Controller in the clearest of cases, for example, where the Controller, on good grounds, can conclude that what is alleged is clearly not, and can never be, an unfair or unreasonable contractual practice. It seems to me that the Controller can arrive at such a conclusion only in the rarest and most exceptional of circumstances because it would amount to pre-judging the issue.'

In particular the court below held that the Controller was not entitled to 'decide that there is no longer a valid agreement between [Business Zone] and Engen' or have regard to the pending high court application in which the validity of the second lease was in issue. And that the Minister's decision in 'more or less adopting [the Controller's] reasoning as her own . . . also falls to be reviewed and set aside.'

[20] The Act itself provides no guidance for the exercise by the Controller of the discretion conferred by s 12B. It is nonetheless important to recognise that such power,

[5] *Engen Petroleum Ltd v Tlhamo Retail (Pty) Ltd* 2010 JDR 0958 (GSJ).

is not granted in the abstract. The power is granted to serve a particular purpose. That purpose can be discerned from the legislation that is the source of the power (see *SA Jewish Board of Deputies v Sutherland NO* 2004 (4) SA 368 (W) para 29). According to the English Court of Appeal (*R v Somerset County Council, ex parte Fewings* [1995] 3 AllER 20 at 32 B-E), there are in fact three categories of consideration relevant to the exercise of the power:

'First, those clearly (whether expressly or impliedly) identified by the statute as considerations to which regard must be had. Second, those clearly identified by the statute as considerations to which regard must not be had. Third, those to which the decision-maker may have regard if in his judgment and discretion he thinks it right to do so. There is, in short, a margin of appreciation within which the decision-maker may decide just what considerations should play a part in his reasoning process'.

[21] Courts of law must consider a matter such as this from the point of view of reasonableness and not upon too narrow an interpretation of the powers conferred by the statute (*City of Cape Town v Claremont Union College* 1934 AD 414 at 420). It must appreciate that the Controller is endowed with these powers, which he or she will be asked to exercise from time to time, details of which cannot be specifically provided for in the statute which constitutes them. Here, the parties had filed voluminous papers with the Controller, who was thus fully aware of all of the relevant considerations. Prinsloo J appeared to take the view that the mere allegation of an unfair or unreasonable contractual practice, without more, triggered the entitlement to arbitration. The learned judge went further: he required the Controller to approach the enquiry on the basis that the request should be declined 'only in the rarest and most exceptional of circumstances'. In my judgment, this is not how an application of this kind should be approached, because a court should not fetter the Controller's discretion in any manner and particularly not by adopting an approach which brooks of no departure except in the 'rarest and most exceptional circumstances'. It must be for the Controller to decide each case upon a consideration of all the relevant features, without adopting a predisposition either in favour of or against a referral to arbitration.

[22] Section 12B vests in the Controller a discretionary power to subject parties to an arbitral jurisdiction to the apparent exclusion of the high court. The section must accordingly be interpreted in a manner which draws a clear line between what falls within the arbitral jurisdiction it contemplates, and the jurisdiction of the high court. In *Tlhamo*, Boruchowitz J focussed on the ordinary meaning of the wording of the section and concluded that it conferred no jurisdiction on an arbitrator to make or stipulate terms of a new contract for the parties or to investigate the fairness or reasonableness of an act of cancellation of a contract. Instead, so held Boruchowitz, the only jurisdiction conferred on an arbitrator was (at 9):

'to determine whether an ongoing practice in the performance of an existing agreement or contract is unfair or unreasonable. . . .

The section empowers an arbitrator to determine how an existing contract is to be implemented and does not go beyond that.'

In my view, on this score, *Tlhamo* and *Hansco Motors CC t/a Hansa Motors v BP Southern Africa (Pty) Ltd*,[6] which followed it, were correctly decided.

