



**CONSTITUTIONAL COURT OF SOUTH AFRICA**

Case CCT 237/20

In the matter between:

**FORMER WAY TRADE AND INVEST (PTY) LIMITED**

Applicant

and

**BRIGHT IDEA PROJECTS 66 (PTY) LIMITED**

First Respondent

**CONTROLLER OF PETROLEUM PRODUCTS**

Second Respondent

**Neutral citation:** *Former Way Trade and Invest (Pty) Limited v Bright Idea Projects 66 (Pty) Limited* [2021] ZACC 33

**Coram:** Mogoeng CJ, Jafta J, Khampepe J, Madlanga J, Majiedt J, Mhlantla J, Theron J, Tlaletsi AJ and Tshiqi J

**Judgment:** Mhlantla J (unanimous)

**Heard on:** 9 March 2021

**Decided on:** This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Constitutional Court website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 28 September 2021

**Summary:** Petroleum Products Act 120 of 1977 — section 12B of the Petroleum Products Act does not oust the High Court's jurisdiction — referral of a factual dispute to arbitration in terms of section 6 of the Arbitration Act 42 of 1965 — stay of proceedings — referral to statutory arbitration

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## ORDER

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On appeal from the Supreme Court of Appeal (on reconsideration of an application for leave to appeal from the High Court of South Africa, KwaZulu-Natal Division, Pietermaritzburg):

1. Leave to appeal is refused.
2. The applicant must pay the first respondent's costs, including the costs of two counsel.

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## JUDGMENT

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MHLANTLA J (Mogoeng CJ, Jafta J, Khampepe J, Madlanga J, Majiedt J, Theron J, Tlaletsi AJ and Tshiqi J concurring):

### *Introduction*

[1] This is an application for leave to appeal<sup>1</sup> against a judgment and order of the High Court of South Africa, KwaZulu-Natal Division, Pietermaritzburg,<sup>2</sup> and to the extent necessary, against the judgment of the Supreme Court of Appeal.<sup>3</sup> The High Court ordered the applicant, Former Way Trade and Invest (Pty) Limited, to vacate the premises of the first respondent, Bright Idea Projects 66 (Pty) Limited.

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<sup>1</sup> This matter was heard at the same time as *Crompton Street Motors CC v Bright Idea Projects 66 (Pty) Ltd* [2021] ZACC 24 (*Crompton*).

<sup>2</sup> *Bright Idea Projects 66 (Pty) Ltd v Former Way Trade and Invest (Pty) Ltd* 2018 (6) SA 86 (KZP) (High Court judgment).

<sup>3</sup> *Former Way Trade & Invest (Pty) Ltd v Bright Idea Projects 66 (Pty) Ltd* [2020] ZASCA 118; 2020 JDR 2072 (SCA) (Supreme Court of Appeal judgment).

[2] This application, like a string of others,<sup>4</sup> concerns the question whether the High Court correctly refused to grant a stay of proceedings pending a referral of the dispute to arbitration in terms of section 12B of the Petroleum Products Act.<sup>5</sup> That question was recently answered by this Court in *Crompton*.<sup>6</sup> Nevertheless, because this application was set down and heard at the same time as *Crompton*, this Court must assess its merits.

### *Background facts*

[3] The applicant carried on business as a petroleum retail service station, in terms of a franchise agreement concluded with the first respondent, a wholesaler of petroleum products. The second respondent, the Controller of Petroleum Products, is not participating in these proceedings.

[4] The business relationship between the applicant and the first respondent arose through a series of cession agreements. On 1 January 2003, Caltex Oil SA (Pty) Limited (Caltex) concluded a franchise agreement with Readyform 1030 CC (Readyform). Under that agreement, Readyform was granted the right to operate a Caltex service station. Caltex agreed to supply Readyform with petroleum products for further sale to retail customers. Readyform then ceded its rights under the agreement to Shantyrien Service Station CC (Shantyrien). On 1 February 2011, after Caltex had changed its name to Chevron, Shantyrien ceded its rights under the agreement to Tomdia Service Station CC (Tomdia).

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<sup>4</sup> *The Business Zone 1010 CC v Engen Petroleum Ltd* [2017] ZACC 2; 2017 JDR 0259 (CC); 2017 (6) BCLR 773 (CC) (*Business Zone*). See also *KZN Oils (Pty) Ltd v Nelta (Pty) Ltd t/a Keyway Motors* [2021] ZAKZPHC 12; 2021 JDR 1261 (KZP); *Crompton* above n 1; *KZN Oils (Pty) Ltd v Frenserve CC t/a John Ross Service Station (KZD)* unreported judgment of the KwaZulu-Natal High Court, Durban, Case No D2658/2018 (30 September 2020).

