

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 2024-147755

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
	<u>2 June 2026</u> [REDACTED]
DATE	SIGNATURE

In the matter between:

TABARAKH INVESTMENTS CC t/a SASOL WEST VILLAGE

Applicant

and

SASOL OIL (PTY) LTD

First Respondent

BLUEHILLS DEVELOPMENTS (PTY) LTD

Second Respondent

JUDGMENT

DJ Smit, AJ

Introduction

- [1] Did a fuel wholesaler, *prima facie*, act unfairly and unreasonably by not renewing a franchise agreement with a fuel retailer?

- [2] This is the question that serves before this court on the return date of a rule *nisi* issued by the urgent court on 31 December 2024. The urgent court coupled the rule *nisi* with an interim interdict preserving the position of the retailer in all respects while an arbitration is pending.
- [3] The question arises against the backdrop of section 12B of the Petroleum Products Act, 120 of 1977.¹ Among other things, the section provides for a compulsory statutory arbitration where a fuel retailer alleges “*an unfair or unreasonable contractual practice by a licensed wholesaler*”. The arbitrator “*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*”.
- [4] Section 12B of the Petroleum Products Act 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

¹ Which provides:

“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) –
 - (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 any order as to costs to be borne by one or more of the parties concerned.”

an arbitral mechanism to ensure that unfair or unreasonable contractual practices were capable of being identified and corrected.²

- [5] The common-cause facts show that the retailer in question had carried on business at the relevant premises for more than 21 years. Over the years, the retailer had several opportunities to sell the retail business. The wholesaler warned the retailer, over a long period, that the franchise would not be renewed at the end of 2024. The reason for the non-renewal was that the wholesaler's long-term lease with the landlord of the retail premises, came to an end.
- [6] The landlord – who was not before the Court when the urgent application was brought – set it as a requirement for a renewal that the landlord would nominate a new operator for the retail business who would then become the wholesaler's franchisee. After the rule *nisi* was issued, the landlord joined the application to explain the prejudice it would suffer if the rule were to be confirmed. It explained that the retailer – Tabarakh Investments CC trading as Sasol West Village (*Tabarakh*) – was now holding over, preventing refurbishment of the premises and delaying the incumbency of the new franchisee.
- [7] In what follows, I deal with:
- a. The background of the matter;
 - b. The urgent application;
 - c. The intervention by the landlord;
 - d. Preliminary issues;
 - e. The role of a court in considering a rule *nisi*; and
 - f. The requirements for an interim interdict.

² *Rissik Street One Stop CC t/a Rissik Street Engen v Engen Petroleum Ltd* 2024 (4) SA 447 (CC) para 1.

Background

- [8] Tabarakh is a close corporation which carries on a fuel retail business in Krugersdorp, on the R28. It is a franchisee of Sasol Oil (Pty) Ltd (*Sasol*), a fuel wholesaler which is part of the Sasol Group, one of South Africa's largest oil and gas companies.
- [9] Mr Riaz Valley is the sole member of Tabarakh. He supports his family from the income earned from his interest in Tabarakh. Tabarakh also has sixteen employees who depend for their livelihood on Tabarakh's continued business.
- [10] Both Tabarakh and Sasol are required to be licensed, as retailer and wholesaler respectively, under the Petroleum Products Act. In Tabarakh's case, the retail license is linked to the premises from which it operates. In other words, if it must relocate the business (assuming that is possible), it loses its retail license.
- [11] Tabarakh (as franchisee) entered into a franchise agreement with Exel (Pty) Ltd (as franchisor) with effect from 1 July 2002. In 2003, Sasol purchased the franchisor, thus becoming the franchisor.
- [12] Bluehills Development (Pty) Ltd (*Bluehills*) is the owner of the premises on which Tabarakh carries on its operations. Sasol is the tenant under a long lease with Bluehills. The long lease on the premises started in 1999 and ran out on 31 December 2024. Sasol has certain rights of pre-emption and first refusal for a five-year period after 2024, but no automatic right to renew the lease.
- [13] Sasol explained that its usual business practice is as follows: At first, it typically enters into a five-year franchise agreement which gives the franchisee an option to renew, first for another five-year period and then for longer (up to ten years):
- a. The length of the first five-year period should allow the franchisee to recoup the value of the sunk costs of the franchise.
 - b. The length of the longer period depends on the length of the underlying tenure on the premises on which the retail operation is conducted. Sasol does not typically own the premises.

