



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

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

DATE: 31/08/2026

CASE NO: 2023/132537

In the matter between:-

SHELL RETAILER COUNCIL

Applicant

and

SHELL DOWNSTREAM SOUTH AFRICA (PTY) LTD

Respondent

IN RE:

THE ACTION BETWEEN:

SHELL RETAILER COUNCIL

Plaintiff

and

LEAVE TO APPEAL (JUDGMENT)

ALLEN AJ

INTRODUCTION

[1] This is an application for leave to appeal against the whole of my judgment and orders handed down on 26 May 2026. Applicant seeks leave to appeal to the Supreme Court of Appeal, alternatively, the Full Bench of this Court.

[2] In my judgment the applicant's main action for dispute resolution was stayed and the disputes between the parties were referred to dispute resolution by way of arbitration in terms of Section 6 of the Arbitration Act, 42 of 1965.

BACKGROUND

[3] The grounds of appeal are that I erred and/or misdirected myself in fact or law in one or more of the material respects set out in the application for leave to appeal.

[4] In this application applicant alleges numerous grounds for the said application and raised seventeen (17) grounds of appeal and thirty-eight (38) points wherein I failed to find, erred and/or misdirected myself. Nothing new has been raised by the applicant, I have dealt with most, if not all, of the issues raised by the applicant and it is not necessary for me to repeat those in full.

[5] This application is against my judgment and order in terms of section 17 (1)(a)(i) and 17(1)(a)(ii) of the Superior Courts Act, 10 of 2013. It is applicant's case that there are inherent constitutional, judicial, legal, industry and wide public interest and importance in the claims and the relief that form the subject matter of the applicant's action and "that another court may come to a different conclusion to the one reached by the court of first instance." (Own emphasis).

[6] For the sake of completeness, I will deal briefly with some of the points raised.

DISCUSSION

[7] The order under appeal is an interlocutory order made in the exercise of my discretion under Section 6(2) of the Arbitration Act¹. In addition, my judgment rests on more than one independent and self-standing ground and applicant should demonstrate a reasonable prospect of success on each such ground to disturb the result. The relief is pursued representatively at the instance of applicant's members.

[8] Some of the points are that respondent breached its identified statutory obligations, the mandatory orders directing respondent to make the disclosure the legislation requires, declarations that the specified standard for contractual terms are in conflict with the Consumer Protection Act("CPA")², alternatively unfair, unreasonable or unjust (considering the provisions of the Petroleum Products Act ("PPA")³ and are consequently void, invalid, unenforceable, severed or deleted at the instance of the relevant member. It is also to interdict respondent from relying upon or enforcing the impugned terms and conduct and from including such terms in any franchise agreement concluded, renewed or extended in future.

The Test

¹ Section 6 of the Arbitration Act 42 of 1965 reads as follows:

"Stay of legal proceedings where there is an arbitration agreement

(1) If any party to an arbitration agreement commences any legal proceedings in any court (including any inferior court) against any other party to the agreement in respect of any matter agreed to be referred to arbitration, any party to such legal proceedings may at any time after entering appearance but before delivering any pleadings or taking any other steps in the proceedings, apply to that court for a stay of such proceedings.

(2) If on any such application the court is satisfied that there is no sufficient reason why the dispute should not be referred to arbitration in accordance with the agreement, the court may make an order staying such proceedings subject to such terms and conditions as it may consider just."

² Act 68 of 2008

³ Act 120 of 1977

[9] The traditional test in deciding whether leave to appeal should be granted was whether there is a reasonable prospect that another court may come to a different conclusion to that reached by me, as averred by applicant. This approach has now been codified in the Superior Courts Act.

[10] In terms of Section 17 of the Superior Courts Act, 10 of 2013:

“(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-

- (a) (i) the appeal would have a reasonable prospect success; or
- (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
- (b) “

[11] The word “would” in Section 17(1)(a)(i) of the Superior Courts Act was discussed in the matter of *Mont Chevaux Trust v Tina Goosen & 18 Others*⁴ as per *Bertelsman J*, held as follows: “It is clear that the threshold for granting leave to appeal against the judgement of a high court has been raised in the new Act. ... The use of the word “would” in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.”⁵

[12] The learned judge in the *Mont Chevaux Trust* matter, *supra*, indicated that the word “would” should include and be interpreted as a “measure of certainty” that another court could come to another conclusion. “Measure of certainty” should not be interpreted that another court will come to a *different conclusion* as a probability of success.⁶

⁴ Case No LCC14R/2014, dated 3 November 2014 at para [6]

