

## REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA  
LIMPOPO DIVISION, POLOKWANE

CASE NUMBER: 1583/2019

|                                                     |                                          |
|-----------------------------------------------------|------------------------------------------|
| (1)                                                 | <u>REPORTABLE: YES/NO</u>                |
| (2)                                                 | <u>OF INTEREST TO THE JUDGES: YES/NO</u> |
| (3)                                                 | <u>REVISED</u>                           |
| DATE: <u>12/02/20</u> SIGNATURE: <u>[Signature]</u> |                                          |

In the matter between:

ENGEN PETROLEUM LIMITED

APPLICANT

And

RISSIK STREET ONE STOP CC t/a

RISSIK STREET ENGEN

FIRST RESPONDENT

KNOESEN WILLEM JOHANNES

SECOND RESPONDENT

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JUDGEMENT

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**KGANYAGO J**

- [1] The applicant has leased the premises from the landowner in terms of a notarial deed of lease. The applicant in turn sublet the premises to the first respondent who sought to conduct the business of operating an Engen service station, and the second respondent is its operator. The first respondent took occupation of the premises during 1998 and since then it has been operating Engen Service Station for its own account. It took occupation in terms of an operating lease. Both the applicant and the first respondent's occupation of the premises is dependent on there being a valid and binding notarial deed of lease in place.
- [2] The operating lease was for a fixed term period. The operating lease has been renewed on several occasions since 1998 for a further fixed term period. The decision to extend the operating lease was in the discretion of the applicant. However, in the event the applicant elected not to offer the first respondent a further renewal of the lease, together with the right to operate an Engen branded fuel filling and service station from the premises, the applicant was required to notify the first respondent at least 12 months in advance.
- [3] The notarial lease as well as the operating lease was to come to an end on the 30<sup>th</sup> June 2018. The land owner demanded R3 million payment from the applicant as a condition to renew the notarial lease which the applicant agreed to pay. As a result of that the notarial lease was extended. In turn the applicant sought to recover the R3 million paid to the landlord from the respondents by requesting the respondents to pay that amount as a condition of renewing the operating lease. The parties could not reach an agreement in relation to the payment of R3 million. As a result of the failure to reach the agreement, on the

2<sup>nd</sup> October 2017 the applicant notified the first respondent of its decision not to renew the operating lease beyond its termination date of the 30<sup>th</sup> June 2018 alternatively 31<sup>st</sup> October 2018. The applicant further advised the second respondent of its entitlement to source a buyer for the business of the first respondent.

- [4] The first respondent introduced a potential buyer to the applicant on the 25<sup>th</sup> May 2018. The applicant did not consider the application of the potential buyer as according to it the application lacked compliance. The second respondent did not present the applicant with any further potential buyers during the 12 months notice period.
- [5] On the 26<sup>th</sup> July 2018, the first respondent approached the Controller of Petroleum Products in terms of section 12B of the Petroleum Products Act <sup>1</sup>("the PPA"). The referral was for arbitration in relation to alleged unfair and /or unreasonable contractual practise committed by the applicant.
- [6] Whilst waiting for a decision by the Controller, on the 17<sup>th</sup> January 2019 the second respondent introduced the second potential buyer of the business to the applicant. The applicant did not consider that application of the second potential buyer as it considered the operating lease to have terminated on the 31<sup>st</sup> October 2018 through effluxion of time.
- [7] On the 22<sup>nd</sup> January 2019, the applicant gave the first respondent with a written notice to vacate the premises. The first respondent refused to vacate the premises. That resulted in the applicant launching an eviction application

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<sup>1</sup> Act 58 of 2003

against the respondents. The respondents are opposing the applicant's application and have brought a counterclaim seeking a stay of the proceedings pending a decision by the Controller.

[8] The applicant's counsel has submitted that the first respondent is not genuinely opposing the application to eject and that it also has no desire to remain in occupation of the premises. Instead the first respondent harbours under the impression that it is entitled to be afforded an opportunity to sell the business and in so doing extract some value therefrom. It is the applicant's contention that it is under no obligation, contractually or otherwise, to allow for the unlawful occupation of the respondents to continue in order to provide the second respondent with a further opportunity to sell the business. According to the applicant, the operating lease has terminated, and the first respondent's continued occupation of the premises is unlawful.

[9] The respondents on the other hand submit that the proceeding in this matter be stayed pending a referral for arbitration which would include the conclusion of that arbitration. It is the respondent's contention that the arbitration stands separate from any other process, and that section 12B of the PPA is simply a consideration in terms of a legislated measure that has been implemented for a very specific purpose to address the imbalances in the relationship between retailers and wholesalers in the petroleum industry. The respondents further submit that an arbitrator is empowered to make interim orders to the dispute. One of such interim order is that the first respondent remains in operation on the same terms and conditions.

[10] What the court is basically called upon to determine, is whether to stay the eviction proceedings pending a determination by the Controller of Petroleum Products of the applicant's referral of a dispute in terms of section 12B of the PPA, and if the proceedings are stayed, whether to interdict the applicant from taking any steps that will adversely affect the operations of the first respondent pending the arbitration in terms of the PPA and certain relief claimed in terms of the Consumer Protection Act<sup>2</sup>. Should the respondents' counterclaim be refused, I must determine whether the respondents should be evicted or not.