- [14] Sasol does not offer franchise agreements beyond the duration of the underlying lease on the premises, because it has – at that time – to negotiate a new lease with the landlord. The terms on which a landlord is willing to lease a property to Sasol often change dramatically once a Sasol convenience store and petrol station has been established there for many years. Therefore, landlords at the renewal of the lease agreement with the wholesaler drive a hard bargain which, in turn has to influence the terms of the franchise agreement. Therefore, it is against Sasol's interests to create the impression that it would renew franchise agreements, at least after the initial three periods have run their course.
- [15] Sasol and Tabarakh entered into several further franchise agreements over the years. Sasol could not find the first franchise agreement it entered into with Tabarakh, but its records reflect that the second renewal of the initial agreement with Tabarakh terminated in 2013 by effluxion of time. After this, Tabarakh refused to sign a new agreement and attempted to find a buyer for the business.
- [16] In 2017, Tabarakh (with Sasol's cooperation) unsuccessfully tried to sell the business.
- [17] At a meeting on 26 April 2018, Mr Valley was reminded that Tabarakh needed to sign the franchise agreement for the (normal) third renewal. He was also reminded that the lease for the premises was due to expire in 2022 and that Sasol would only negotiate an extension to the franchise agreement until 2022. This buffer was built in to allow for a lengthy negotiation period with the landlord. According to Sasol, the purpose of reminding Mr Valley of this limitation on renewal was that he would understand that the goodwill he could realise from a sale of business was limited to the remaining period of the franchise agreement. Mr Valley noted that he was struggling to find a buyer.
- [18] On 10 August 2020, Tabarakh signed the third renewal of the franchise agreement. While it was in form a nine-year renewal, the nine years were calculated from 2013 (when the previous agreement terminated) to 29 June 2022. The third renewal did not contain any option to renew the franchise agreement, and (according to Sasol, and not denied) Tabarakh was told in a meeting that Sasol could not grant a right to renew.

- [19] Sometime in 2021, a third prospective sale of Tabarakh's business did not materialise. According to Mr Valley, this was because Sasol told the potential purchaser of Sasol's inability to offer a franchise agreement beyond 2024. Mr Valley was thus in no doubt, even in 2021, of the limited horizon of his franchise.
- [20] After the third renewal ran out by effluxion of time on 29 June 2022, Sasol wished to offer Tabarakh a very limited further renewal until 30 December 2024 since its lease agreement with Bluehills terminated on 31 December 2024. For a time, Tabarakh avoided signing this final renewal. Mr Valley said that he wanted his lawyers to consider its contents.
- [21] Eventually, during April 2023, Mr Valley signed the version of the franchise agreement which was in force when this dispute erupted towards the end of 2024. Its duration was from 30 June 2022 to "a period not exceeding 30 December 2024" (unless terminated before).
- [22] During the ensuing period, Sasol actively reminded Tabarakh of the termination at the end of December 2024. Its Retail Accounts Manager engaged in site visits. He raised the impending termination with Mr Valley on 14 August 2024 and 26 September 2024. At the latter of the meetings, the Retail Accounts Manager warned Mr Valley that he needed to start scaling down Tabarakh's business.
- [23] In late October 2024, two of Sasol's employees attempted to meet with Mr Valley to discuss Tabarakh's exit from the premises. Mr Valley was not available. Thus, on 25 November 2024, Sasol sent a letter dated 12 November 2024 to Tabarakh in which it formally notified Tabarakh of the termination of the agreement by effluxion of time. The notice required Tabarakh to hand vacant and undisturbed possession of the premises to Sasol by 31 December 2024 and to wind up all other aspects such as supplier relations and employee retrenchment.
- [24] Several reminders followed from Sasol; and Tabarakh engaged attorneys to demand that Sasol refrain from taking steps to enforce the termination.
- [25] On 12 December 2024, only eighteen days before the expiry of the franchise agreement, Tabarakh lodged a request for arbitration with the Controller of

Petroleum Products. The request alleges that Sasol engaged in unfair and unreasonable contractual practices as follows:

- a. Sasol has given no reason for the termination of the franchise agreement.
- b. Sasol created a reasonable expectation that the franchise agreement would be renewed, given the 22-year history of the franchise.
- c. Any third party who “takes over” the franchise would unfairly benefit from the goodwill Tabarakh has built up in the business over the years. This means that Tabarakh cannot sell the business for its market value, to recoup the goodwill. The termination thus unfairly and unreasonably interferes with Tabarakh’s right to operate its business and with its inherent value. Tabarakh was not afforded a fair opportunity of at least one year to sell its business.

[26] On 17 December 2024, Sasol signed a new lease with Bluehills after months of negotiation. The rental payable by Sasol was significantly increased and the landlord insisted on a clause that Sasol would appoint either the landlord, or an operator nominated by the landlord and approved by Sasol, as the franchisee.

The urgent application

[27] Tabarakh launched the urgent application on 13 December 2024 and set it down on 24 December 2024. The urgent application asked for an order which would preserve Tabarakh’s commercial position, i.e. would allow it to continue its business, pending the outcome of the arbitration proceedings.

[28] The main thrust of the urgent application was that, if the position was not preserved, Tabarakh would lose the goodwill embedded in its business, which it valued at R3.5 million. Tabarakh contended it is unfair to let a new franchisee take advantage of that goodwill, which it receives for free and for which Tabarakh is not compensated. Further, the last fixed-term renewal commenced on 30 June 2022 terminating on 30 December 2024. This was in itself unfair, Tabarakh contended. There was a reasonable expectation that it would be renewed, given

the history of the renewals. But the unequal bargaining position between the parties was such that Tabarakh could not object to the term.

