IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, JOHANNESBURG)

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

[redacted]RE DATE: 26 MAY 2026

CASE NO: 2023/132537

In the matter between:-

SHELL DOWNSTREAM SOUTH AFRICA (PTY) LTD Applicant

and

SHELL RETAILER COUNCIL Respondent

IN RE:

The matter between:-

SHELL RETAILER COUNCIL Plaintiff

and

SHELL DOWNSTREAM SOUTH AFRICA (PTY) LTD Defendant

JUDGMENT

ALLEN AJ

INTRODUCTION

[1] This is an opposed interlocutory application for the stay of the respondent's main action proceedings pending final determination of the disputes by arbitration. The parties did not agree to the filing of a joint practice note in terms of Directive 1 of 2024 and filed separate unilateral practice notes.

[2] Applicant sought the following relief:

> "1. That the main action proceedings brought by the respondent in this Honourable Court, under the same case number, be stayed, pending final determination of the dispute by arbitration.
>
> 2. That the issues in dispute be referred to an arbitration within 15 calendar days from this order in accordance with the provisions of the Shell Franchise Agreement.
>
> 3. Costs of suit in the event of opposition.
>
> 4. Further and or alternative relief."

BACKGROUND

[3] Respondent issued a summons against applicant on 13 December 2023 predicated on 9 claims which evidently are also the disputes. The respondent is a voluntary association, with separate legal personality and perpetual succession, capable of suing and being sued in its own name, and acting with non-profit objectives. The respondent's members are licensed fuel retailers in terms of the Petroleum Products Act, Act 120 of 1977 ("PPA"), conduct business as franchisees and fuel retailers of the applicant. Applicant is a subsidiary of Shell PLC and a licensed fuel wholesaler and franchisor.

[4] Respondent's *locus standi* is as set out in paragraph 8 of the particulars of claim:"D. THE PLAINTIFF'S (SRC'S) LOCUS STANDI

8. SRC is constitutionally mandated by its members to pursue and achieve the following aims and objectives:

8.1. to actively develop, pursue and promote strategies intended to improve the qualitative and quantitative lot of its members in its dealings with Shell;

8.2. to do all things necessary, inclusive of mediation and/or the conduct of arbitration and/or litigation proceedings, in any forum, in order to promote, pursue, and protect the mutual interests and welfare of SRC members, where SRC contends such are being unfairly prejudiced by Shell;

8.3. to promote, through result driven actions, the interests of SRC members;

8.4. to do all things necessary to achieve the aims and objectives of SRC, including but not limited to:

8.4.1. conducting of legal proceedings in any forum;

8.4.2. conducting of proceedings as provided for in the CPA, the PPA, or any other legislation, which may have a bearing on the welfare of its members; and

8.4.3. conducting of arbitration and litigation proceedings against Shell."(Own emphasis)

[5] Respondent served a Rule 41A Notice[1] in terms of the Uniform Rules of Court with its summons wherein it objected to mediation. Applicant filed a reply to the mediation notice that it did not object to mediation.

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[1] "41A. Mediation as a dispute resolution mechanism
(1) In this rule—

[6] Applicant filed a notice of intention to defend on 29 January 2024. Applicant filed a notice in terms of Rule 7(1)[2] of the Uniform Rules on even date disputing the authority of the respondent, respondent's attorneys of record and thereby seeking clarity prior to the launching of this application. Respondent served a reply on 14 February 2024 submitting its constitution and resolutions. This reply was filed on 5 April 2024.

[7] Respondent's constitution and resolutions require closer scrutiny. The constitution was signed on 14 December 2022 to deal on behalf of its members with, amongst other, disputes, legal or arbitration proceedings in any forum, mediation, the Consumer Protection Act, Act 68 of 2008 ("CPA") or any other legislation, arbitration and/or litigation against applicant. Decision making consists of an executive council ("EXCO") and paid-up members also having voting rights.