<sup>5</sup> 120 of 1977.

<sup>6</sup> *Crompton* above n 1.

[5] On 23 December 2011, Chevron and the first respondent concluded a retail assignment agreement in terms of which the first respondent purchased immovable properties from Chevron. The rights accruing under the franchise agreements in terms of which retailers traded petroleum products on the properties were also ceded. The property on which Tomdia conducted business was included in that agreement. The franchise agreement between Tomdia and the first respondent was set to terminate on 31 December 2017.

[6] In February 2015, Tomdia sold its service station and ceded its rights under the retail assignment agreement to the applicant at a price of R8.5 million. This cession was subject to approval by the first respondent. The term of the franchise agreement remained as it was from the beginning. That is, no right of renewal of the franchise agreement was conferred upon the applicant following the cession. In terms of clause 11 of the franchise agreement, the right of occupation would fall away on the date of termination of the franchise agreement, being 31 December 2017.

[7] The applicant was dissatisfied with the fact that the franchise agreement did not include a renewal clause and raised its concerns with the first respondent. The first respondent offered to consider this on condition that the applicant paid R3.25 million as a “brand fee”. The applicant agreed to pay the amount, provided that a new franchise agreement would be concluded between it and the first respondent. This agreement would be on standard terms and only lapse after 10 years, that is, a five-year term, with an option to renew the new franchise agreement for a further five years.

[8] After realising that the R3.25 million sought would be an additional cost over and above the purchase price of R8.5 million, the applicant negotiated with Tomdia, the seller, for the reduction of the purchase price. Tomdia agreed to reduce the price to R6 million.

[9] The first respondent then provided the applicant with a draft franchise agreement, which made provision for an extension, together with the invoice for the

brand fee. In a strange turn of events, the applicant refused to pay the brand fee before being furnished with a signed copy of the new franchise agreement, which extended the term of the franchise. As a result, the first respondent furnished the applicant with the agreement in terms of which only the franchise agreement rights were ceded, and the applicant signed it, this being the approval by the first respondent to which the cession by Tomdia to the applicant was subject. It did not pay the brand fee or sign a new franchise agreement with an extended tenure.

[10] On 30 June 2017, six months *before* the franchise agreement was set to terminate, the first respondent gave the applicant notice of the termination of the franchise agreement. The applicant acknowledged receipt of the notice. However, it did not vacate the premises upon the expiry of the original franchise agreement and advised the first respondent that it would not do so. Instead, the applicant asserted that the parties had concluded an agreement extending the tenure of the franchise agreement by five years – with an option to renew. On 22 December 2017, eight days before the franchise agreement was set to end, the applicant referred the matter to the second respondent for arbitration.

### *Litigation history*

#### *High Court*

[11] After the expiry of the franchise agreement, on 15 January 2018, the first respondent launched an application in the High Court for the ejectment of the applicant from its premises. The applicant filed a counter-application in which it sought to enforce the “new franchise agreement”. It alleged that it had entered into an agreement with the first respondent, conferring upon it a right to continue conducting business on the premises for five more years from 1 March 2015, and with a right to renew until 1 March 2025.<sup>7</sup> In the alternative, the applicant sought an order staying the High Court proceedings pending arbitration pursuant to section 12B of the Petroleum Products Act.

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<sup>7</sup> High Court judgment above n 2 at para 16.

[12] The High Court considered two main issues. First, whether the parties had, as a matter of fact, concluded a “new franchise agreement” that extended the life of the agreement between the parties by five years, with a renewal option for a further five years. Second, whether the High Court was required to stay the eviction proceedings pending the conclusion of arbitration proceedings in terms of section 12B of the Petroleum Products Act.

[13] On the first issue, the High Court held that the applicant failed to discharge the onus of: (a) proving the existence of a “new franchise agreement” and whether such agreement was written or oral; (b) providing proof of when, where and by whom it was concluded; and (c) producing a copy of the agreement, if one existed. In addition, the High Court held that, because the applicant had failed to pay the brand fee, no renewal agreement on the applicant’s terms materialised. It noted that the applicant, in its submissions, had undertaken to pay the brand fee. However, this contradicted the applicant’s prayer in its conditional counter-application for an order declaring that the first respondent was not entitled to charge a brand fee for a franchise agreement and that such a stipulation was void or severable from the remaining terms of the franchise agreement.<sup>8</sup> Therefore, the High Court held that the parties had not concluded an agreement to extend the original franchise agreement beyond 31 December 2017.