- [29] Neither the landlord, Bluehills, nor the entity described as the “incoming franchisee”, Henley Fuels West Village (Pty) Ltd (*Henley Fuels*) was cited in the urgent application. It is this aspect which gave rise to the rule *nisi*, which the urgent court issued together with its judgment on 31 December 2024. The rule *nisi* provided that the order issued by the court operates as an interim order until the return date. The urgent court at that stage set the return date as 13 February 2025, although the rule was extended twice, until it came before me in the opposed motion court on 3 March 2026.
- [30] The rule *nisi* ordered that the urgent court’s judgment and order had to be served on Bluehills and Henley Fuels by 13 January 2025 to allow them to join proceedings to indicate why the interim order should not be made final on the return date. The rule *nisi* also ordered Sasol to preserve Tabarakh’s commercial position pending the outcome of the section 12B arbitration.
- [31] The main thrust of the urgent court’s judgment is that the arbitrator could conclude that Sasol was engaging in an unfair or inequitable practice by denying Tabarakh the opportunity to realise its goodwill. For that reason, the urgent court concluded the status quo should be preserved while the arbitration proceeds.

The intervention of Bluehills and its aftermath

- [32] On 27 January 2025, Bluehills filed an application to join as an interested party. It contends that this court should discharge the interim order granted on 31 December 2024. It also filed a supporting and confirmatory affidavit on behalf of Henley Fuels, which is a party related to Bluehills.
- [33] Bluehills contends that Henley Fuels and Bluehills will suffer significant prejudice should the interim order be confirmed. The only reason why Bluehills entered into a new lease with Sasol is the fact that Bluehills procured an exclusive right to appoint a dealer and/or operator of its choice as franchisee. In return, Bluehills would completely refurbish the site. The plan was to break ground before the end

of January 2025 and for the doors of the new facility to open on 1 July 2025. This would be delayed due to the interim order.

- [34] Because of the interim order, Sasol was unable to finalise the appointment of Henley Fuels as franchisee. Sasol has been unable to give occupation to Bluehills and Sasol is therefore in material breach of the new lease, with the result that Bluehills is entitled to cancel the lease with immediate effect. (It is not disputed that Bluehills has, since then, cancelled the lease with Sasol.)

Preliminary issues

- [35] Bluehills applied to be joined to the application, which was not opposed.
- [36] After Bluehills filed its papers and Tabarakh answered them, both Sasol and Tabarakh filed further affidavits. The purpose of these affidavits was to highlight delays in the commencement and conduct of the section 12B arbitration and to debate the reasons for these delays. The termination by Bluehills of the lease with Sasol was also recorded, as well as the fact that Bluehills had instituted eviction proceedings against Tabarakh.
- [37] At the hearing, it was common cause that these affidavits should be admitted. This means that there are now seven sets of affidavits before the court.

The role of a court in considering a rule nisi on the return date

- [38] There was a debate before me regarding the role of a court on the return date of a rule *nisi*.
- [39] Tabarakh argued that this court is bound by the reasoning and order of the urgent court and may only deviate from it (if at all) insofar as the submissions by Bluehills are concerned (since Bluehills was not heard during the urgent application). Thus, it was argued, upon the return day of a rule *nisi*, the court may not reconsider the matter as a whole but may only consider factors which were not before the court making the rule in the first place.
- [40] For this proposition, Tabarakh quoted *dicta* in *Quits Aviation Services* in which this court held that a reconsideration of an order given *ex parte* –

“ ... may even be on the same papers. That hearing is not an appeal; it is what as word says, a ‘reconsideration’. The reason why the application is permitted to be reconsidered, is because the absent respondent was not present in the first place when the matter was argued and an order was granted. If the application is then reconsidered, and it is dismissed, it is akin to an application on notice which is dismissed.”³

- [41] Tabarakh contends that this means that the court hearing the matter is *functus officio* in respect of the considerations raised by Sasol. It seems to me that Tabarakh's contentions are not supported by the quoted *dicta*, which contemplates a reconsideration.
- [42] Sasol contends that a court must on the return date of a rule *nisi* consider the matter *de novo*. The court must consider whether the interim interdict is apposite in light of all the facts including those set out by new party (Bluehills). It may also consider material events since the rule *nisi* was made. Sasol cited the judgment of the Constitutional Court in *Zondi*, which held that –

“It is not uncommon for a court to make an order and reserve to itself the power to vary the order made. In the past this Court has reserved its authority to reconsider orders for costs or vary the period of suspension of a declaration of invalidity or made further appropriate orders. Thus in *Steyn*, the Court allowed the Minister of Justice and Constitutional Development to apply to it for an order varying the terms stipulated in the order or extending the period of suspension provided in the order. Such orders expressly contemplate that the order made may be varied if the circumstances warrant it. By their very nature such orders are therefore not final. Neither the principle of finality nor the doctrine of *functus officio* arise in relation to such

³ *Quits Aviation Services Limited v Empire Engineering (Pty) Ltd* [2016] ZAGPJHC 218 (17 August 2016) paras 8-9.

orders. Those who are bound by these orders know in advance that the order is not final."⁴

[43] The debate before me raises the question: what is a court's role on the return date of a rule *nisi*? Is it a rubber-stamp, bound by the reasoning of the court issuing the rule? Or is it a reconsideration untrammelled by what had preceded?