[8] The "eligible members" passed resolutions mandating the respondent to, inter alia, address/consider/action all iniquitous contractual terms in the franchise agreement with applicant through legal, arbitration or alternative dispute resolution proceedings in any forum, mediation and/or negotiation, arbitration and/or litigation against the applicant. The resolutions were signed by the different regions on 3 and 14 February 2021 respectively, approximately 18 months prior to the signing of the constitution. In the papers before me the resolutions made reference to respondent only and not the constitution or the EXCO. It is questionable whether the constitution came into effect prior to these resolutions or thereafter. No substance was proffered

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"dispute" means the subject matter of litigation between parties, or an aspect thereof.
"mediation" means a voluntary process entered into by agreement between the parties to a dispute, in which an impartial and independent person, the mediator, assists the parties to either resolve the dispute between them, or identify issues upon which agreement can be reached, or explore areas of compromise, or generate options to resolve the dispute, or clarify priorities, by facilitating discussions between the parties and assisting them in their negotiations to resolve the dispute.
(2) (a) In every new action or application proceeding, the plaintiff or applicant shall, together with the summons or combined summons or notice of motion, serve on each defendant or respondent a notice indicating whether such plaintiff or applicant agrees to or opposes referral of the dispute to mediation.
[Rule 41A(2)(a) substituted by GNR 6230 in G. 52750 with effect from 4 July 2025.]
(b) A defendant or respondent shall, when delivering a notice of intention to defend or a notice of intention to oppose, or at any time thereafter, but not later than the delivery of a plea or answering affidavit, serve on each plaintiff or applicant or the plaintiff's or applicant's attorneys, a notice indicating whether such defendant or respondent agrees to or opposes referral of the dispute to mediation" (Own emphasis)

[2] "7. Power of attorney
(1) Subject to the provisions of subrules (2) and (3) a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed, whereafter such person may no longer act unless he satisfied the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application."

to substantiate that the discrepancy was ratified. I am not convinced that the eligible members' resolutions will muster closer scrutiny.

[9] It appears that the respondent only represents those franchisees included. It is not certain whether all franchisees of applicant form part of respondent's council although, in terms of the resolutions passed, it is certain which regions were eligible to pass a resolution. Respondent's EXCO, at a meeting on 3 August 2023, passed a resolution in terms of the constitution to litigate against applicant and to appoint the attorneys of record. In the papers before me it appears that the eligible member regions authorized applicant only and the EXCO authorized the attorneys of record.

[10] I am not convinced that good cause was shown regarding the authority issue predicated on the construction proffered. To this extent, it cannot be said that applicant has taken "other steps" to bring the case one step closer to finality, as the court may postpone the case pending compliance. If, for a moment, it is accepted that the authority issue is not questionable and for the sake of taking the matter forward and in the interests of justice, my conclusions follow hereinafter.

[11] Respondent also filed a Rule 7(1) Notice on 14 February 2024 disputing the authority of applicant's attorneys of record. Applicant replied thereto on 26 February 2024 by submitting a power of attorney and on the same day launched this application.

[12] Respondent filed a Rule 28 Notice[3] on 15 May 2024 wherein it gave notice of its intention to amend its summons by inserting a new claim 10 dealing with the arbitration provisions in terms of the franchise agreement between applicant and its franchisees. The amendment has not been effected to date.

[13] Respondent filed a further affidavit to which applicant has not objected.

DISCUSSION

[14] The franchise agreement between applicant and its franchisees and more specifically clause 29 thereof reads as follows:

[3] Uniform Rules of Court

"29 ARBITRATION AND CONSENT TO JURISDICTION

29.1 In the event of any dispute arising between the Parties in relation to any matter connected with this Agreement or the Schedules hereto (including but not limited to the interpretation of this Agreement, the enforcement of any provision of this Agreement, the breach by any Party of any provision of this Agreement, the validity of this Agreement or any part thereof, the enforceability of any provision of this Agreement, or the validity of any notice given hereunder), the Parties agree that such dispute shall be referred to arbitration by the Parties.

29.2 The Parties agree that should either of the Parties request the Controller to refer an alleged unfair or unreasonable contractual practice to arbitration under clause 12B of the Petroleum Products Act and the Controller finds that the matter be submitted to arbitration, clause 29.3 and 29.4 shall govern the appointment of the arbitrator and the applicable rules. The jurisdiction of an arbitrator appointed for purpose of determining whether an alleged unfair or unreasonable contractual practice occurred is restricted to what is contemplated by section 12B (4) of the PPA.

29.3 On referral of a dispute to arbitration, the parties shall within seven (7) business days thereof appoint an arbitrator by agreement, failing agreement the Chairperson of the Law Society of South Africa (or its successor-in-title) shall be approached to appoint the arbitrator.