⁵ *Daantjie Community and Others v Crocodile Valley Citrus Company (Pty) Ltd and Another* (75/2008) 2015 JDR 1534 (LCC) at para 3. *Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others* (19577/09) [2016] ZAGPPHC 489 (24 June 2016) at para 25

⁶ *Van Zyl v Steyn* (83856/15) [2022] ZAGPPHC 302 (3 May 2022) at para 11

[13] The courts as far back as 2013 in the *Mgezeni Gasbat Nxumalo v The National Bargaining Council for the Chemical Industry (NBCCI) and Others*⁷ summarized the approach one should follow in determining whether to allow an application for leave to appeal having due regard to the wording of Section 17(1)(a)(i) of the Superior Courts Act: “[12]...[3] The traditional formulation of the test that is applicable in an application such as the present requires the court to determine whether there is a reasonable prospect that another court may come to a different conclusion to that reached in the judgement that is sought to be taken on appeal. As the respondents observe, the use of the word “would” in section 17(1)(a)(i) are indicative of a raising of the threshold since previously, all that was required for the applicant to demonstrate was that there was a reasonable prospect that another court might come to a different conclusion.”

[14] “Reasonable prospect of success” was discussed in the matter of *MEC for Health, Eastern Cape v Mkhitha and Another* **(1221/2015) [2016] ZASCA 176 (25 November 2016)** at para 17: “An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.”

[15] The statutory prerequisite derived from section 17(1)(a)(i) of the Superior Courts Act, is the prompt resolution of disputes where there is a reasonable prospect that the factual matrix could receive a different treatment or where there is some legitimate dispute of law which would allow another court to come to a different conclusion.

[16] In *Ramakatsa and Others v African National Congress and Another* **(724/2019) [2021] ZASCA 31 (31 March 2021)** at para 10 the court expressed itself as follows on “reasonable prospects of success” as provided for in Section 17(1)(a) of the Superior Courts Act: “.... The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In other words, the appellants in this matter need to convince this court on proper grounds that they have prospects of success on appeal. Those

⁷ **JR1170/2013 [2016] ZALCJHB 212 (15 June 2016)**

prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist”.

[17] In the case of *S v Smith* **2012 (1) SACR 567 (15 March 2011)** Plasket AJA (Cloete JA and Maya JA concurring) held as follows at para 7: “What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that 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”.

[18] In the judgment of *Notshokovu v S*⁸ at para 2 the SCA remarked that an appellant now faces a higher and a more stringent threshold, in terms of the Superior Courts Act 10 of 2013 compared to that under the provisions of the repealed Supreme Courts Act 59 of 1959.

[19] I agree that there must be sound, rational, and compelling reasons that there are prospects of success on appeal before leave to appeal can be granted. Applicant’s case is that another court may come to a different conclusion.

[20] In *Songono v Minister of Law and Order* **1996 (4) SA 384 (E)** it was stated at 385F-386B: “I am not aware of any judgment dealing specifically with grounds of appeal as envisaged by Rule 49(1)(b); however, Rule 49(3) is couched in similar terms and also requires the filing of a notice of appeal which shall specify ‘the grounds upon which the appeal is founded’. In regard to that subrule it is now well established that the provisions thereof are peremptory and that the grounds of appeal are required, inter alia, to give the respondent an opportunity of abandoning the judgment, to inform the respondent of the case he has to meet and to notify the Court of the points to be raised. Accordingly, insofar as Rule 49 (3) is concerned, it has been held that grounds of appeal are bad if they are so widely expressed that it leaves the appellant free to canvass every finding of fact and every ruling of the law

⁸ *Notshokovu v S* **(157/2015) [2016] ZASCA 112 (7 September 2016)**.

made by the court a quo, or if they specify the findings of fact or rulings of law appealed against so vaguely as to be of no value either to the Court or to the respondent, or if they, in general, fail to specify clearly and in unambiguous terms exactly what case the respondent must be prepared to meet - see, for example, *Harvey v Brown* 1964 (3) SA 381 (E) at 383; *Kilian v Geregsbode, Uitenhage* 1980 (1) SA 808 (A) at 815 and Erasmus Superior Court Practice B1-356-357 and the various authorities there cited.