[44] The question was answered by the Appellate Division (as it then was) in *Safcor Forwarding*. The Appellate Division considered the approach of a review court where a court had made an interim order in the form of a rule *nisi* pending the review court's decision on the return date (where the correct parties were before the court when the rule was issued). Corbett JA (as he then was) held –

*"Very often legal rulings are inextricably bound up with the facts placed before the Court. Obviously in such a case a ruling at the rule nisi stage could not bind the Court finally hearing the matter on a more broadly-based factual foundation. In some instances the ruling of law might transcend the particular facts and be applicable both at the rule nisi and the final stages. Assuming that in that event the ruling could be regarded as a binding precedent, I can see no reason why on that score the rule nisi procedure should be condemned. The same position would obtain in the case of a rule nisi granted on an ordinary application, where a similar situation arose."*⁵

[45] The following emerges from the above cases, and from general principle:

- a. Where a court issues a rule *nisi*, it explicitly and by its very nature contemplates that the matter will be reconsidered later. By their very nature such orders are not final and are susceptible to variation or discharge. Issues of *functus officio* or finality do not arise.
- b. The hearing on the return date of a rule *nisi* can be (but is not necessarily) on the same papers. This makes no difference in principle to the nature of

⁴ *Zondi v MEC, Traditional and Local Government Affairs* 2006 (3) SA 1 (CC) para 49, internal citations omitted.

⁵ *Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission* 1982 (3) SA 654 (A) at 676D-F. Emphasis added.

the reconsideration. It is wholly artificial only to consider some (new) facts and not all facts on the return day of a rule *nisi*.

- c. The hearing on the return date is a reconsideration, not an appeal. This means that the court reconsidering the rule is not obliged to inquire or analyse whether and how the court issuing the rule erred; and matters of discretion (true or otherwise) and deference are irrelevant.
- d. The duty of the court reconsidering the matter is to apply its mind to the matter on a more broadly-based factual foundation and it is not bound by a ruling made by the court issuing the rule.
- e. If the court issuing the rule made pronouncements of law which transcend the facts before the court, the court reconsidering it may be bound by such a pronouncement and may only deviate from it on recognised grounds.

[46] The urgent court in this case did not make a pronouncement of law which transcends the facts. I therefore proceed to reconsider the matter.

The requirements for an interim interdict: a prima facie right

[47] An applicant for an interim interdict must, in addition to other requirements and on a *prima facie* basis, show that it has a substantive right to relief which ought to be preserved pending other proceedings which would vindicate that right.

[48] Therefore, Tabarakh is required to show, on a *prima facie* basis, that it could or should obtain relief from an arbitrator which would reinstate its tenure as a franchisee for, at least, a time. (Because continuation of its tenure as a franchisee is in substance what Tabarakh sought in this applicaiton.) If Tabarakh is not entitled to such relief from an arbitrator, it follows that a court cannot grant it relief which would preserve its tenure as a franchisee pending the arbitration. Otherwise, the interim relief is disproportional to the final relief.

[49] Tabarakh does not contend, in either its pleadings before this court or in the referral to arbitration, that an arbitrator would or could grant such a reinstatement. It contends that Sasol engaged in an unfair or unreasonable contractual practice;

and that an arbitrator would order a correction of that contractual practice, without specifying how the arbitrator would correct it.

[50] In *Rissik Street*, the Constitutional Court found that section 12B of the Petroleum Products Act did not require an aggrieved party to specify the relief it sought at the time of requesting an arbitration.⁶ It does not follow that, in seeking interim relief pending the arbitration, an aggrieved party does not need to show that an arbitrator could or would award relief for which the status quo would need to be preserved pending arbitration.

[51] Put briefly, to show a *prima facie* right to interim relief, Tabarakh must show sufficient prospects of success in the mooted arbitration, which success must entail a substantive continuation of the franchise agreement for at least a time.

[52] Tabarakh's case is that Sasol engaged in unfair and unreasonable contractual practices by not giving reasons for the termination of the franchise agreement; creating a reasonable expectation that the franchise agreement would be renewed; colluding with Bluehills or Henley Fuels to "*filch*" the goodwill embedded in Tabarakh's business; and thus frustrating Tabarakh's ability to sell its business for market value.

[53] The following questions of law and fact must be answered against that backdrop:

- a. Did Sasol fail or refuse to give reasons for the non-renewal of the franchise agreement and, if so, could that constitute an "unfair or unreasonable contractual practice"?
- b. Can the non-renewal of a fixed-term franchise agreement that expired through the effluxion of time constitute an "unfair or unreasonable contractual practice" if a wholesaler created a reasonable expectation of renewal and, if so, did Sasol create a reasonable expectation of renewal?

⁶ *Rissik Street (supra)* para 79.

- c. Does Tabarakh have any goodwill to protect in the business and, if so, did Sasol do anything to threaten that goodwill which could constitute an “unfair or unreasonable contractual practice”?

[54] In considering these issues, I bear in mind the following:

- a. The most relevant cases, including *Crompton Street*⁷ and *Rissik Street*, were decided as appeals against the High Court’s decisions to stay or not to stay an eviction application pending arbitration. As the Constitutional Court pointed out in *Crompton Street*,⁸ the standard position in law (pursuant to section 6(2) of the Arbitration Act, 5 of 1965) is that a stay of legal proceedings should be granted pending arbitration, thus requiring the party opposing the stay application to make out “a very strong case” before a stay would be refused. This explains the Court’s caution that courts should not decide stay decisions based on premature assessments of what the section 12B arbitrator would or would not decide.⁹
- b. In an application for an interim interdict brought by a retailer, there is no presumption that the factual consequences of the expiry of a contract by effluxion of time should be postponed until an arbitrator has had an opportunity to pronounce on the merits of the underlying dispute. Once there is “serious doubt” about the merits of the retailer’s case before the arbitrator, the interim interdict should be refused.¹⁰ This requires, of necessity, an investigation into those merits on a *prima facie* basis.
- c. The grant of an interim interdict pending other proceedings is an extraordinary remedy within the discretion of the court, weighing up all the relevant factors.¹¹ It is similar to the grant or the refusal of a stay of legal proceedings pending arbitration to that extent.