29.4 Unless otherwise agreed to by the Parties, the arbitration shall be concluded (i.e. a final arbitral award rendered by the appointed arbitrator on the merits) on an expedited basis within a period of four (4) months from the date of the appointment of the arbitrator or such replacement arbitrator. Should an appointed arbitrator refuse to act or is or becomes incapable of acting or dies or is removed from the office or his appointment is terminated, or is set aside by a court a replacement arbitrator shall be appointed in the manner contemplated by clause 29.3 above. The Parties agree that for the arbitration to be concluded on an expedited basis, the Parties together with the appointed arbitrator shall at the first pre-arbitration meeting agree to the rules applicable to the arbitration proceedings.

29.5 The decision of the arbitrator in respect of any dispute referred to arbitration under this Agreement or the Schedules thereto shall be final and binding.

29.6 Notwithstanding the provisions of this clause, Shell may in its sole discretion at any time if it so elect, institute legal proceedings against the Franchisee:

29.6.1 for recovery of any monies due to it by the Franchisee;

29.6.2 for the immediate return to it of any Shell Equipment;

29.6.3 for any urgent relief from a court; and

29.6.4 under this Agreement or any of the Schedules hereto in any Court and in this regard the Franchisee hereby consents in terms of Section 45 of Act 32 of 1944, as amended, to

Shell instituting any such legal proceedings in the Magistrate's Court of any district having jurisdiction in respect of the Franchisee by virtue of Section 28(1) of the said Act."(Own emphasis)

[15] Paragraph 29 states that referral to arbitration is peremptory. Had it said "may" a party could exercise its discretion accordingly. This alternative is not available to respondent but only to applicant. The franchisees contracted with applicant on this basis and it was never an issue until respondent elected to do so in a proposed amendment of the summons. The summons has not been amended to date and is paragraph 29 not in dispute or the subject of court proceedings wherein a decision is required affecting the merits of the application before me. I am therefore bound by the wording of the franchise agreement and summons as is.

[16] In the matter of *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* **(434/06) [2007] ZASCA 143; [2008] 1 All SA 321 (SCA); 2008 (2) SA 448 (SCA); 2008 (7) BCLR 725 (SCA) (22 November 2007)** it was said in para 22:". . . Whenever two parties agree to refer a matter to a third for decision, and further agree that his decision is to be final and binding on them, then, so long as he arrives at his decision honestly and in good faith, the two parties are bound by it...."

[17] In *Telcordia Technologies Inc v Telkom SA Ltd* **[2006] ZASCA 112; 2007 (3) SA 266 (SCA)** para 51, Harms JA made the following pointed remarks: "Last, by agreeing to arbitration the parties limit interference by courts to the ground of procedural irregularities set out in s 33(1) of the Act. By necessary implication they waive the right to rely on any further ground of review, "common law" or otherwise...."

[18] In *Hos+Med Medical Aid Scheme v Thebe Ya Bophelo Healthcare Marketing & Consulting (Pty) Ltd and Others* **[2007] ZASCA 163; 2008 (2) SA 608 (SCA)** para 30 it was said:"In my view it is clear that the only source of an arbitrator's power is the arbitration agreement between the parties and an arbitrator cannot stray beyond their submission where the parties have expressly defined and limited the issues, as the parties have done in this case to the matters pleaded..."(Own emphasis)

[19] In the further matter of *Lufuno Mphaphuli & Associates (Pty) Ltd v Nigel Athol Andrews, Bopanang Construction* **2009 (4) SA 529 (CC)** it was said:"[216] If we understand s 34 not to be directly applicable to private arbitration, the effect of a person

choosing private arbitration for the resolution of a dispute is not that they have waived their rights under s 34. They have instead chosen not to exercise their right under s 34. I do not think, therefore, that the language of waiver used by both the European Court of Human Rights in *Suovaniemi* and by the Supreme Court of Appeal in *Telcordia* is apt. Indeed, it may not be apt in relation to constitutional rights at all, but that is a topic for another day.

[217] Despite the choice not to proceed before a court or statutory tribunal, the arbitration proceedings will still be regulated by law and, as I shall discuss in a moment, by the Constitution. Those proceedings, however, will differ from proceedings before a court, statutory tribunal or forum. The first difference is that the process must be consensual - no party may be compelled into private arbitration. The second is that the proceedings need not be in public at all. The third is that the identity of the arbitrator and the manner of the proceedings will ordinarily be determined by agreement between the parties. The party who opts for arbitration will have chosen these consequences.