[14] On the second issue, relating to the application for a stay, the High Court considered the impact of a referral to arbitration on the litigation before it. It also considered whether, on a “sensible interpretation” of the Petroleum Products Act, applied to the facts of the case, a stay would be justified.<sup>9</sup> The High Court, relying on this Court’s judgment in *Business Zone*,<sup>10</sup> held that section 12B does not automatically

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<sup>8</sup> Id. The prayers in the conditional counter-application, in relevant part, requested an order declaring that—

- “(i) the [first respondent] is prohibited or not entitled to charge a brand fee, royalty or key money in consideration for the franchise agreement. . . ;
- (ii) such stipulation is void and severable from the remaining terms of the franchise agreement between the parties . . . .”

<sup>9</sup> Id at para 22.

<sup>10</sup> *Business Zone* above n 4.

suspend litigation, but a party is entitled to apply to the court for a stay of litigation. The Court held that courts may stay proceedings pending the outcome of a section 12B arbitration, subject to such terms and conditions as may be considered just in the general exercise of the courts' powers to regulate their own processes. It emphasised that "[w]hat section 12B arbitration is not, is a stratagem to delay litigation".<sup>11</sup>

[15] In respect of the eviction application, the Court held that the applicant had failed to challenge the first respondent's ownership of the premises or to request an award refusing or suspending its eviction from the premises.<sup>12</sup> In the result, the High Court dismissed the counter-application, including the application for a stay of proceedings pending the outcome of the section 12B referral to arbitration.<sup>13</sup> The applicant was ordered to vacate the premises.<sup>14</sup>

#### *Supreme Court of Appeal*

[16] The Supreme Court of Appeal dismissed an application for leave to appeal. The applicant applied for the reconsideration of the order refusing leave to appeal in terms of section 17(2)(f) of the Superior Courts Act.<sup>15</sup> This resulted in the application being referred for oral argument for reconsideration of the order.

[17] The Supreme Court of Appeal considered the merits of the matter only to the extent of determining whether prospects of success were established. In this regard, it considered two main issues. First, whether the applicant had established a right of occupation of the premises in terms of a "new franchise agreement"; and second, whether the referral to arbitration in terms of section 12B ousted the High Court's jurisdiction.

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<sup>11</sup> High Court judgment above n 2 at para 37.

<sup>12</sup> Id at para 39.

<sup>13</sup> Id at para 44.

<sup>14</sup> Id.

<sup>15</sup> 10 of 2013.

[18] The Supreme Court of Appeal held that the contention by the applicant, that it had concluded a further renewable agreement with the first respondent, was a misnomer. The agreement described in its replying affidavit was unrelated to and did not purport to effect a renewal of the original franchise agreement that was ceded to the applicant on 26 February 2016.<sup>16</sup> It was, instead, a further franchise agreement allegedly concluded between the parties in 2015. The Supreme Court of Appeal held that any right of occupation beyond the termination of the franchise agreement, which ended on 31 December 2017, would need to be determined on the basis whether the evidence established the existence of an agreement conferring that right of occupation. Further, the applicant bore the onus of proving such right of occupation.<sup>17</sup> On this issue, the Court concluded that the first respondent did not provide the applicant with a signed “new franchise agreement”, as the refusal by the applicant to pay the brand fee prevented this. Therefore, the Supreme Court of Appeal agreed with the High Court that the applicant had failed to establish a right of occupation or justify its continued occupation of the first respondent’s property.

[19] On the second issue, the Court rejected the contention by the applicant that the referral to arbitration had the effect of suspending litigation.<sup>18</sup> It held that there were no circumstances that would warrant a finding that a referral to arbitration under section 12B ousts a court’s jurisdiction to adjudicate a dispute. Further, there was no basis for a stay pending the arbitration under section 12B.<sup>19</sup>

[20] Importantly, the Supreme Court of Appeal noted that the applicant had conceded that it was not seeking a corrective order from the arbitrator in respect of an alleged unfair or unreasonable practice *per se*, but rather the arbitrator was being requested to make a *factual finding* regarding the existence of a “new franchise agreement”. The Supreme Court of Appeal held that this concession undermined the applicant’s primary

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<sup>16</sup> Supreme Court of Appeal judgment above n 3 at para 12.