⁷ *Crompton Street Motors CC t/a Wallers Garage Service Station v Bright Idea Projects 66 (Pty) Ltd t/a All Fuels* 2022 (1) SA 317 (CC).

⁸ *Crompton Street* (*supra*) para 4. I note that in the subsequent decision in *Rissik Street*, the Constitutional Court doubted the applicability of the Arbitration Act and decided that section 173 of the Constitution furnishes the basis for the court’s power to stay eviction proceedings pending the section 12B arbitration: see paras 52-57.

⁹ *Crompton Street* (*supra*) para 52.

¹⁰ *Simon NO v Air Operations of Europe AB* 1999 (1) SA 217 (SCA) at 228G-H.

¹¹ *Eriksen Motors (Welkom) Ltd v Protea Motors Warrenton* 1973 (3) SA 685 (A) at 691B-G.

- d. Courts should not treat the disputes arising out of agreements between wholesalers and retailers as purely contractual. They should bear in mind that section 12B imposes a fairness standard on contractual relationships in the petroleum industry.¹²

A right to reasons for the failure to renew the franchise agreement?

- [55] Tabarakh pleaded in its referral to the arbitrator that Sasol's failure to provide reasons for its failure or refusal to renew the franchise agreement beyond 30 December 2024 constitutes an "unfair or unreasonable contractual practice". This is an allegation similar to the retailer's allegation in *Rissik Street* that Eskom's refusal to provide reasons for its rejection of prospective buyers of the retailer's business was unfair or unreasonable.
- [56] *Rissik Street* concerned an application to stay an eviction application pending the section 12B arbitration. Unlike in *Crompton Street* and *Former Way Trade*,¹³ the High Court granted the stay. The Constitutional Court had to decide whether the High Court was correct to do so.
- [57] The factual backdrop to *Rissik Street* is important. The retailer's agreement with the wholesaler (Engen) was scheduled to end on 30 June 2018. The owner of the premises required a R3 million payment from Engen to renew Engen's notarial lease beyond that date. Engen paid and the lease was renewed. Engen sought to recover this amount from the retailer, by making payment a condition for renewing the agreement with the retailer. The parties were unable to agree.
- [58] In terms of the agreement, Engen was obliged to furnish the retailer with 12 months' notice of its intention not to renew the agreement; and in that event, the retailer had the right to sell the business during the notice period. The agreement provided that Engen could not unreasonably withhold its consent to a proposed sale. It also recognised that the retailer had an "*entrenched value*" (which the court held amounted to goodwill) in the business, which it was entitled to realise.

¹² *Crompton Street (supra)* para 62.

¹³ *Former Way Trade and Invest (Pty) Limited v Bright Idea Projects 66 (Pty) Limited* 2021 (12) BCLR 1388 (CC).

- [59] Within the notice period, the retailer found two potential purchasers, but Engen refused its approval for a sale and also refused to give reasons for its refusal. More than three months before the end of the lease, the retailer submitted a request for arbitration. It alleged that Engen's refusal to provide reasons for the refusal amounted to an unfair or unreasonable contractual practice which left the retailer unable to determine if Engen's consent had been unreasonably withheld. The retailer could therefore not exercise its rights under the agreement. The retailer alleged that this unreasonably frustrated its right to sell its business and thus to realise its "*embedded value*". Subsequent to the expiry of the agreement, the retailer identified another prospective buyer, but Engen refused to consider the buyer on the basis that the agreement had expired.
- [60] The Constitutional Court found that there was a reasonable possibility that the arbitrator may determine that Engen's refusal to provide reasons for its decision not to approve potential purchasers constituted an unfair or unreasonable contractual practice.¹⁴
- [61] Tabarakh's counsel did not press in argument that Sasol's failure to provide reasons for a non-renewal was an unfair or unreasonable contractual practice and this ground can be disposed of summarily:
- a. Unlike in *Rissik Street*, Tabarakh did not formally request reasons for the non-renewal from Sasol. It is not surprising that Sasol did not formally furnish them. The right to reasons therefore does not arise, on the facts. It seems to me that, in any event, Sasol had informed Tabarakh in substance (if not in the form) of the reason for the non-renewal, namely that the lease agreement with Bluehills was expiring and was subject to renegotiation with potentially onerous terms that may bear on Tabarakh's further tenure.
 - b. Unlike in *Rissik Street*, there is no contractual basis for the provision of reasons. The agreement in *Rissik Street* provided that Engen could not unreasonably withhold its consent for a sale to another retailer.¹⁵ The

¹⁴ *Id* para 65.

¹⁵ *Rissik Street (supra)* para 51.5

franchise agreement with Sasol does not create a similar entitlement in respect of the renewal of the agreement.

- c. It is not beyond the realm of possibility that facts could arise where an arbitrator could conclude that a wholesaler is obliged to furnish reasons for a decision not to renew, lest it fall foul of the prohibition on engaging in “unfair or unreasonable contractual practices”. An example of such a situation may be where the wholesaler created a legitimate expectation that the agreement would be renewed. As I show below, on the facts this situation does not arise. Therefore, it is unnecessary to express a final view on whether, in law, there could be such an obligation.