"It seems to me that, by a parity of reasoning, the grounds of appeal required under Rule 49(1)(b) must similarly be clearly and succinctly set out in clear and unambiguous terms so as to enable the Court and the respondent to be fully and properly informed of the case which the applicant seeks to make out and which the respondent is to meet in opposing the application for leave to appeal. Just as Rule 49(3) is peremptory in that regard, Rule 49(1)(b) must also be regarded as being peremptory. In my view the lengthy and rambling notice of appeal filed in casu falls woefully short of what was required. Mr Bursey suggested that grounds of appeal could be gleaned from the notice but that is not the point - the point is that the notice must clearly set out the grounds and it is not for the Court to have to analyse a lengthy document in an attempt to establish what grounds the applicant intended to rely upon but did not clearly set out. On this basis alone the application seems to me to be fatally defective and must be dismissed."⁹ (Emphasis added)

[21] In the instant case the lengthy application also fell short of what was required.

[22] In *Doorewaard and Another v S* (CC33/2017) [2019] ZANWHC 25 (23 May 2019), prolixity in grounds of appeal was deprecated where Hendricks J (as he then was) said: "[3] The law governing a notice of appeal (and also notice of application for leave to appeal) is trite. The grounds of appeal in a notice of application for leave to appeal must be clearly and succinctly set out in unambiguous terms so as to enable the Court and the respondent to be fully and properly informed of the case which the applicant seeks to make out and which the respondent is to meet in opposing the application for leave to appeal. The notice should not contain arguments. Therefore heads of argument must also be filed and served in which the points to be argued will be set out in much more detail." (Emphasis added)

[23] In *Hing and Others v RAF* 2014 (3) SA 350 (WCC) the following was stated on

⁹ The decision in *Songono* was approved by the Full Court in *Xayimpi and Others v Chairman Judge White Commission (formerly known as Browde Commission) and Others* [2006] 2 All SA 442 (E) and has been consistently followed in various divisions of the High Court.

page 353: "[4] The explanation is unacceptable. The application for leave to appeal had listed 65 grounds on which the judge a quo was alleged to have 'erred and misdirected himself'. As the respondent's counsel justifiably observed, a number of those grounds were so vaguely formulated as to be of little or no assistance in meaningfully defining the bases of the intended appeals. In any event it should have been apparent to the appellants that the learned acting judge could not possibly have intended his words to be taken literally. The effect of the notice of application for leave to appeal was to suggest that he had misdirected himself at every turn in making any findings adverse to their claims. In the context of his detailed and fully reasoned judgment, it could not reasonably have been assumed by the appellants or their legal representatives that by granting leave to appeal in the terms he did, the judge meant to be understood to be acknowledging that such wide-ranging error and misdirection on his part might reasonably be established on appeal. On the contrary, the manifestly indiscriminate formulation of the grounds on which the application for leave to appeal was brought brings to mind the observation of a US Appeals Court judge that when he sees 'an appellant's brief containing seven to ten points or more, a presumption arises that there is no merit to any of them'".(Emphasis added)

[24] In the instant case I failed to find, erred and/or misdirected myself on 38 points.

[25] Grounds 1 to 5 and 14 contend that respondent failed to meet the jurisdictional requirements of Section 6(1) of the Arbitration Act. In my judgment, I exercised my discretion under Section 6(2) to stay the proceedings to the extent that if the Section 6(1) requirements were not met, clause 29, the CPA, the PPA, Section 6(2) and my discretion under Rule 41A and the Compulsory Mediation Directive of this Court made it in the interests of justice to stay the action pending the outcome of the arbitration proceedings.

[26] In the matter of *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)** it was said:"[33] A special plea for arbitration is one of several dilatory pleas and can be included in pleadings. Generally, when a special plea is raised, all the defences on which the defendant intends to rely must be raised at the same time. This is so because, should the special plea fail, there would be no further opportunity to plead over on the merits. There is no objection to pleading a special defence in the course of the plea, with or without a special heading.

[34] Therefore, the inclusion of the request for a stay of proceedings in the applicant's conditional counter-application and as part of the answering affidavit did not render the

application defective. The High Court erred when it considered the first option and omitted to consider the second one as set out in *PCL Consulting*.

[35] Fortunately for the applicant, the High Court did not regard its finding that the application did not comply with s 6(1) as the end of the matter, as it went on to consider the merits of the stay application in terms of s 6(2). Therefore, what must now be considered is the scope of the High Court's discretion when considering whether to grant a stay pending arbitration and whether the High Court in this matter exercised that discretion judicially.