[23] In terms of Section 12B(4) an arbitrator, once appointed, is faced with two rather stark choices, namely to determine whether, on the one hand, the alleged practices are 'unfair or unreasonable' (subsec (4)*(a)*) or, on the other, the allegations giving rise to the arbitration were frivolous or capricious (subsec (4)*(b)*). Section 12B(4)*(a)* operates in relation to allegations of an 'unfair or unreasonable' contractual practice and enjoins an arbitrator appointed under its provisions to make whatever award is necessary 'to correct such practice'. Subsection 12B(4)*(b)*, which operates in relation to allegations found to be 'frivolous or capricious', authorises the arbitrator to make such award as he or she deems necessary to compensate any party affected by such allegations. Section 12B(4) thus distinguishes between a corrective remedial jurisdiction, under subsection (4)*(a)*, and a compensatory remedial jurisdiction, under subsection (4)*(b)*. A corrective remedial jurisdiction can operate only prospectively. In relation to contractual practices, a corrective remedial jurisdiction accordingly presupposes an ongoing contractual relationship. Where a contract has been terminated, a practice under it can no longer be

[6] *Hansco Motors CC t/a Hansa Motors v BP Southern Africa (Pty) Ltd* [2011] ZAKZPHC 48 paras 30 and 31.

corrected and a corrective remedial jurisdiction is accordingly rendered nugatory. The only remedy available to an injured party after a contract has been terminated is perhaps a damages remedy. But an award of damages is not competent under a corrective remedial jurisdiction – it requires the existence of a compensatory remedial jurisdiction.

[24] If - as I have sought to demonstrate - the jurisdiction conferred by section 12B(4)*(a)* is a corrective remedial jurisdiction and not a compensatory one, it cannot confer jurisdiction on an arbitrator to decide disputes which arose under a contract which has been terminated. Moreover, s 12B(4)*(a)* cannot vest in an arbitrator the power to determine whether a contract has been validly terminated because if it did, it would confer upon the arbitrator the power to make a decision which itself would determine whether or not she had jurisdiction over the dispute. Importantly, an arbitrator has no power to fix the scope of her jurisdiction – that is fixed by her terms of reference.[7] That jurisdiction must be objectively ascertainable in advance of the arbitration, for an arbitrator cannot by her decision confer a jurisdiction upon herself that she does not in law possess.[8]

[25] When viewed in the context of the Act as a whole, the purpose of section 12B(4)*(a)* is, as correctly reflected in the *Tlhamo* judgment and the decisions of the Controller and the Minister, to regulate the relationship between a wholesaler and a retailer against the backdrop of a valid contract. In particular, the determination of the validity of the cancellation of a lease cannot fall within the jurisdiction of an arbitrator under section 12B(4)*(a)*. In terms of our common law, cancellation is ordinarily the proper preserve of the high court. And, it is a sound rule to construe a statute in conformity with the common law, save where the statute itself evidences a plain intention on the part of the legislature to alter it.[9] What is more, on the contention advanced by Business Zone, the high court's jurisdiction would be ousted in respect of that issue. However, there is nothing in the section to suggest that the jurisdiction of the

[7] *Radon Projects (Pty) Ltd v NV Properties (Pty) Ltd* [2013] ZASCA 83; 2013 (6) SA 345 (SCA) para 28.
[8] *Minister of Public Works v Haffejee NO* [1996] ZASCA 17; 1996 (3) SA 745 (A) at 751F-G.
[9] *Nedbank v National Credit Regulator* [2011] ZASCA 35; 2011 (3) SA 581 (SCA) para 38.

high court is excluded. Nor, is such an ouster necessarily implicit in its terms, while it is trite that there is a strong presumption against such an implication.[10] Moreover, the logical stopping place of that contention, as I understood the submission, is that if there are conflicting decisions on the issue, the arbitrator's decision would trump that of the court.