[62] I therefore conclude that Tabarakh will not, on the facts set out in the application before me, be able to show in an arbitration that the fact that Sasol did not provide formal reasons for its non-renewal of the franchise agreement constituted an unfair or unreasonable contractual practice.

A substantive right to the renewal of an agreement that expired by effluxion of time?

[63] Tabarakh contends that Sasol created a reasonable expectation that the franchise agreement would be renewed.

[64] As I point out above, to constitute a *prima facie* right which grounds a right to preservation of the status quo, it is not sufficient for Sasol to have created a reasonable expectation that the agreement would be renewed. The necessary corollary of Tabarakh’s submission must be that the arbitrator has the power to reinstate or renew Tabarakh’s tenure as franchisee, at least for a period, based on the reasonable expectation. If that were not so, there would be no reason to preserve the status quo (entailing the agreement essentially continuing in its terms, aside from expiry) while the arbitration continues to unfold.

[65] The Constitutional Court has on several occasions explicitly or implicitly left open the question whether an arbitrator has the power to reinstate or renew an agreement between a retailer and a wholesaler in the petroleum industry.

[66] In *Crompton Street*, as in *Former Way Trade*, the Constitutional Court had to decide whether a High Court was entitled to refuse a stay of eviction proceedings instituted in respect of a matter already referred to arbitration under section 12B.

[67] In *Crompton Street*, the franchise agreement came to an end by effluxion of time (after several renewals) on 28 February 2018, the fuel wholesaler having warned the retailer in August 2017 that it would not renew the agreement. On 14 February 2018, the retailer indicated that it would refer a dispute to a section 12B arbitration. In response, the wholesaler launched eviction proceedings. The retailer applied for a stay of the eviction proceedings based on an oral agreement to extend the franchise, which the High Court refused. The Constitutional Court found that:

- a. It was not required to make a definitive finding on the precise scope of the corrective powers of a section 12B arbitrator and whether she may extend a lapsed agreement in making an “award as he or she deems necessary to correct such [unfair or unreasonable] practice”.¹⁶
- b. The High Court was entitled to consider the fact that the agreement had lapsed. The franchise and lease agreements had a fixed termination date. The retailer may have taken the view then that, due to industry practice or its previous relationship with the wholesaler, the termination date ought to have been extended. If so, it ought to have approached the Controller at that time to arbitrate on the reasonableness or otherwise of the duration of the agreement or its terms. It ought not to have done so shortly before the expiry of the lease agreement. This would have allowed the section 12B process to unfold well before the agreement expired.¹⁷
- c. The retailer would have been aware of the imminent expiry of the franchise agreement and should have acted expeditiously if it believed that the refusal to extend the agreement was an unfair or unreasonable contractual practice. The wholesaler gave the applicant sufficient notice of its intention, and was, therefore, well within its rights to seek the eviction of the retailer

¹⁶ *Crompton Street (supra)* para 52.

¹⁷ *Crompton Street (supra)* para 53.

and to vindicate its ownership rights. The High Court was entitled to consider the retailer's delay in acting, and to weigh this set of facts in its assessment whether sufficient reasons existed not to grant a stay.¹⁸

- d. The High Court was not influenced by a wrong principle of law in finding that the wholesaler's refusal to extend the lapsed agreement or to conclude a new agreement, did not amount to a "*contractual practice*" that could be corrected by an arbitrator in terms of section 12B.¹⁹
- e. While the Petroleum Products Act provides that the arbitrator may make such award as she deems necessary to correct such practice, it is silent on whether this includes the power to reinstate lapsed agreements.²⁰

[68] The Constitutional Court substantially echoed these finding in *Former Way Trade*. In this case, the wholesaler timeously reminded the retailer that the contract would end; however, only eight days before the agreement was due to end did the retailer refer the matter to arbitration. The Constitutional Court held that parties must make the election to refer a matter under section 12B timeously and diligently once they are of the view that there is an unfair contractual practice in their contractual relations.²¹

[69] In a gloss on *Crompton Street* and *Former Way Trade*, the Constitutional Court stated in *Seebed*²² that it had left open the question whether a party could rely in a section 12B arbitration on a reasonable expectation that a lease agreement that had expired through an effluxion of time would or should have been extended, despite the "*whole agreement*" clause in the relevant agreement.

[70] In *Rissik Street*, the Constitutional Court held that it was a reasonable possibility that an arbitrator could grant the retailer a further period of occupation to compensate the retailer for as much of the 12-month selling period as it was deprived of due to the unfair or unreasonable failure of Engen to give reasons for

¹⁸ *Crompton Street (supra)* para 54.

¹⁹ *Crompton Street (supra)* para 58.

²⁰ *Crompton Street (supra)* paras 56-59.

²¹ *Former Way Trade (supra)* para 49.

²² *Seebed v Engen Petroleum Ltd* 2023 (12) BCLR 1535 para 52 and fn 43.

its disapproval of potential purchasers.²³ The Court emphasised, however, that this 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.²⁴ The Constitutional Court also expressly declined to find that the arbitrator has the power to renew or reinstate the agreement.²⁵

[71] For these reasons, I doubt that an arbitrator could extend or reinstate a franchise agreement between a retailer and a wholesaler pursuant to section 12B of the Petroleum Products Act in circumstances where such an agreement has expired by effluxion of time. This is particularly so where such extension or reinstatement would negatively affect the rights of third parties.