[218] In the light of the foregoing, on a proper construction of s 34 it should be understood not to apply directly to private arbitrations. I differ in this respect, therefore, from the conclusion of Kroon AJ. This conclusion, however, does not mean that the Constitution will have no relevance to private arbitration, as I shall now discuss.

The relevance of the Constitution to the terms of arbitration agreements

[219] The decision to refer a dispute to private arbitration is a choice which, as long as it is voluntarily made, should be respected by the courts. Parties are entitled to determine what matters are to be arbitrated, the identity of the arbitrator, the process to be followed in the arbitration, whether there will be an appeal to an arbitral appeal body and other similar matters.

[220] However, as with other contracts, should the arbitration agreement contain a provision that is contrary to public policy in the light of the values of the Constitution, the arbitration agreement will be null and void to that extent (and whether any valid provisions remain will depend on the question of severability). In determining whether a provision is *contra bonos mores*, the spirit, purport and objects of the Bill of Rights will be of importance. As stated above, it is not necessary to determine what role s 34 might play in this analysis."

[20] Applicant brought this application in terms of Section 6 of the Arbitration Act, Act 42 of 1965, which reads as follows:

"Section 6 – Stay of legal proceedings where there is an arbitration agreement

(1) If any party to an arbitration agreement commences any legal proceedings in any court (including any inferior court) against any other party to the agreement in respect of any matter agreed to be referred to arbitration, any party to such legal proceedings may at any time after

entering appearance but before delivering any pleadings or taking any other steps in the proceedings, apply to that court for a stay of such proceedings.
(2) If on any such application the court is satisfied that there is no sufficient reason why the dispute should not be referred to arbitration in accordance with the agreement, the court may make an order staying such proceedings subject to such terms and conditions as it may consider just." (Own emphasis)

[21] Applicant also relies on Sections 34 and 173 of the Constitution, Act 108 of 1996 ("The Constitution"), which reads as follows:
"34. Access to courts
Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.
173. Inherent power
The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

[22] The franchise agreement states that applicant can elect to litigate or arbitrate whereas the franchisee shall arbitrate any dispute between the parties. The franchisees elected to be represented by respondent. In my view the issuing of respondent's summons appears to be premature as respondent had alternative remedies at its disposal. Respondent's rights are conferred as set out in the franchise agreements and it cannot have more rights than the franchisees it represents. In addition, respondent was not a party to the franchise agreements and when representing the franchisees or a portion of those franchisees eligible regarding their franchise agreements, cannot act outside the wording of the franchise agreement which sets out the relationship between the franchisor and the franchisee. Applicant, furthermore, is not a member or a party to respondent's council and is therefore only bound through its franchise agreements. Respondent's constitution and the February 2021 resolutions make provision for arbitration and respondent's mandate is therefore not inconsistent with the franchise agreements.

[23] In the papers before me there were attempts to mediate prior to the issuing of the summons. The contents of those disputes are not before me.

[24] The respondent's Rule 41A(2)(a) Notice reads as follows: "The plaintiff opposes the referral of this matter to mediation. The plaintiff does so for the following reasons:

"1. The plaintiff and defendant's attempts to resolve the dispute between the parties have been unsuccessful.

2. There is no reasonable or realistic prospect of this matter being resolved by way of mediation."

[25] In the Gauteng Division a revised directive was issued introducing mandatory mediation effective from 22 April 2025 for mediation to be conducted according to the guidelines in the Mediation Protocol for the Gauteng Division.[4] The process is initiated by the Rule 41A Notice. In this case a subsequent Amplified Rule 41A Notice is applicable, but not filed.

[26] The process was not initiated correctly and the current Rule 41A Notice is inadequate and constitutes an irregular notice.[5] Applicant did not take steps in this regard, but launched this application.