<sup>17</sup> Id at para 13.

<sup>18</sup> Id at para 39.

<sup>19</sup> Id at para 40.

defence, that a “new franchise agreement” had been concluded that granted it, amongst other things, occupational rights (and therefore it ought not to be evicted from the premises).

[21] The Supreme Court of Appeal held that no new franchise agreement had been concluded. As a consequence, there were no reasonable prospects of success of establishing the factual defence at the section 12B arbitration.<sup>20</sup> Therefore, the order dismissing the application for leave to appeal was confirmed.

[22] The applicant now seeks leave to appeal to this Court.

### *Applicant’s submissions*

[23] The applicant’s main argument before this Court is the so-called ouster argument.<sup>21</sup> As this issue was ventilated by this Court in *Crompton*, the submissions on this point will not be extensively dealt with here. The gravamen of the applicant’s argument is that section 34 of the Constitution,<sup>22</sup> read with *Business Zone*, establishes a principle that, when a licenced retailer has initiated the referral procedure in terms of section 12B of the Petroleum Products Act, the jurisdiction of the High Court to hear that matter is ousted. In this matter, the applicant contends that, since it had made a referral to the Controller on 22 December 2017, before the institution of the eviction proceedings, the High Court did not have the authority to entertain the eviction application.

[24] In the alternative, the applicant submits that should that not be the case, this Court should find that a High Court’s discretion to stay proceedings is very narrow

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<sup>20</sup> Id at para 28.

<sup>21</sup> In *Crompton* above n 1, this Court confirmed that a referral in terms of section 12B does not oust the High Court’s jurisdiction.

<sup>22</sup> Section 34 of the Constitution provides:

“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.”

when a section 12B referral has been initiated. A court is in fact compelled to grant a stay in the proceedings and a refusal to do so is unconstitutional, to the extent that it undermines the section 34 right to access a specialist forum or tribunal.

[25] On the issue of the existence of the “new franchise agreement”, the applicant confirms before this Court, that its case for a section 12B referral is “based on a dispute of fact”, which is that the arbitrator would be required to make a factual finding about the existence of the “new franchise agreement”. The applicant submits that it rejected the draft franchise agreement because it wanted a signed agreement before paying the brand fee. In its view, the demand for an upfront, non-refundable payment of a brand fee was incongruent with the original franchise agreement between the parties.

*First respondent’s submissions*

[26] On the ouster argument, the first respondent submits that *Business Zone* is clearly distinguishable because it did not deal with an expired agreement. It dealt with an agreement that was prematurely cancelled, and categorised the section 12B route as an exclusive remedy but made no finding that it ousts the jurisdiction of the courts. The first respondent submits that the Petroleum Products Act in no way abolishes an owner’s common law rights to obtain an eviction order.

[27] In respect of the allegation that the parties had concluded a “new franchise agreement” extending the life of the franchise, the first respondent submits that the findings of the High Court and Supreme Court of Appeal are unassailable. It submits that this Court should not overturn the factual findings made by these Courts. In addition, there are no constitutional grounds raised in this matter, as the applicant has conceded that it is not seeking a finding by the arbitrator in terms of section 12B compelling the conclusion of a new contract – it is merely asking that the arbitrator makes a finding of fact regarding the existence of the alleged new franchise agreement. It reasserts that the original franchise agreement was set to expire by effluxion of time on 31 December 2017 and, after that date, there was *no contract* between the parties.

Therefore, the applicant had no right of occupation and eviction proceedings were competent.

[28] Finally, on this issue, the first respondent states that it was willing to conclude a new franchise agreement on consideration of payment which was intended to be used for a refurbishment of the premises. However, the applicant refused to make that payment and, therefore, it was not required to conclude a new franchise agreement.

### *Issues*

[29] The main issues for determination are the following: first, does this application engage this Court's jurisdiction? Second, is it in the interests of justice for leave to appeal to be granted? In determining whether leave should be granted, we would have to consider two issues, namely, the ouster argument and whether the High Court exercised its discretion judicially. However, in this matter, it will not be necessary to consider the ouster argument because this Court has already determined in *Crompton* that section 12B arbitration does not oust the jurisdiction of the High Court.<sup>23</sup> Therefore, the only remaining issue will be whether the High Court should have stayed the proceedings in this matter pending the section 12B arbitration.

### *Jurisdiction*

[30] This Court is empowered to decide matters of a constitutional nature and any other matter that raises an arguable point of law of general public importance that ought to be considered by it.<sup>24</sup> Jurisdiction is determined on the pleadings and not the substantive merits of the matter.<sup>25</sup> It is to these pleadings that I now turn.