[26] Business Zone's contention would lead as well to a potentially chaotic situation if an arbitrator and a court both had jurisdiction to determine the existence of the contract. In *MV Iran Dastghayb Islamic Republic of Iran Shipping Lines v Terra Marine SA* [2010] ZASCA 118; 2010 (6) SA 493 (SCA) para 31 it was pointed out that:

'It suffices to state that it should be fairly obvious that to permit parallel proceedings to commence and run in different *fora* at the same time and in respect of essentially the same dispute is undesirable. In *Universiteit van Stellenbosch v JA Louw (Edms) Bpk*[11] this court stated:

'As to the undesirability of allowing two different proceedings in two separate tribunals, the *dicta* in the English Court of Appeal in *Taunton-Collins v Cromie and Another*[12] are very apposite. At 333 Lord Denning said:

"It seems to me most undesirable that there should be two proceedings in two separate tribunals – one before the official referee, the other before an arbitrator – to decide the same questions of fact. If the two proceedings should go on independently, there might be inconsistent findings. The decision of the official referee might conflict with the decision of the arbitrator. There would be much extra cost involved in having two separate proceedings going on side by side; and there would be more delay. Furthermore, as counsel for the plaintiff pointed out, if this action before the official referee went on by itself – between the plaintiff and the architect – without the contractors being there, there would be many procedural difficulties. For instance, there would be manoeuvres as to who should call the contractors, and so forth. All in all, the undesirability of two separate proceedings is such that I should have thought that it was a very proper exercise of discretion for the official referee to say that he would not stay the claim against the contractors."'

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[10] *Metcash Trading Ltd v Commissioner, South African Revenue Service* [2000] ZACC 21; 2001 (1) SA 1109 (CC) para 43.
[11] 1983 (4) SA 321 (A) at 335H-336A.
[12] [1964] 2 All ER 332.

[27] Thus, for example, if a court were to find that a lease had been validly cancelled and ordered the eviction of the tenant, such an order could not live side-by-side with a concurrent finding that the cancellation was unfair or unreasonable (especially in circumstances where the award of an arbitrator is final and binding on the parties). In a similar vein, breach of the court order would constitute contempt but would be lawful in terms of the arbitrator's finding. It would create intolerable delays, sequential proceedings before different fora, the potential for forum shopping and uncertainty for the parties and for interested third parties in their relationships with the parties. If one is to avoid these anomalous consequences it is necessary to define precisely the ambit of the jurisdiction of the arbitrator, on the one hand, and the courts on the other. The *Tlhamo* judgment does precisely that. It preserves for the high court decisions on questions of legality such as the validity of a cancellation of a contract or the terms of a contract while leaving to the arbitrator the question of unfairness in the implementation of the contract.

[28] Importantly, the phrase 'unfair or unreasonable contractual practice' must derive meaning from its context, namely, the bulk supply of petroleum products. The jurisdiction of the arbitrator is not a plenary jurisdiction which extends to any contract whatsoever. Given its setting within the Act, it would seem that only those aspects of the contractual relationship which relate directly to the supply in bulk of petroleum products can be subjected to arbitration, under section 12B. In that sense much of Business Zone's complaint had, at best, a tenuous connection to the supply of petroleum products. In claim A, Business Zone contended that Engen had an obligation to provide additional access points to the site. But, the site development plan, which was attached to the first addendum, did not provide for new access points. In any event, all new access points would require the official approval of the Johannesburg Roads Agency and are subject to a process in which interested parties have a right of objection. Central features of Claims B and C related to the Woolworths and KFC outlets. In terms of clause 11 of the first addendum the leased premises had been redefined so that they were now confined to the service station area alone. That, in and of itself, may have been destructive of Business Zone's Claim C. Further, an arbitrator could hardly have

had jurisdiction over parties other than licensed wholesalers and retailers of petroleum products. Thus the further one goes from the supply in bulk of petroleum products, the more interests are implicated of parties who cannot be subject to the jurisdiction of the Controller. Accordingly, the Controller, who has no jurisdiction over Woolworths or a KFC franchisee, cannot properly exercise jurisdiction over a dispute between Engen and the dealer in relation to the contractual provisions which involve and affect those interests. In the circumstances, it could hardly have been competent for either the Controller or Minister to have referred these disputes to arbitration.