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[4] "2. COURT-ANNEXED MEDIATION PROTOCOL
2.1 Purpose & Aim
2.1.1. The purpose of this Protocol is to provide a structured standardised yet flexible framework for implementing court-annexed mediation in the Gauteng Division of the High Court (Gauteng Division), pursuant to the Mediation Directive.
2.1.2. This Protocol aims to:
2.1.2.1. Ensure compliance with Rule 41A of the Uniform Rules of Court (Rules).
2.1.2.2. Promote the efficient administration of justice in the Gauteng Division whilst also transforming access to justice and the availability of the courts to the litigating public.
2.1.2.3. Promote the use of mediation as an alternative dispute resolution mechanism to alleviate congestion on the court rolls.
2.1.2.4. Enhance access to justice by providing an efficient, cost-effective, and less adversarial method of resolving disputes.
2.1.2.5. Foster a culture of cooperation and mutual respect among litigants.
2.2. Scope of Application
2.2.1. This Protocol applies to all civil trials in the Gauteng Division, including but not limited to commercial disputes, delictual claims, family disputes and personal injury claims (including, specifically, all actions where habitual litigants such as the Road Accident Fund (RAF) or Gauteng MEC for Health is the defendant).
2.2.2. A court directing or encouraging the parties to engage in mediation in a case which is not a trial, may direct the parties to apply this Protocol.
2.2.3. This Protocol applies uniformly to both the Pretoria and Johannesburg seats of the Gauteng Division.
2.2.4. Nothing in the Mediation Directive or this Protocol shall detract from the right of the parties to refer their dispute to mediation in accordance with the provisions of Rule 41A, Page | 1 MEDIATION PROTOCOL FOR THE GAUTENG DIVISION or otherwise by agreement between them, or from a Judge, or a Case Management Judge referred to in Rule 37A, to direct the parties to consider the referral of a dispute to mediation as contemplated in Rule 41A(3)."

[5] "4.7. Irregular Notices:
4.7.1 A generic Rule 41A notice delivered by a party (the delinquent party) to another party (the aggrieved party), either of its own volition or in response to the receipt of an Initial Rule 41A Notice or an Amplified Rule 41A

[27] Respondent raised two points *in limine* in the answering affidavit. In the first point *in limine* it is respondent's case that applicant has taken "other steps" by filing a reply in terms of Rule 41A and a Rule 7 Notice instead of launching its current application. Applicant therefore "no longer qualifies to apply, and it has abandoned and/or waived the right to seek a stay of the SRCs action".

[28] Respondent's Rule 41A Notice is inadequate and irregular and consequently the reply thereto cannot regularize the notice and be considered as another step. An Amplified Rule 41A Notice remains outstanding. The applicant's Rule 7 Notice, similarly, cannot be considered as another step for the reasons proffered hereinbefore.

[29] In the second point *in limine* it is respondent's case that applicant failed to identify any dispute(s) and an identified or identifiable dispute must exist before any question of arbitration can arise. In addition, applicant has failed to set out those disputes in the proceedings sought to be stayed and must be properly formulated in applicants founding papers for reliance on a Section 6 (1) application. In my view applicant has identified the disputes in its founding affidavit and upon consideration thereof, are the same as in respondent's summons.

[30] In the circumstances respondent's points *in limine* must fail.

[31] Respondent should have referred the disputes to arbitration first and not elected to issue a summons on the assumption that there is no reasonable or realistic prospect of the matter being resolved by way of mediation. Respondent's authority to represent certain members is cloudy. Respondent did not make out a case in its Rule 41A Notice why there is no prospect of the disputes being resolved by way of mediation.

Notice from the aggrieved party, as the case may be, which simply rejects the referral of the matter to mediation without cogent reasons (specifically and directly applicable to the unique facts of the matter) motivating why:
4.7.1.1. the matter cannot be resolved, either in full or partially; and
4.7.1.2. none of the other aspects provided for in terms of Rule 41A including:
4.7.1.2.1. the identification and classification of issues in dispute, and
4.7.1.2.2. the procedural aspects and timelines to be applicable to the further conduct of the matter can be dealt with by way of mediation, is inadequate and constitutes an irregular notice (irregular notice).
4.7.2. An aggrieved party who received such an irregular notice shall be entitled to proceed in accordance with the provisions of Rule 30A. Furthermore, the provisions that relate to delinquent parties, as set out in paragraph 4.9 below, shall be applicable and the aggrieved party shall be entitled to proceed accordingly."

[32] If, for a moment, it is accepted that applicant did not identify any disputes and applicant has taken other steps, it does not negate the fact that respondent, as representative of the franchisees, is bound by clause 29 of the franchise agreement.