[41] Section 6(2) of the Arbitration Act allows a court to stay proceedings 'if [upon application in terms of s 6(1)] the court is satisfied that there is no sufficient reason why the dispute should not be referred to arbitration in accordance with the agreement'. The language of s 6(2) directs a court acting under that section to stay proceedings where such an application is made unless sufficient countervailing reasons exist for the dispute not to be referred to arbitration. The words 'no sufficient reason why the dispute *should not* be referred to arbitration' denote that the standard position is that a stay should be granted upon request. The onus of satisfying the court that the matter *should not* be referred to arbitration and instead heard by the High Court is on the party who instituted the legal proceedings.¹⁰ In *Universiteit van Stellenbosch*¹¹ the then Appellate Division held that, when a court is faced with a stay application, the discretion to refuse arbitration in the circumstances should be exercised judicially, and only when a 'very strong case' has been made out.¹² This high threshold for refusal is 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'.

[64] This matter is a cautionary tale to both retailers and wholesalers in the petroleum industry to approach the Controller without undue delay once a party suspects that there are unfair or unreasonable contractual practices. In this case, while the High Court's analysis failed to consider the importance of the s 12B arbitral process in light of *Business Zone*, it cannot be said that the High Court's exercise of discretion fell outside the ambit of s 6(2) of the Arbitration Act and the 'sufficient reasons' requirement, such that the discretion was not exercised judicially. It is not for this court to say whether the High Court came to a right or wrong conclusion when exercising its discretion, but whether it was influenced by wrong principles of law or fact. The High Court used the 'sufficient reasons' test in s 6(2). It considered

¹⁰ *Kathmer Investments (Pty) Ltd v Woolworths (Pty) Ltd* 1970 (2) SA 498 (A) at 504H; *Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd* 1971 (2) SA 388 (W) at 391C – E; and *Rhodesian Railways* above n33 at 361.

¹¹ *Universiteit van Stellenbosch v JA Louw (Edms) Bpk* 1983 (4) SA 321 (A).

¹² *Id* at 327C – D. See also *Transasia* above n36 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 s 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.]

countervailing factors based on the facts before it, which in its assessment amounted to sufficient reasons to refuse a stay. The countervailing factors were sufficient. Accordingly, there is no basis to set aside the decision of the High Court to refuse the stay application. It follows that the appeal must be dismissed."

[27] In my judgment, I found that applicant had not discharged its onus under Section 6(2) why the disputes ought not to be referred to arbitration.¹³

[28] Ground 6 is that I erred in not finding that there was no privity of contract between applicant and respondent, applicant enjoyed no benefits, rights or obligations under the franchise agreements, "was not a party" to the relevant arbitration provisions contained in the franchise agreements, was not litigating in a "representative capacity" and was litigating in its own name in terms of its constitutional mandate and accompanying election/discretion.

[29] In my judgment, I relied on applicants' particulars of claim, constitution and members' resolutions.¹⁴ Applicant brought the action in a representative capacity and a mandate authorizing it to conduct arbitration and litigation proceedings against respondent. This is not inconsistent with Section 1 of the Arbitration Act which defines a party to include a representative recognized by law of a party to an arbitration agreement. Applicant elected to sue in a representative capacity and the duty to arbitrate is also in terms of its mandate. Applicant's right to litigate is asserted in the contractual arbitration provisions which bounds applicant as a representative litigant on behalf of its members.

[30] Grounds 7 and 9 contend that respondent took another step in the proceedings with its reply to the Rule 41A notice and its Rule 7 notice and thereby disqualifying it

¹³ See also *Nick's Fishmonger Holdings (Pty) Ltd v De Sousa* **2003 (2) SA 278 (SE)** at paras 17 to 24

¹⁴ In *Majola and Another v Country Cloud Trading 221 CC and Others* **2019 (5) SA 195 (KZP)** on page 203 it was said: "[23] The appellants never entered into any contract with the respondents and their rights need to be protected, particularly as the property is mortgaged for the entire value of the property. The court has the power to decide on legal issues not pertinently raised in the affidavits, where it is satisfied that all the relevant facts have been canvassed in the affidavits, so that none of the parties is prejudiced. The issue relating to the common intention of the parties, which has been raised by the appellants, though not pertinently raised in the appellants' papers, arises, however, out of the established facts. This issue may be considered by the court and may form the basis of its judgment. I do not see how the consideration of common intention would prejudice the respondents, as it is related to the interpretation of the provisions of s 4(1) of the Act. Section 39(2) of the Constitution is also applicable to the interpretation of legislation, like s 4(1) of the Act, which should not be used to achieve an unconstitutional end." (Emphasis added)

from the relief it sought. The Rule 41A notice is a separate dispute resolution mechanism. Applicant's notice was in any event inadequate and irregular and a reply thereto cannot be a step advancing litigation.¹⁵

[31] The Rule 7 notice deals with the authority of applicants' attorneys and not the merits or correctness of the court proceedings. In my judgment I found that even if the respondent has not complied strictly with Section 6(1) it does not preclude reliance on my discretion exercised in terms of Section 6(2).