[72] The Constitutional Court found in *Business Zone*²⁶ that the arbitrator's remedial powers can go no further than correcting the contractual practice in question. The interests of third parties are thus protected in the section 12B arbitration process, the subject matter of which is limited to a "*contractual practice*". This presumes that remedying the dispute lies squarely within the contractual rights and obligations of the parties to the contract.²⁷

[73] In this case, the relief sought before this court (and by necessary implication, before the arbitrator) has negative consequences for at least Bluehills. It deprives Bluehills, in effect, from the use of its land according to its preference and from the right that it bargained for in the new long lease with Sasol that Sasol would choose Bluehills (or its nominee) as its new franchisee.

[74] For these reasons, I do not think the arbitrator's powers extend to granting Tabarakh relief that would perpetuate these consequences for Bluehills.

[75] Assuming that I may be wrong on this, at best for Tabarakh, an arbitrator could perhaps – if it is proven that Tabarakh had a legitimate expectation of renewal

²³ *Rissik Street (supra)* para 69.

²⁴ *Id* para 72.

²⁵ *Id* para 80.

²⁶ *The Business Zone 1010 CC v Engen Petroleum Limited* 2017 (6) BCLR 773 (CC).

²⁷ *Id* para 92.

and an interest in the form of goodwill to protect – permit the status quo to be kept in place for a limited time to allow any remaining goodwill to be realised.²⁸

[76] But, in my view, Tabarakh does not have such a *prima facie* right either:

- a. Tabarakh's case falls far short of proving a legitimate expectation of renewal. Its allegations in that regard were that there had been several renewals in the past and that the relationship (including with a predecessor of Sasol) had lasted for 22 years. Against that has to be weighed the fact that Sasol had, several times, over years and unequivocally, emphasised to Tabarakh that its franchise agreement was approaching its end.
- b. The most telling fact, in this regard, was that – on Tabarakh's own version in its replying affidavit – it could not sell its business in 2021 because Sasol told the potential purchaser of Sasol's inability to offer a franchise agreement beyond 2024.
- c. In any event, Tabarakh did not attempt to make out a case in this application that an arbitrator should or would prolong the status quo to allow it to sell its business (or for how long). In contrast to the facts in *Rissik Street*, it is common cause that Sasol at no stage obstructed Tabarakh's failed attempts to sell its business. Therefore, there seems to be no ground – whether contractual or based upon considerations of fairness or reasonableness – to afford Tabarakh an additional opportunity to do so.

[77] I conclude that Tabarakh will not, on the facts set out in this application, be able to show in an arbitration that the fact that Sasol did not renew or extend its franchise agreement constituted an unfair or unreasonable contractual practice. Concomitantly, Tabarakh will not on these facts be able to show that Sasol created a legitimate expectation of renewal of the franchise agreement.

²⁸ *Rissik Street* paras 76-78.

A right to protect the goodwill Tabarakh has built up in its business?

- [78] Tabarakh alleges that Sasol's actions in relying on the expiry of the franchise agreement through effluxion of time threaten (and will extinguish) its goodwill in the business and thus constitutes an unfair or unreasonable contractual practice.
- [79] Sasol's answer, on the law, is that normally, under a franchise agreement, the franchisor owns the assets of the business – including its goodwill – whereas the franchisee merely acquires the right to use those assets. This proposition is to an extent supported by the judgment of the Labour Appeal Court in *PE Pack*²⁹ in regard to the nature of a franchise agreement.
- [80] And Sasol's answer on the facts, is that the franchise agreement vests the title in the goodwill of the business in Sasol, not in Tabarakh. Clause 2.3 of the franchise agreement provides that the goodwill associated with Sasol's trademarks, trade names and intellectual property vests in Sasol. Clause 4.4 as read with various definitions of the franchise agreement further provides that the right, title and interest in relation to goodwill arising from the use of these trademarks, way of doing business and other intellectual property remains for the benefit of Sasol and that the retailer simply uses it.
- [81] Tabarakh, in turn, relies on the judgment in *Rissik Street* which protected the right of a retailer to sell its business to realise the “*embedded value*” of the business, which was the goodwill in the business.
- [82] It is perhaps too categorical a statement to say that legally, and factually, Tabarakh has no goodwill in the business. It may be more correct to say that the value of such goodwill is wholly dependent on the terms of the franchise agreement, especially its expiration date. Without a franchise agreement, Tabarakh has no right to carry on the business and accordingly no way to realise its goodwill – which means that the goodwill is either without value or non-existent (which amounts to the same thing).
- [83] This, it seems to me, is implicit in Tabarakh's case that it requires the status quo to be maintained to realise the goodwill. It is also the law: Goodwill, being the

²⁹ *PE Pack 4100CC v Sanders* [2013] ZALAC 1 paras 16-18 and the cases cited there.

relationship between a business and its customers, can only be enforced by the business as long as it exists.³⁰