[33] In addition, in terms of Rule 41A as well as the Mediation Directive of this Division should respondent persist by not agreeing to arbitration, I can direct that the matter be referred to mediation.

[34] Respondent on behalf of its members and duly authorized should have either instituted/referred the disputes for arbitration in the name of either/all the franchisees separately or in a representative capacity representing fully paid-up eligible members. To protect the members identities, respondent proceeded in its name. Predicated on respondent's authority and the wording of the particulars of claim I come to the conclusion that respondent is a "party" as defined in Section 1 of the Arbitration Act[6].

[35] Respondent elected to litigate in a representative capacity regarding the disputes the franchisees have with applicant.[7] Paragraph 11 of respondent's particulars of claim reads as follows:

> "11. In respect of Shell's below alleged conduct, and to the extent necessary and/or required:
>
> 11.1. SRC members are individually reluctant to raise a dispute, and/or take Shell to task, regarding Shell's alleged conduct because they verily and genuinely fear recriminations, victimization and or retribution by Shell (see also paragraph 24 below); and/or

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[6] 1. In this Act, unless the context otherwise indicates-
(i) "arbitration agreement" means a written agreement providing for the reference to arbitration of any existing dispute or any future dispute relating to a matter specified in the agreement, whether an arbitra tor is named or designated therein or not;
(vi) "party", in relation to an arbitration agreement or a reference, means a party to the agreement or reference, a successor in title or assign of such a party and a representative recognized by law of such a party, successor in title or assign"(Own emphasis)

[7] In the case of *EX-TRTC United Workers Front and Others v Premier, Eastern Cape Province* **2010 (2) SA 114 (ECB)** at page 124 and 125 it was said:"...In effect the rule says this: The common-law procedure of suing each individual member of an unincorporated association need therefore not to be followed, the plaintiff being entitled to sue the unincorporated association by name.' The rule enables a plaintiff to successfully sue the members of an association, or, in the case of a partnership, the individual partners where he may not know who they are. What it effectively does is to allow the individual persons who form the partnership, firm or association to sue or be sued in the name the entity usually bears. 'Implicit in at least the provisions of subrules (1) and (2) is that the actual party which trades thus is the actual plaintiff.' To put it differently, the members of the partnership or association, as the case may be, will be regarded as if they had been cited individually by name."

11.2. SRC (and/or its relevant members), and Shell have been unable to amicably and/or successfully mediate and/or resolve its/their concerns, and/or the disputes between them, regarding Shell's conduct alleged infra; and/or

11.3. Shell seeks unilaterally to impose, unreasonable terms and conditions (Rules of Engagements) on any such engagements and/or mediations; and/or

11.4. Endeavours by SRC (and/or its relevant members) to engage and/or mediate with Shell regarding Shell's alleged conduct would be an exercise in futility given the parties' respective unequal bargaining positions and powers (see topic F below)." (Own emphasis)

[36] The respondent also sued as an authorized person with authority conferred upon it in terms of Section 4 of the CPA. Respondent also relies on Section 38(e) of The Constitution.[8]

[37] In paragraph 24 of the particulars of claim respondent also elected not to disclose the names of the franchisees "in order to protect the anonymity and/or identity of the relevant franchisee in circumstances where SRC's members (the franchisees) verily and genuinely fear recriminations, victimisation, and/or retribution by Shell because of their (identifiable) participation in this action". It is respondent's case that it be allowed to litigate on behalf of some unidentified franchisees who voluntarily contracted with applicant and having disputes with applicant which disputes should be resolved by respondent in a representative capacity without disclosing the other contracting party's identity. Predicated on this, the franchise agreement remains a franchise agreement until validly cancelled or amended and respondent is bound by the terms thereof. Respondent is not prevented from referring the relevant disputes disclosed to

[8] "38. Enforcement of rights
Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are -
a.....
e. an association acting in the interest of its members."

arbitration or mediation for consideration in accordance with the resolutions and respondent's mandate.

[38] The franchise agreement, clause 25.1, reads as follows: "The franchisee may not without Shell's prior written consent, cede, assign, delegate and transfer any of its rights and obligations under this agreement" and clause 25.2 specifically records the terms and conditions under which applicant's consent in writing to be given. In the papers before me the consent issue was not raised. I accept applicant has no objection to the franchisees' appointment of the respondent regarding their rights.