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<sup>23</sup> *Crompton* above n 1 at para 26.

<sup>24</sup> Section 167(3)(b) of the Constitution.

<sup>25</sup> In *Gcaba v Minister for Safety and Security* [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC) this Court took pains to set out the correct approach to determining jurisdiction. It stated at para 75:

“Jurisdiction is determined on the basis of the pleadings . . . and not the substantive merits . . . . In the event of the Court's jurisdiction being challenged at the outset (*in limine*), the applicant's pleadings are a determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence.”

[31] First, the applicant submits that this application raises a constitutional issue because, amongst other things, the High Court, and the Supreme Court of Appeal failed to *properly apply* the principles of law enunciated by this Court in *Business Zone* in respect of the proper interpretation of section 12B of the Petroleum Products Act. In terms of this Court's jurisprudence, it has been accepted that the mere misapplication of an accepted common law rule by the High Court or the Supreme Court of Appeal does not *ordinarily* raise a constitutional matter.<sup>26</sup> In other words, if the High Court or the Supreme Court of Appeal gets the common law right, but applies it incorrectly to the facts, this Court would normally not have jurisdiction.

[32] In this matter, both the High Court and the Supreme Court of Appeal relied on *Business Zone* in assessing the merits of the stay application. At this juncture, it is clear that those Courts addressed themselves to – and applied – the correct legal principles. It is the application thereof that is at issue. The applicant disagrees with the manner in which both courts applied *Business Zone*, and argues that *Business Zone*, properly read, guarantees access to section 12B arbitration (hence the ouster argument). The core of the applicant's case, however, relates to whether section 12B, *properly interpreted*, provides that when a referral in terms of section 12B has been made, the jurisdiction of the High Court is ousted, therefore the Court cannot hear a dispute on the issue and must stay proceedings pending the conclusion of such arbitration.

[33] Second, the applicant argues that a finding that the section 12B arbitration does not oust the jurisdiction of the High Court would infringe its right to access a specialist tribunal as envisaged in section 34 of the Constitution. This is a thinly veiled attack against the constitutionality of section 6(2) of the Arbitration Act<sup>27</sup> which confers a discretion upon a court to refuse to grant a stay of proceedings.

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<sup>26</sup> *Booyesen v Minister of Safety and Security* [2018] ZACC 18; 2018 (6) SA 1 (CC); 2018 (9) BCLR 1029 (CC) at para 59. See also: *Loureiro v Invula Quality Protection (Pty) Ltd* [2014] ZACC 4; 2014 (3) SA 394 (CC); 2014 (5) BCLR 511 (CC) at para 33; and *Mbatha v University of Zululand* [2013] ZACC 43; (2014) 35 ILJ 349 (CC); 2014 (2) BCLR 123 (CC) at para 194.

<sup>27</sup> 42 of 1965.

[34] This application, therefore, requires us to do more than simply determine whether the High Court and Supreme Court of Appeal misapplied *Business Zone* as this Court, in that matter, did not consider the ouster argument. It will be recalled that *Business Zone* was concerned with the nature of the Controller's referral powers and the premature cancellation of an existing contract, and not a contract that had expired by the effluxion of time or the question of the impact of a referral on section 12B proceedings.

[35] Of course, these issues have now been dealt with by this Court in *Crompton*. However, at the time that this matter was set down, and when the High Court and Supreme Court of Appeal in the present instance made their decisions, the issues raised had not yet been determined. Accordingly, a challenge of the High Court's discretion to stay proceedings, based on the principle of legality, paired with the purported limitation of the section 34 right to access an appropriate or "specialist" tribunal or forum, raise constitutional issues. Therefore, this Court's jurisdiction is engaged.

#### *Leave to appeal*

[36] If the interests of justice favour granting leave, it should be granted. In considering the interests of justice, prospects of success, although not the only factor, are an important aspect of the enquiry. An applicant who seeks leave to appeal must show that there are reasonable prospects that this Court will reverse or materially alter that decision.<sup>28</sup>

[37] To succeed, the applicant must persuade this Court that it could reasonably arrive at a different conclusion than that of the High Court or Supreme Court of Appeal, and that—

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<sup>28</sup> *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 12.

“those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. *There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.*”<sup>29</sup> (Emphasis added).

