



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

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

SIGNATURE

DATE: 13 February 2023

Case No. 16138/2021

In the matter between:

LEHANA'S PASS INVESTMENT CC

Applicant

and

AFRICA CAMPUS TRADING 300 (PTY) LTD

First Respondent

BP SOUTHERN AFRICA (PTY) LTD

Second Respondent

CONTROLLER OF PETROLEUM PRODUCTS

Third Respondent

JUDGMENT: LEAVE TO APPEAL

WILSON J:

1 The applicant, "Lehana's Pass", seeks leave to appeal against my judgment of 17 November 2022. In that judgment, I evicted the first respondent, "Africa Campus", from the filling station it operates on Lehana's Pass' property under

franchise from the third respondent, “BP”. However, I suspended the execution of the eviction order pending the outcome of an arbitration Africa Campus has initiated, in which it seeks damages from BP for what it says is BP’s collusion with Lehana’s Pass to divest it of the right to operate the franchise, and the equity that Africa Campus has built up in the business over the last several years. That arbitration was instituted under section 12B of the Petroleum Products Act 120 of 1977 (“the Petroleum Act”).

The application for leave to appeal as argued

- 2 It is difficult to identify and understand the theory upon which the application for leave to appeal was originally conceived. It was clear enough that Lehana’s Pass objected to the suspension I placed on the execution of the eviction order I granted. The suspension was criticised as an “undue and *ultra vires* restriction” on Lehana’s Pass’ property rights. But it was hard to discern the legal basis on which that objection was advanced.
- 3 In particular, there was no attack on the proposition that I had the power to suspend execution of the eviction order in terms of Rule 45A. There was also no suggestion that I had mistaken the boundaries of my power under Rule 45A, or that I had exercised it improperly. In Lehana’s Pass’ written application for leave to appeal, it was suggested that I had ignored a series of delaying tactics Africa Campus was said to have deployed to string out the arbitration process for as long as possible. But Mr. Richard, who appeared for Lehana’s Pass in the application for leave to appeal, very fairly accepted that no such tactics had been alleged in the papers before me at the time I gave judgment.

In that event, it seems to me that there is no suggestion that I ignored relevant facts in the exercise of my discretion under Rule 45A.

- 4 This appears to dispose of the suggestion that the suspension I placed on the eviction order was “undue and *ultra vires*” on the law as it stood at the time.
- 5 At the time the application for leave to appeal was argued, the facts also suggested that the arbitration was at an advanced stage. A pre-arbitration meeting was scheduled for 30 January 2023, and there was no indication that the arbitration hearing itself could last for more than two weeks. Africa Campus placed on record that it was ready to proceed with the arbitration at the earliest time convenient to the arbitrator and to BP’s legal representatives.
- 6 In these circumstances, much of the oral argument at the application for leave to appeal revolved around whether the proposed appeal would have any practical effect or result. It appeared, on the facts as they then stood, that the arbitration would be concluded, and Africa Campus would have left the property, or have been ejected from it, long before the hearing of any appeal could reasonably be anticipated.
- 7 Bearing that in mind, the parties agreed that I should reserve judgment on the application, but that I should await the outcome of the pre-arbitration meeting, together with any written submissions that the parties might wish to make about its implications for the proposed appeal, before finally handing my judgment down. I acceded to that request, and reserved judgment on that basis.

- 8 For what it is worth, and having given the matter some thought, I would not have refused leave to appeal merely because the appeal would probably have become moot by the time it could have been entertained. Whether an appeal should be dismissed as moot is not a question that should be anticipated. As things stood at the time the application was argued, the proposed appeal raised a live controversy, and it would not have been appropriate for me to speculate about whether there would still have been such a controversy at the time the appeal came to be argued.
- 9 I would nonetheless have dismissed the application as having no prospects of success, given that there was no recognisable basis, at the time the application was argued, on which the exercise of my discretion under Rule 45A could reasonably have been impugned.

The decision of the Constitutional Court in *Mfoza*

- 10 After I reserved judgment, however, the Constitutional Court handed down its own judgment in *Mfoza Service Station (Pty) Ltd v Engen Petroleum Ltd* (CCT 167/21) [2023] ZACC 3 (1 February 2023). In that decision, the majority of the court chose to interpret section 12B of the Petroleum Act narrowly, so as to exclude from its scope the power of an arbitrator to grant compensation to correct an unfair or unreasonable contractual practice. The minority of the court favoured a broader interpretation that would have permitted such an award.
- 11 In my judgment on the main application in this case, I anticipated the reasoning of the minority of the Constitutional Court, in that I concluded that the Constitutional Court's decision in *Business Zone 1010 CC t/a Emmarentia*

Convenience Centre v Engen Petroleum Limited 2017 (6) BCLR 773 (CC) had already as good as established that section 12B (4) (a) of the Petroleum Act permits the award of compensation to correct an unfair or unreasonable contractual practice, and that it was easy to imagine a wide variety of circumstances in which compensation could serve that end.

12 This issue was also explored at the hearing of the main application in this matter. Counsel were agreed that compensatory claims fell within the scope of section 12B (4) (a) of the Petroleum Act.

13 Be that as it may, the majority decision in *Mfoza* is now the law. My decision on the main application in this case is inconsistent with it, and must be accepted as erroneous to the extent of that inconsistency.

14 The effect of this is that the basis on which I decided that it was in the interests of justice to suspend the eviction order I granted has now fallen away. In light of the *Mfoza* decision, it is not clear to me what is left of Africa Campus' claim at arbitration. It may be that there are justiciable claims still to be raised in the arbitration, and it may also be that those claims would have provided me with a different basis on which to suspend the eviction order I granted. However, the basis on which I actually suspended the eviction order is no longer tenable in law.

15 For that reason, it seems to me that Lehana's Pass now stands not just a reasonable prospect of success on appeal, but a very good one, albeit on grounds that were not advanced, and that could not have been advanced, in its application for leave to appeal. On 3 February 2023, I called for further written submissions, to be filed by no later than 10 February 2023, showing

cause why I should not grant leave to appeal to a Full Court of this division. Neither party elected to file submissions showing such cause. In a letter addressed to my Registrar, and dated 10 February 2023, Africa Campus' attorney acknowledged that Lehana's Pass' application for leave to appeal could no longer reasonably be opposed.

- 16 For all these reasons, leave to appeal must be granted. Given that the questions of law that lie at the heart of this case are now settled, a referral to the Supreme Court of Appeal would be inappropriate.

Order

- 17 Accordingly -

17.1 The applicant is granted leave to appeal to a Full Court of the Gauteng Local Division, Johannesburg.

17.2 The costs of this application are costs in the appeal.



S D J WILSON
Judge of the High Court

This judgment was prepared and authored by Judge Wilson. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 13 February 2023.

HEARD ON:	20 January 2023
DECIDED ON:	13 February 2023
For the Applicant:	C Richard (Heads of argument drawn by E van As) Instructed by Koor Attorneys
For the First Respondent:	N Lombard Instructed by Garlicke and Bousfield Inc
For the Third Respondent	Lawtons Africa Inc