[39] The CPA also finds application in this matter. A consumer may refer any dispute in terms of Section 70.[9] Respondent is of the view that the relief sought are beyond the remedial powers of any arbitrator or alternative forum. Respondent has not proffered any substance to substantiate its view or any findings by an arbitrator or alternative forum that the disputes are not within their jurisdiction and powers.

[40] Clause 31.3 of the franchise agreement under the heading "Other CPA Provisions" reads as follows: "Any provision in this agreement, which is in conflict with the CPA (including the CPA regulations) is void to the extent of such a conflict, in which event such provision shall be treated as *pro non script* (as though it had not been written) and shall be deemed to be severed from this agreement and the remaining provisions and clauses of this agreement shall remain of full force and effect." Respondent has not taken any steps in this regard.

[41] Clause 29 of the franchise agreement refers to Section 12B of the PPA which also finds application.[10] Respondent elected to also not make use of this alternative

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[9] "Alternative dispute resolution
70. (1) A consumer may seek to resolve any dispute in respect of a transaction or agreement with a supplier by referring the matter to an alternative dispute resolution agent..
(2) If an alternative dispute resolution agent concludes that there is no reasonable probability of the parties resolving their dispute through the process provided for, the agent may terminate the process by notice to the parties,..."(Own emphasis)

[10] "12B. Arbitration
(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)—

remedy available, alternatively no substance was proffered that respondent did make use of this remedy and the outcome thereof.

[42] In the matter of *Mfoza Service Station (Pty) Ltd v Engen Petroleum Ltd and Another* **(CCT 167/21) [2023] ZACC 3; 2023 (4) BCLR 397 (CC); 2023 (6) SA 29 (CC) (1 February 2023)** it was said:"[32] Section 12B, in general terms, provides that a licensed retailer or wholesaler in the petroleum products industry may, upon alleging an unfair or unreasonable contractual practice by the other party, request the Controller to submit the matter to arbitration. The arbitrator must determine whether the alleged practice is unfair or unreasonable, and in such event, is obliged to make an award he or she deems necessary to correct such practice.

[34] Section 12B also operates against the backdrop of a contractual relationship between the parties that is subject to the equitable standard of fairness and reasonableness. To that extent, it is a far-reaching measure that seeks to achieve a necessary and transformative objective in the petroleum industry, but it is also a measure that brings with it its own challenges. This Court has in *Business Zone CC* [11]said that there was—

"no reason why the specifics of the general standard of fairness and good faith in the common law of contract should not be given shape in the context of petroleum contracts, as is done in the context of labour or rental housing contracts.

[37] In sum, the features of the section 12B arbitral system reflects a mechanism that is limited in its scope and application. It is confined to dealing only with contractual practices that are alleged to be unfair or unreasonable and then to correct those practices. The jurisdiction of the High Court is not ousted by section 12B, and what emerges are parallel systems whose scope and reach may differ but share a common adjudicative standard.

[40] Section 12B(4)(a) requires an arbitrator to establish whether the alleged contractual practices are unfair or unreasonable and, if so, to correct such practice by the making of an award. It follows that all that an arbitrator is required to do is to make a determination whether

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(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."(Own emphasis)

[11] *Business Zone 1010 CC t/a Emmarentia Convenience Centre v Engen Petroleum Limited* **[2017] ZACC 2; 2017 (6) BCLR 773 (CC)** at para 55

a contractual practice is unfair or unreasonable. There is no power nor requirement for the arbitrator to go beyond that and matters of fault, causation, loss, or damage fall outside of the enquiry. Once an arbitrator has made a determination that a contractual practice is unfair or unreasonable then the arbitrator has wide powers but they are confined to correcting the practice. One must therefore distinguish the limited nature of the determination that an arbitrator is required to make and the wide powers of redress following such a determination. The purpose of making the award is that it must be *necessary to correct such practice.* The arbitration model is a creation of statute and the power of the arbitrator is derived from the PPA. It is a power that must be exercised within its lawful parameters and for the purpose it has been given.[12]

[41] It must follow that the award may go no further than correcting the practice. This is the ordinary meaning that the section must attract, and it was not in dispute before us that the remedial power of the arbitrator is limited to being a corrective one. The meaning of what it is to "correct a practice" is where the parties part ways."[13](Own emphasis)

[43] The CPA and PPA are to be read with Section 40 of the Arbitration Act.[14]

[44] In my view summons has been issued prematurely, alternatively the action to be stayed as none of the available alternative remedies were exhausted, alternatively no substance was proffered why they could not be exhausted. In addition, no substance was proffered disclosing the outcome of any of the alternative remedies possibly exhausted to enable the respondent to proceed with its action or to prevent a stay.