- [84] This analysis reveals that Tabarakh's claim to goodwill does not create a self-standing basis for a *prima facie* right. It only has goodwill (which is co-existent with the right to realise it) for as long as it has a franchise agreement. Thus, whether it has a *prima facie* right to protect its goodwill is the same question as whether it has a *prima facie* right to an extension, renewal or other continuation of its franchise agreement.
- [85] This conclusion is consistent with the judgment in *Rissik Street*. That judgment held that the retailer had a right to sell its business (including its goodwill) before the expiry of the franchise agreement. Since the wholesaler frustrated the right to sell the business, an arbitrator could find that the retailer should be afforded a limited time to exercise the right that was frustrated by the wholesaler. The Constitutional Court did not find that, after the expiry of the franchise agreement, a right to goodwill remained which afforded the retailer the right to remain on site and installed as franchisee – which is what Tabarakh's case implies.
- [86] In any event, contrary to the facts in *Rissik Street*, Tabarakh had multiple opportunities to sell its business, with Sasol's cooperation, but they came to nought. In addition, it had at least eighteen months' warning (from 30 June 2022) that its franchise agreement would not be renewed at the end of 2024. This was ample opportunity to realise the remaining goodwill in the business.
- [87] I conclude above that Tabarakh has no *prima facie* right to an extension or renewal of the franchise agreement which has terminated through the effluxion of time. This means that, on a *prima facie* basis, it also has no remaining goodwill that could be protected through an interim order.

³⁰ A P Boppert "Should goodwill remain a protectable intangible asset after business cessation?" Queen Mary University of London – Centre for Commercial Law Studies (2017) at 8, cited by the Supreme Court of Appeal in *Koni Multinational Brands (Pty) Ltd v Beiersdorf AG* [2021] ZASCA 24 (19 March 2021) para 29.

Conclusion on *prima facie* right

[88] It follows that Tabarakh has not established a *prima facie* right which ought to be protected through maintaining the status quo while an arbitration unfolds.

[89] This conclusion means it is unnecessary to consider the other elements that should be present before an interim interdict would be granted, i.e. a well-grounded apprehension of irreparable harm if the interim relief is not granted; whether Tabarakh has another satisfactory remedy; and whether the balance of convenience favours Tabarakh. It is also difficult to deal with these other elements, since Tabarakh has not sought to indicate what relief it would seek from the arbitrator. For example, it is impossible to say if Tabarakh would suffer irreparable harm if the interim interdict is not granted but the arbitrator grants it final relief, given that Tabarakh has not indicated what final relief it seeks.

The court's discretion

[90] It is trite that a court has a discretion not to grant an interim interdict even if the applicant has shown that all the elements are present. In this case, I find that no *prima facie* right has been shown and accordingly the discretion does not arise. In case I am wrong in that regard, I consider whether the discretion should be exercised to refuse the interim interdict.

[91] Fundamentally, whatever prejudice Tabarakh suffers (assuming it otherwise has a right to perpetuate the franchise agreement), was caused by its own delay. It will be recalled that the Constitutional Court found in *Crompton Street*³¹ and *Former Way Trade*³² that the High Court in those cases correctly exercised their discretion not to stay eviction applications pending arbitration, among other reasons because the retailers in those cases had waited inordinately long to refer their complaints to arbitration. In *Crompton Street*, the retailer waited until fourteen days before the expiry of the relevant agreement while the retailer in *Former Way Trade* waited until eight days before such expiry.

³¹ *Crompton Street (supra)* paras 53-54.

³² *Former Way Trade (supra)* paras 44 and 49.

[92] In this case, Tabarakh sought to refer its dispute to arbitration only eighteen days before the expiry of the franchise agreement with Sasol. Tabarakh had known for years not only about the imminent expiry date, but also that it was Sasol's attitude that it would not renew the franchise agreement and that Tabarakh's goodwill would become valueless upon the expiry of the agreement. If it is correct that Tabarakh has a right to an extension or a renewal of the franchise agreement, or a right to protect any residual goodwill, it should have asserted those rights long before the expiry of the franchise agreement. Tabarakh's delays have caused its current predicament.

[93] Tabarakh's delay in exercising its right to refer its grievances to arbitration justify the exercise of this court's discretion against the grant of an interim interdict.

Costs

[94] As between Tabarakh and Sasol, the urgent court ordered that Sasol would pay Tabarakh's costs, including the costs of two counsel on scale B. That was a final order and not susceptible to reconsideration. The costs order I make only deals with such costs as were incurred after 31 December 2024.

[95] In respect of those costs, they should follow the event. Sasol asked for costs on scale C. It employed one counsel. In my view, the matter was of sufficient complexity to justify a costs order on scale C.

[96] The notice of motion of Bluehills only prayed for joinder of Bluehills to the application and costs only in the event of opposition to the joinder. Such joinder was not opposed and accordingly, I make no costs order in respect of Bluehills.

Order

[97] I make the following order:

- a. Bluehills is joined to the application.
- b. The rule *nisi* issued on 31 December 2024 is discharged.
- c. Tabarakh's application is dismissed.

- d. Tabarakh is to pay Sasol's costs incurred after 31 December 2024, such costs to include the costs of counsel taxed on scale C.



DJ SMIT
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

Date of hearing: 3 March 2026

Date of judgment: 2 June 2026

For the applicant:

M Desai instructed by Govender Patel
Dladla Inc

For the first respondent:

D Watson instructed by Mchunu
Attorneys

For the second respondent:

M Majozi instructed by Ivan Pauw &
Partners Attorneys