



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: 20350/2023

In the matter between:

ENGEN PETROLEUM LIMITED

Applicant

and

**SLICK OIL CC t/a CHELSEA VILLAGE CONVENIENCE
CENTRE**

Respondent

Coram: Bishop, AJ

Dates of Hearing: 15 October, 13 November and 9 December 2024

Date of Judgment: 24 February 2025

JUDGMENT

BISHOP, AJ

[1] An application for the payment of money arising from an acknowledgement of debt was met with an application to stay those proceedings pending a referral to arbitration.

[2] The Respondent (**Slick Oil**) runs operates a service station in Wynberg under an agreement with the Applicant (**Engen**). That agreement allowed Engen to exploit an “alternative profit opportunity” by introducing a Woolworths store on the premises.

[3] In mid-2022, Engen approached Slick Oil to exploit the alternative profit opportunity. There was some engagement between the parties and Slick Oil indicated it was not in a position to pay the contribution. Ultimately, Engen paid R3 106 538.57 to construct the Woolworths store, which Slick Oil agreed to repay when it was able to do so. Slick Oil now claims that it agreed to this arrangement under duress, or based on a misrepresentation about the parties respective contractual rights. But at the time, it accepted its liability.

[4] Following demands for repayment, on 27 September 2022 Slick Oil sent Engen a document titled “Acknowledgement of Debt and Undertaking to Pay”. In the document, Slick Oil offered to pay the outstanding amount in one sum by 28 February 2023. Slick Oil’s representative signed the document and sent it to Engen’s representative, Noloyisa Majekiso, by email.

[5] This is the document on which Engen relied for its original relief. The version it attached to its founding affidavit was signed by Ms Majekiso also dated on 27 September 2022. Ms Majekiso also deposed to an affidavit confirming she had signed it on that date. However, Slick Oil claimed it had never received the version signed by Ms Majekiso.

[6] Slick Oil did not pay Engen by 28 February 2023 as it had offered to do. The parties met about the failure. But Engen did not demand immediate payment.

[7] On 11 April 2023, Slick Oil wrote to Engen. The letter primarily dealt with a failure to ensure the service station was stocked with fuel, in breach of the primary agreement between the parties. But Mr Muller, the sole member of Slick Oil, also

stated: “I am doing everything in my power to facilitate the release of funds from my investment so that I am able to fulfil my obligation in terms of the acknowledgment of debt.” However, no further payments were made, nor did Engen demand payment.

[8] Instead, on 26 June 2023, Slick Oil sent a letter to Engen making a new offer – to repay the amount owed in 36 instalments of R86 292.74. The letter also stated that, as Engen had not accepted the previous offer it had made in the September 2022 Acknowledgement of Debt, Slick Oil withdrew that offer.

[9] Engen did not accept this new offer. There were various further meetings between the parties, and two further offers by Slick Oil, none of which Engen accepted. Engen did not, however, insist on the full and immediate repayment – it merely insisted on better repayment terms than Slick Oil was offering.

[10] On 27 July 2023, Slick Oil made a fourth offer to repay in 30 instalments of R120 006.46 per month. This offer, too, was not accepted. But between 7 August 2023 and 24 April 2024, Slick Oil made ten payments to Engen (five of R 125 000, and five of R30 000). Engen accepted those payments.

[11] On 15 November 2023 Engen launched the present application. It is a simple application. It claims that the original 27 September 2022 acknowledgment of debt remains binding on Slick Oil, and that this is confirmed by the letter of 11 April 2023. It claims payment of the R3 106 538.57 less the payments which had been made, plus interest.

[12] Slick Oil’s answer (which was late in coming) took a double-barrel approach. First, it brought a counter-application to stay the determination of Engen’s application until the resolution of a request for arbitration it intended to submit to the Controller of Petroleum Products under s 12B(1) of the Petroleum Products Act 120 of 1977.

[13] Second, its primary defences to the main application were that: (a) there was no valid acknowledgement of debt as Engen had not communicated its acceptance of his offer of 27 September 2022; and (b) there was no agreement with regard to

the contribution to constructing the Woolworths, and that it had entered the agreement because of duress and misrepresentations by Engen.

[14] The application and the counter-application were initially set down for 15 October 2024. The day before the hearing, Slick Oil applied for a postponement. It had not yet delivered its replying affidavit in its counter-application, or its heads of argument. I granted the postponement to 13 November 2024, but ordered Slick Oil to pay the costs of the postponement on an attorney and client scale.

[15] On 13 November 2024, the parties' counsel indicated to me in chambers that the parties were attempting to settle the matter and sought a further postponement to explore that possibility. I postponed the matter to 29 November 2024, but the parties again sought more time, so the matter was postponed to 9 December 2024. The parties were unable to settle their dispute, and I heard the matter on that date.

[16] I intend to deal with the counter-application first. It is in the nature of a special plea, and logically it comes first. It is about who should decide the merits of the dispute between the parties – this Court or an arbitrator. That issue requires resolution before the merits.

[17] The Petroleum Products Act was enacted, in part to address “pervasive” inequality in bargaining power in the industry between wholesalers and retailers.¹ Retailers like Slick Oil generally have “fewer resources” and less bargaining power than wholesalers like Engen.² The Act seeks to equalize their positions.

[18] One of the mechanisms to give effect to that purpose is the statutory right given to both retailers and wholesalers to refer disputes to arbitration. Section 12B(1) provides: “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.”

¹ *Business Zone 1010 CC t/a Emmarentia Convenience Centre v Engen Petroleum Limited and Others* [2017] ZACC 2; 2017 (6) BCLR 773 (CC) at para 47.