[29] On any interpretation of section 12B(4)*(a)*, it contemplates a situation where both the high court and arbitrator may have some concurrent jurisdiction over the same subject matter. The discretion vested in the Controller must be exercised having regard to this fact. In particular, to the extent that complaints of 'unfair or unreasonable practices' are, in effect, complaints of a failure by one of the parties to perform its obligations under the contract between them, the Controller must decide whether those, being essentially complaints that turn on the meaning of the contract, would be better determined by the high court under its ordinary jurisdiction, and if there is any prospect of parallel proceedings, the Controller should consider what the potential impact of the high court proceedings would be on the dispute which he may refer to arbitration and whether the existence of the high court proceedings is a good enough reason to refuse the request for arbitration (or to defer a final decision thereon).

[30] Finally, accepting that *Tlhamo* was correctly decided, there was no error of law on the part of the Minister and the Controller and it must follow that the judgment of the court below falls to be set aside. In any event it is important to bear in mind that when both the Controller and Minister took their decisions in this case, *Tlhamo* was the final word on the subject. Both of them were thus not free to simply ignore that decision on the assumption that it would in due course be overruled. But even if Prinsloo J was correct in overruling *Tlhamo* (and as I have already indicated he was not) he clearly erred in failing to have regard to the pending ejectment application flowing from the second cancellation. Thus, quite aside from the legal principle in *Tlhamo*, the facts of

the present case (to which the Controller was clearly alive) were such that if the matter was referred to arbitration, the arbitrator would not have jurisdiction to determine whether the contract remained in force and her proceedings would have been hamstrung accordingly. Thus, by the time the Controller came to exercise her discretion on the request for referral, there was already pending before the high court an ejectment application brought by Engen on the basis of the second cancellation that was not the subject of any request for arbitration. Nothing in the request for arbitration would have been capable of affecting the outcome of Engen's application for ejectment on the basis of this cancellation. But the outcome of that application could have terminal consequences for the arbitration on any approach to the jurisdiction of the arbitrator. If Engen succeeded in the high court on that application, there would be no lease and no ongoing business relationship between the parties. This would have meant that the arbitrator would have been reduced to making an award absent any ongoing contractual relationship between the parties. In this context, it is significant that the request for a referral to arbitration from Business Zone did not identify the relief that it was claiming. The discretion of the Controller had to be exercised in the light of these facts and, in the circumstances of this case, it was wholly appropriate for the Controller to decide not to accede to the request for referral to arbitration while the high court proceedings were pending, but rather to require they be finalised first.

[31] Before closing it is necessary to make some remarks about the record and the approach of the legal representatives to compliance with the rules of this court. The record filed with the Registrar of this court ran to approximately two thousand pages. It commenced with four volumes described as a core bundle, which consisted of a haphazard selection of documents and exhibits. Rule 8 of this court's rules envisage that a record would be prepared sequentially and logically and that unnecessary and duplicated documents would be excluded. Various documents that played little part before the court below and no part at all in the appeal, which should have been excluded in terms of rule 8, were not. On any reckoning very little regard was had to the rules of this court and the true issues in the case in preparing the record. In response to repeated complaints from Business Zone's attorney that the record was defective and

had to be reconstituted, Engen's attorney stated somewhat euphemistically that 'at most it suffered from a few shortcomings'. Before us Counsel accepted that had the rules been observed the record could have been reduced by at least fifty per cent. This would not only have eased our task considerably but would also have reduced the costs substantially. The order for costs will take account of this.

[32] In the result:

1. The appeal is upheld with costs, including those of two counsel, save that the costs of the preparation, perusal and copying of the record shall be limited to fifty per cent of the costs incurred in those tasks.
2. The order of the court below is set aside and replaced by the following order:

'The application is dismissed with costs including those of two counsel.'

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V M Ponnan

Judge of Appeal

APPEARANCES:

For Appellant:	G Marcus SC (with him M Chaskalson SC) Instructed by: AD Hertzberg Attorneys, Johannesburg Honey Attorneys, Bloemfontein
For First Respondent:	J Suttner SC (with him N P G Redman SC) Instructed by: Des Naidoo Attorneys, Johannesburg Claude Reid, Bloemfontein