[11] Section 12B of the PPA reads 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.
- (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) -

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<sup>2</sup> Act 68 of 2008.

- (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."

[12] The applicant has notified the first respondent on the 2<sup>nd</sup> October 2018 that it will not renew the operating lease agreement beyond its termination date being the 30<sup>th</sup> June 2018. However, it was a material term of the operating lease agreement that the first respondent must be notified of at least 12 months in advance should the applicant elect not to renew the operating lease for a further fixed period. In this instance the 12 months period would have ended on the 31<sup>st</sup> October 2018.

[13] During the notice period the existing operating lease agreement remains valid and the parties are still bound by the terms of that agreement. The notice period does not suspend the operation of the existing operating lease agreement. The licensed retailer who is of the view that an alleged an unfair or unreasonable contractual practice has been committed by a licensed wholesaler or vice versa may request the Controller of Petroleum Products to submit the matter for arbitration.

[14] The first respondent from the moment it was given the notice that the operating lease will not be renewed, seems to have been content in vacating the premises

at the end of the notice period. The second respondent was advised that it was entitled source a buyer for the business of the first respondent. The buyer was subject to the approval of the applicant. The second respondent introduced a potential buyer to the applicant for consideration. The applicant found that the buyer did not meet its requirements and did not approve.

[15] The respondents have been operating the same business for the past 20 years. During that period they have improved and built the goodwill of the business to be where it is. The cruelty of a lease is that when one leaves at the end of the term of lease he/she leaves with nothing. In this case the respondents were given an opportunity to salvage something out of the business which they have operated for the past 20 years by sourcing a buyer which they did, but the potential buyer did not meet the applicant's requirements.

[16] The approval of the buyer is solely at the discretion of the applicant. The applicant is under no duty to give the respondents reasons for its refusal to approve the potential buyer. That seems to be a one sided relationship between the applicant and the respondents. The state of affairs only favours the applicant. The introduction of PPA seems to address the imbalances that may occur as the aggrieved party's remedy is to invoke the provisions of section 12B of PPA. The respondents have invoked the provisions of section 12B before the operating lease had expired, and were therefore justified in doing so.

[17] In **Business Zone 1010 CC t/a Emmarencia Convenience Center v Engen Petroleum Limited and Others**<sup>3</sup> Mhlantla J said:

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<sup>3</sup> [2017] ZACC 2 at para 57 and 58

*“[57] 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.*

*[58] 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.”*

- [18] It is not in dispute that the notice period given to the respondents has expired on the 31<sup>st</sup> October 2018. Under normal circumstances, the respondents were supposed to vacate the premises by the 31<sup>st</sup> October 2018. However, there is a pending dispute which the respondents have requested the Controller of Petroleum Products to request the parties to refer their dispute for arbitration. That process has not yet been exhausted. At the time the notice period expired, there was still a live dispute which was still pending.

- [19] The applicant submitted that the referral of the dispute to the Controller by the respondent does not bar it proceeding with the eviction application since the operating lease terminated on the 31<sup>st</sup> October 2018 through effluxion of time. The applicant contended that the granting of the eviction order will have no bearing on the powers of the arbitrator in respect of issues referred for arbitration, in that the second respondent does not seek reinstatement of the operating lease, but an opportunity to sell the business.
- [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 are much quicker and less costs effective. Secondly in terms of section 12(B) (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 procedure 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 power to grant relief for the intervening period. In the case at hand even though the notice period has expired on the 31<sup>st</sup> 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.

[22] Since the process of referring the matter for arbitration has been started, in my view, it should be given an opportunity to run its course. Section 12B (5) provides that an award made by an arbitrator is final and binding. If the other party is dissatisfied with the outcome of the arbitrator's award there are still other remedies available to him/her. In my view, there is nothing preventing the parties to refer all the disputes emanating from the operating lease agreement for arbitration in terms of section 12B which will be much quicker and less costs effective. It will therefore be in the interest of justice if the proceedings are stayed pending the outcome of the referral by the respondents of the alleged unfair and/or unreasonable contractual practice to the Controller for determination whether the parties submit the matter for arbitration.

[23] In the result I make the following order:

23.1 That the current proceedings are stayed pending the decision by the Controller on referral by the respondents in terms section 12B of the PPA;

23.2 The applicant is interdicted from taking any steps that will adversely affect the operations of the respondents pending the final outcome of the process referred to the Controller.

23.3 The applicant to pay the respondents costs on party and party scale.

  
MF. KGANYAGOJ

JUDGE OF HIGH COURT OF SOUTH AFRICA,  
LIMPOPO DIVISION, POLOKWANE

**APPEARANCE:**

**COUNSEL FOR APPLICANT: ADV S AUCAMP**

**INSTRUCTED BY : MATHOPO MOSHIMANE MULANGAPHUMA  
INC T/A DM5 INCOPORATED**

**COUNSEL FOR RESPONDENTS: ADV LR ADAMS**

**INSTRUCTED BY : SETON AMITH AND ASSOCIATES**

**DATE OF HEARING : 02 DECEMBER 2019**

**DATE OF JUDGEMENT 12<sup>TH</sup> FEBRUARY 2020**