[38] Has the applicant, then, persuaded this Court in this application? Unfortunately, not. In *Crompton*, this Court – much like in the present matter – considered the question whether section 12B ousted the jurisdiction of the High Court. The factual matrix involved the cession of rights and duties under a franchise agreement which was due to end on 28 February 2018. Six months before the expiry of the term, the property owner notified the retailer, Crompton Motors (Crompton), that it would not grant further extensions of the franchise agreement and that the retailer would have to vacate the premises on 28 February 2018. Crompton stated that it would refer the dispute to the Controller for arbitration and would not vacate pending the outcome of the arbitration. The owner approached the High Court for a declarator that the lease agreement would terminate on 28 February 2018 as well as an order directing Crompton to vacate the premises by that date. In response, Crompton sought a stay of the proceedings pending the referral of the dispute to arbitration on the basis that section 12B ousted the jurisdiction of the High Court.

[39] This Court confirmed the importance of the section 12B arbitration considering the power disparity in the petroleum industry between licenced retailers and wholesalers.<sup>30</sup> We held that the High Court is not obliged to stay proceedings in the face of a section 12B referral. Importantly, this Court said that, generally, in terms of section 6 of the Arbitration Act or the common law, if an application is made for a stay of proceedings pending arbitration (including statutory arbitration), a court must exercise its discretion in favour of such a stay. The discretion to refuse arbitration should be exercised judicially, and only when a court finds that “there are compelling

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<sup>29</sup> *S v Smith* 2012 (1) SACR 567 (SCA) at para 7.

<sup>30</sup> *Crompton* above n 1 at para 42.

reasons to refuse the stay despite the purpose of section 12B and all its numerous benefits for retailers and wholesalers”.<sup>31</sup> This high threshold for refusal exists because the party who does not want the matter referred to arbitration “is seeking to deprive the other party of the advantage of arbitration to which the latter is entitled”.<sup>32</sup>

[40] That being said, the discretion remains a discretion in the true sense and a court is required to *satisfy itself* that in the circumstances, sufficient reasons exist *not to refer the dispute before it to arbitration*. Any number of factors could sway a court in one way or the other; a court is simply required to exercise its discretion judicially. This discretion will not be interfered with on appeal unless the court of first instance has exercised that discretion based on a wrong appreciation of the facts or on a wrong principle of law.<sup>33</sup> It is trite that the question is not whether the court of first instance was “correct” or if this Court would have made a different decision, but rather whether the discretion was exercised judicially.<sup>34</sup>

[41] In this matter, the High Court, after considering the legislative scheme of the Petroleum Products Act and the importance of the section 12B arbitration, refused a stay of proceedings for several reasons. The first was that the agreement, as a matter of fact, had lapsed. The High Court held that the arbitrator has the power to determine whether the contractual practice was unfair or unreasonable and to correct it.<sup>35</sup> It said

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<sup>31</sup> Id at para 43. See also *Universiteit van Stellenbosch v JA Louw (Edms) Bpk* 1983 (4) SA 321 (A) at 327C-D and *Transasia 1 (Pty) Limited v Arbitration Foundation of South Africa*, unreported judgment of Gauteng Local Division, Johannesburg, Case No 2018/25821 (13 September 2018) at para 19 where the High Court said:

“Where a party to an arbitration agreement commences legal proceedings against the other party to that agreement, the defendant is entitled either to apply for a stay of the proceedings pursuant to section 6 of the Arbitration Act 42 of 1965 or to deliver a special plea relying upon the arbitration clause. *Whichever course it adopts the onus then rests on the claimant to persuade the court to exercise its discretion to refuse arbitration. This requires a very strong case to be made out.*” (Emphasis added).

<sup>32</sup> *Body Corporate of Via Quinta v Van der Westhuizen N.O.* unreported judgment of the Free State Division, Bloemfontein, Case No A196/2017 (16 November 2017) at para 41.

<sup>33</sup> *Crompton* above n 1 at paras 46-8.

<sup>34</sup> *Giddey N.O. v J C Barnard and Partners* [2006] ZACC 13; 2007 (5) SA 525 (CC); 2007 (2) BCLR 125 (CC) at para 22.