² *Crompton Street Motors CC v Bright Idea Projects 66 (Pty) Ltd* [2021] ZACC 24; 2021 (11) BCLR 1203 (CC); 2022 (1) SA 317 (CC)

[19] When it filed its answering affidavit, Slick Oil had not yet made a request to the Controller of Petroleum Products to refer the dispute to arbitration. It belatedly made the request on 12 November 2024, the day before the hearing. Slick Oil's counsel offered various explanations for the delay. They were given from the bar, not in affidavit. I intend to disregard them. The request includes a statement of claim which largely repeats the allegations in the answering affidavit – that Slick Oil did not agree to the contribution, and that it had been forced to make it by misrepresentation and duress.

[20] Section 12B(1) not only provides the procedural protection of a right to refer to arbitration, it also alters the substantive relationship between the parties. In *Business Zone* the Constitutional Court held that the provision imposes an “equitable standard” for contractual relations in the petroleum industry that “overrides the terms of their contract to ensure that fairness and reasonableness prevail.”³ Both courts and arbitrators appointed under s 12B(1) must apply the same standard.⁴

[21] Fortunately, I need not apply that standard to resolve the counter-application. Slick Oil does not directly rely on the substantive equitable standard established by s 12B(1), but on its right to refer dispute to arbitration, and to stay pending litigation until the arbitration is complete. As Mhlantla J explained the position: “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.”⁵

[22] What triggers the right to apply for a stay is the Controller's referral to arbitration or at least a valid request that he makes a referral. The Controller's “discretionary threshold” to refuse a referral “is a low one”.⁶ The only jurisdictional requirement is “an allegation by a retailer that a wholesaler, or vice versa, has committed an unfair or an unreasonable contractual practice.”⁷ The Controller only

³ *Business Zone* (n 1) at para 48.

⁴ *Ibid* at para 56.

⁵ *Ibid* at para 58.

⁶ *Ibid* at para 60.

⁷ *Ibid* at para 61.

needs to be satisfied about the existence of an allegation, not its validity. Once he is, the Controller “should then refer the matter to arbitration.”⁸

[23] When a party seeks to enforce the right to stay litigation pending a s 12B(1) arbitration, it can either rely directly on s 6(1) of the Arbitration Act,⁹ or it can demand the stay as a special plea or by way of a counter-application.¹⁰ A court faced with a request to stay pending the outcome of a s 12B(1) request will apply a similar standard to that applied under s 6(2) of the Arbitration Act – it “must find that there are compelling reasons to refuse the stay”.¹¹ In making that assessment, it must consider “the purpose of section 12B and all its numerous benefits for retailers and wholesalers.”¹²

[24] Slick Oil has, belatedly, made a request to the Controller to refer a dispute to arbitration. As far as I am aware, the Controller has not yet made a decision. Without wanting to prejudge the Controller’s decision, it appears to me that the referral meets the very low threshold to require the referral – an allegation of “an unfair or unreasonable contractual practice by a licensed wholesaler”. Engen did not suggest otherwise.

[25] The question then is whether there are any “compelling reasons” not to stay these court proceedings until the outcome of the referral and, if it is referred, the arbitration. I see none.

[26] Engen’s counsel contended – somewhat half-heartedly – that there were reasons not to stay the litigation. He argued that the referral – and the stay to ensure it is resolved – was simply an attempt to avoid the inevitable. I prefer not to express an opinion on that. Whatever I think about the merits of the current application (and I have intentionally said nothing about my views), the arbitrator should make her own assessment, which will include an assessment of whether any of the contractual practices are “unfair or unreasonable”. I cannot say without knowing what evidence

⁸ Ibid.

⁹ *Crompton Street* (n 2) at para 31.

¹⁰ Ibid at paras 32-4.

¹¹ Ibid at para 43.

¹² Ibid.

will ultimately serve before the arbitrator, what Slick Oil prospects of success might be.

[27] Engen also argued that part of the relief Slick Oil seeks in the arbitration – the extension of its lease for five years – is incompetent. That may be. But Slick Oil seeks a range of other relief as well with which Engen raises no principled objection.

[28] Are there any other reasons? It is obviously frustrating for Engen that the request for referral came so late – just a day before the hearing. There was no acceptable explanation for the delay. I intend to factor that into my award on costs. But I do not think it is a reason to refuse the stay. Slick Oil indicated in its counter application, the request has now been made, and that triggers the entitlement to seek a stay.

[29] Accordingly, I conclude that Slick Oil is entitled to a stay of the main application. That stay must be until the Controller makes a decision on its request and, if he refers it to arbitration, until the completion of that arbitration.

[30] That leaves the issue of costs. Ordinarily, Slick Oil would be entitled to its costs in the counter-application, which has been successful. But there is a modifying factor here – its delay in making the request for referral to the Controller. With merely the promise of a request, and not the request itself, I would likely have dismissed the counter-application. Engen's opposition was entirely reasonable up to the day before the hearing.

[31] In my view, despite Slick Oil's success, each party should bear their own costs in the counter-application. The main application is merely stayed. The costs of that application will need to be determined in due course, depending on the result of the Controller's decision and any arbitration that may follow.

[32] Accordingly, I make the following order:

32.1. The counter-application is granted.

32.2. The main application is stayed pending the outcome of: (a) the Controller of Petroleum Product's decision in terms of s 12B(1) of the Petroleum Products Act 120 of 1977 whether to require the parties to submit the Respondent's allegations to arbitration; and (b) if the Controller does require the parties to submit to arbitration, the outcome of that arbitration.

32.3. Each party shall pay their own costs in the counter-application.

M J BISHOP

Acting Judge of the High Court

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