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[12] *Minister of Public Works v Haffejee N.O.* **[1996] ZASCA 17; 1996 (3) SA 745 (SCA)** at para 11

[13] See also *Rissik Street One Stop CC t/a Rissik Street Engen and Another v Engen Petroleum Ltd* **(CCT 196/21) [2023] ZACC 4; 2023 (4) BCLR 425 (CC); 2024 (4) SA 447 (CC) (1 February 2023)** where it was said:"
[1] Section 12B of the Petroleum Products Act (PPA) was introduced in recognition of the deep inequality within the retail fuel industry and with the objective of transforming that industry. It introduced a normative framework of fairness and reasonableness that would apply to all contracts in the industry. It also created an arbitral mechanism to ensure that unfair or unreasonable contractual practices were capable of being identified and corrected. This case presents compelling evidence of the contours of that inequality while at the same time representing a searching test of the scope and efficacy of the legislative promise that section 12B heralded.
[72] Such an outcome would be inimical to bringing about change in power relations in the fuel industry, to which the PPA is committed. Courts must, in the pursuit of these legitimate constitutional imperatives, interpret the PPA and the contracts in the industry through the lens of the transformative commitment that the PPA seeks to achieve. This, of course, does not mean that courts are at liberty to make and impose contracts for the parties in the name of transformation and beyond what the parties may have intended for themselves. However, section 12B enjoins the parties to look beyond the written terms of their contracts in recognising the normative framework of fairness and reasonableness that the section introduced as an overarching framework that governs all contracts in the retail fuel industry."(Own emphasis)

[14] "40. This Act shall apply to every arbitration under any law passed before or after the commencement of this Act, as if the arbitration were pursuant to an arbitration agreement and as if that other law were an arbitration agreement: Provided that if that other law is an Act of Parliament, this Act shall not apply to any such arbitration in so far as this Act is excluded by or is inconsistent with that other law or is inconsistent with the regulations or procedure authorized or recognized by that other law."

[45] Respondent has not proffered good and sufficient reasons to persuade me to exercise my discretion to refuse a stay at this stage. In my view the possible development of the common law, although not pleaded by respondent, will not necessarily be excluded through the referral of the disputes to arbitration.

[46] If, for a moment, it is accepted that summons was not issued prematurely and applicant has not met the requirements to bring this application in terms of Section 6 of the Arbitration Act, then Clause 29 of the franchise agreement, the CPA, the PPA, Section 6(2) of the Arbitration Act, my discretion in terms of Rule 41A and my discretion in terms of the Compulsory Mediation Directive of this Division makes it abundantly clear that it is in the interests of justice that the main action be stayed at this stage.

CONCLUSION

[47] Consequently, in my view, applicant has made out a case and it is in the interests of justice that the main action proceedings brought by the respondent in this Honourable Court under the same case number be stayed pending the final determination of the disputes by arbitration in accordance with the provisions of the applicant's franchise agreement. Costs are to follow the result.

[48] In the result the following order is made:

ORDER:

1. The main action proceedings brought by the respondent in this Honourable Court under the same case number is hereby stayed pending the final determination of the disputes by arbitration.

2. The issues in dispute are hereby referred to arbitration within 15 calendar days from the date of this order in accordance with the provisions of the applicant's franchise agreement.

3. Costs of suit on scale C.

ALLEN AJ

ACTING JUDGE OF THE HIGH COURT,

GAUTENG DIVISION, JOHANNESBURG

This judgment was prepared by Acting Judge Allen. It is handed down electronically by circulation to the parties or their legal representatives by email, by uploading to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 26 May 2026.

HEARD ON:	13 May 2026
DECIDED ON:	26 May 2026
For the Applicant:	Adv H Louw
Instructed by:	Cliffe Dekker Hofmeyr Inc
For the Respondent:	Adv G W Amm SC
Instructed by:	Lanham-Love Inc