<sup>35</sup> High Court judgment above n 2 at paras 26-7.

that the Petroleum Products Act, unlike the Labour Relations Act,<sup>36</sup> does not grant a section 12B arbitrator the explicit power to reinstate a lapsed agreement. Although it did not determine whether the arbitrator's powers went so far as to permit them to make a new contract for the parties, it held that this was unlikely, considering the principle of freedom of contract.<sup>37</sup> On this aspect, this Court in *Crompton* said the following, which applies equally in this matter:

“In this matter, this Court is 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 she deems necessary to correct such [unfair or unreasonable] practice’. I do, however, caution courts against making stay decisions based on premature assessments of what the section 12B arbitrator (or any arbitrator) would or would not decide. Prospects of success, so to speak, before the arbitrator should not be given undue weight in the analysis.”<sup>38</sup>

[42] The second was that, in the referral to the Controller, the applicant did not challenge the first respondent's ownership rights over the premises or request an order suspending its eviction from the premises. As the High Court saw it, the issues before it would, therefore, not be resolved in the arbitration. The High Court concluded that it had not been “addressed on any authority that would result in the award trumping the order in this application for restoration of a real right to its lawful owner”.<sup>39</sup> In those circumstances, it dismissed the application for a stay pending the outcome of the section 12B arbitration.<sup>40</sup>

[43] The Supreme Court of Appeal held that the concession by the applicant, that it would not request the arbitrator to create a new contract between parties but rather that it would request that the arbitrator make a *factual finding* as to whether the “new

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<sup>36</sup> 66 of 1995.

<sup>37</sup> High Court judgment above n 2 at paras 31-2. Similarly, this Court is not required to decide this in the present application.

<sup>38</sup> *Crompton* above n 1 at para 52.

<sup>39</sup> High Court judgment above n 2 at para 40.

<sup>40</sup> *Id.*

franchise agreement” had been concluded, was the kiss of death for its request to stay the proceedings. This was because “there [was] little or no prospect of success of establishing the factual defence at the arbitration”.<sup>41</sup>

[44] Can it be said that these courts did not exercise their discretion judicially in assessing the stay application to the extent that this Court’s intervention is warranted? In my assessment, the answer is a resounding no. The High Court was entitled to consider the fact that the agreement had lapsed. I say so for the following reasons: A referral just before the expiry of an agreement is not, per se, an absolute bar to a stay. What may tilt the scales against a stay is an unwarranted and undue delay caused by the party making the referral.<sup>42</sup> In this matter, although the applicant instituted its referral before the eviction proceedings were initiated, it only did so a mere eight days before the agreement was set to lapse. Had the applicant been of the view that it ought not to have been required to pay the brand fee to receive an extended franchise agreement, it should have approached the Controller at that time to arbitrate on the reasonableness or otherwise of the requirement to pay the brand fee and the actual quantum. This is especially so given that the first respondent had given it notice six months before the expiry of the agreement. The undue delay in approaching the Controller was to the applicant’s peril. Before it, the High Court was primarily dealing with eviction proceedings on a commercial property. The applicant did not show, on the facts, that it was entitled to remain on the property or how the arbitrator would address this issue.

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<sup>41</sup> Supreme Court of Appeal judgment above n 3 at para 28.

<sup>42</sup> *Department of Transport v Tasima (Pty) Ltd* [2016] ZACC 39; 2017 (2) SA 622 (CC); 2017 (1) BCLR 1 (CC) at para 160. In that matter, although in the context of a delay in bringing a challenge to the lawfulness of an exercise of public power, this Court stated:

“While a court ‘should be slow to allow procedural obstacles to prevent it from looking into a challenge to the lawfulness of an exercise of public power’, it is equally a feature of the rule of law that undue delay should not be tolerated. Delay can prejudice the respondent, weaken the ability of a court to consider the merits of a review, and undermine the public interest in bringing certainty and finality to administrative action. A court should therefore exhibit vigilance, consideration and propriety before overlooking a late review, reactive or otherwise.”

[45] The High Court, looking at the totality of circumstances before it, found that there were sufficient reasons not to stay the proceedings. It cannot be said that this decision was not made judicially.

[46] Before the Supreme Court of Appeal, the applicant conceded that it did not want the arbitrator to make a finding on whether the first respondent had acted unfairly or unreasonably in seeking an eviction or not concluding the franchise agreement, but rather that the arbitrator should make a *factual finding* about the existence of the agreement. In this Court, the applicant maintains that the proceedings ought to have been stayed for this factual finding to be made. I agree with the Supreme Court of Appeal that this concession significantly weakens the applicant's case. In any event, both courts had made factual findings regarding the non-existence of a "new franchise agreement". It is also clear from the record before this Court that no such agreement was concluded by the parties and that, by refusing to pay the brand fee, the applicant rejected an extended tenure.

[47] I am well aware of the power imbalance in the petroleum industry. It may also very well be that the request to pay a brand fee as a condition for concluding a new franchise agreement would have been classified by the arbitrator as an unfair and unreasonable practice.

[48] In this matter, the applicant initially committed to paying the brand fee in exchange for an extended tenure, and then reneged on that offer. Following that, it signed the cession agreement which indicated, in no uncertain terms, that the franchise agreement would terminate in December 2017. Even worse, the applicant is now referring a *factual* dispute to the arbitrator in respect of the agreement that gives it the right to occupy the premises. As it is, the dispute here is not one relating to an unfair or unreasonable contractual practice but one where this Court is asked to determine whether there was a further franchise agreement concluded to extend the life of the franchise. These are similar circumstances to those in *Crompton*, where this Court held:

“It is also important to remember that before the High Court, the applicant primarily argued that there had been an oral agreement between the parties which extended the life of the franchise agreement beyond 28 February 2018. This claim could not be sustained on the facts. Indeed, this argument was abandoned by the applicant on appeal. This also explains why the High Court considered the dispute to be one of contract and not of unreasonable or unfair contractual practices. It was requested to determine, amongst other things, whether *as a matter of fact* there had been an agreement to extend the life of the franchise and lease agreements (had there been, the eviction of the applicant would have been a non-starter).”<sup>43</sup>

[49] Section 12B provides for an invaluable process for licenced retailers. As previously stated by this Court, it provides a much needed “*expedient, specialised and procedurally flexible forum*”<sup>44</sup> to resolve disputes in the industry. Licensed retailers are encouraged to make use of it and courts are encouraged, as far as possible, to grant an order to stay proceedings to allow the arbitration process to take place if one of the parties has elected to pursue it. This is of course not a boundless election that must give way in any and all circumstances. Parties must make the election timeously and diligently once they are of the view that there is an unfair contractual practice in their contractual relations.

[50] For all these reasons, it cannot be said that the High Court, in exercising its discretion to refuse to stay the proceedings, did not act judicially. There was clear evidence before the High Court – which has now been considered by this Court – that the so-called “new franchise agreement” extending the tenure of the franchise contended for by the applicant simply did not exist. The applicant also failed to clearly set out what it wished the arbitrator to decide and how that related to its right of occupation of the premises. Therefore, it is unlikely that this Court will reverse the decision on the stay. Had the applicant initiated the section 12B proceedings long before the agreement was set to lapse, the position may very well have been different, though the applicant would still face the difficulty that its referral asked the Controller

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<sup>43</sup> *Crompton* above n 1 at para 55.

<sup>44</sup> *Business Zone* above n 4 at para 59.

to determine whether, as a matter of fact, a further franchise agreement had been concluded.

*Section 6(2) of the Arbitration Act and the right to access courts*

[51] Having concluded that the High Court is not obliged to stay proceedings where there is a referral in terms of section 12B, but has a discretion to refuse the stay of proceedings, and that in this matter it exercised that discretion judicially, an incidental issue arises. As mentioned earlier, the applicant takes issue with section 6(2) of the Arbitration Act. The discretion to refuse to grant a stay of proceedings, so the argument goes, conflicts with the right to access specialist tribunals as provided for in section 34 of the Constitution.

[52] It cannot be overstated that the right of access to courts and specialist tribunals is the cornerstone of ensuring fairness and justice in the resolution of disputes. The section 12B process is one such process and any curtailment to accessing it cannot be done capriciously. Can it then be said that the refusal to exercise a discretion in favour of granting a stay to enable a party to pursue proceedings in terms of section 12B is unconstitutional?

[53] In my view, the applicant has failed to make out a case for the unconstitutionality of section 6(2) of the Arbitration Act. The right to access the High Court under section 34 of the Constitution remains intact. Each application for a stay must be determined on its own merits. That is what happened in this case. Therefore, a refusal for a stay cannot be said to be in conflict with section 34.

*Conclusion*

[54] In the result, there is no basis for this Court to interfere with the exercise of the High Court's discretion in refusing to stay the proceedings. It is not in the interests of justice to grant leave to appeal. On costs, there is no reason to deviate from the general rule that costs follow the result.

*Order*

[55] The following order is made:

1. Leave to appeal is refused.
2. The applicant must pay the first respondent's costs, including the costs of two counsel.

For the Applicants:

B G Savvas instructed by K Swart and  
Company Incorporated

For the First Respondent:

G D Harpur SC and D Ramdhani SC  
instructed by Norton Rose Fulbright  
Incorporated