[32] In the matter of *Universiti Malaya v ESA Jurutera Perunding SDN BHD* [2026] 5 MLRA 1, a Civil Appeal No: 01(i)-20-07-2024(W) of 14 May 2026, Federal Court of Malaysia, an application was also brought for a stay of court proceedings pending arbitration. In this matter the taking of other steps in the proceedings was also considered and more specifically a request for an extension of time to file a defence and a notice to produce documents. The court held:" [131]Guided by the principles laid down in *Yeo Eng Lam*, a necessary but peripheral application or action that does not touch on the merits of the substantive dispute does not constitute a step in the proceedings. The Notice to Produce Documents cannot be classified as pleadings within the ambit of limb (b) of *Sanwell*.¹⁶ Rather, it falls within limb (c) of *Sanwell*. Additionally, the nature of a Notice to Produce Documents is to enable the inspection of documents referred to in the pleadings. It is, though not an application, purely peripheral to the substantive disputes between the parties and does not advance the merits of the case in any manner. As made clear by the Defendant in its letter dated 8 December 2022 and *Affidavit* in Reply affirmed on 4 January 2023 in response to the Plaintiff's *Affidavit* in Reply, some documents referred in the Statement of

¹⁵ Rule 41A of the Uniform Rules of Court reads:" Mediation as a dispute resolution mechanism

(1) In this rule— "dispute" means the subject matter of litigation between parties, or an aspect thereof.

"mediation" means a voluntary process entered into by agreement between the parties to a dispute, in which an impartial and independent person, the mediator, assists the parties to either resolve the dispute between them, or identify issues upon which agreement can be reached, or explore areas of compromise, or generate options to resolve the dispute, or clarify priorities, by facilitating discussions between the parties and assisting them in their negotiations to resolve the dispute.

(2) (a) In every new action or application proceeding, the plaintiff or applicant shall, together with the summons or combined summons or notice of motion, serve on each defendant or respondent a notice indicating whether such plaintiff or applicant agrees to or opposes referral of the dispute to mediation.

(b) A defendant or respondent shall, when delivering a notice of intention to defend or a notice of intention to oppose, or at any time thereafter, but not later than the delivery of a plea or answering affidavit, serve on each plaintiff or applicant or the plaintiff's or applicant's attorneys, a notice indicating whether such defendant or respondent agrees to or opposes referral of the dispute to mediation: Provided that in urgent applications, the court or a judge may dispense with compliance with paragraphs (a) and (b).

(c) The notices referred to in paragraphs (a) and (b) shall be substantially in accordance with Form 27 of the First Schedule and shall clearly and concisely indicate the reasons for such party's belief that the dispute is or is not capable of being mediated."

¹⁶ *Sanwell Corp v Trans Resources Corp Sdn Bhd & Anor* [2002] 2 MLJ 625 (FC)

Claim were not in the Defendant's possession. In our view, the Defendant's Notice to Produce Documents is reasonable and necessary, and was issued and served in good faith. Therefore, we are of the considered view that the serving of Notice to Produce Documents by the Defendant's solicitors does not indicate an intention to waive arbitration rights.

[132] In *The Londonderry Port and Harbour Commissioners v. W S Atkins Consultants Ltd and Charles Brand Ltd* [2011] NIQB 74, it was held that a request for discovery of documents referred to in the Statement of Claim did not constitute a step in the proceedings. Weatherup J observed as follows: "[25] **Similarly in the present case I am satisfied that the 1st defendant was investigating the nature and terms of the contractual arrangement between the parties. The request for discovery related to matters referred to in the Statement of Claim and included the contractual documents relied on by the plaintiff.** The discussion of a timetable for delivery of the 1st defendant's defence was in the course of the ongoing exchange about the contractual documents. **There was no unequivocal representation that the matter would proceed in Court and no election to waive any right to proceed by way of arbitration. The 1st defendant's actions were consistent with the investigative measures being undertaken to ascertain the terms of engagement between the plaintiff and the 1st defendant. While it would have been desirable if the 1st defendant had stated expressly in correspondence that the right to apply for a stay was reserved while the contractual arrangements were being investigated, that was not essential in order to maintain the right to make the application for the dispute to be determined by arbitration.**

[26] Accordingly I am satisfied that the arbitration clause was incorporated into the contractual arrangements between the plaintiff and the 1st defendant and that the actions taken by the 1st defendant did not constitute steps in the proceedings to answer the substantive claim. I am satisfied that the order should be made on behalf of the 1st defendant staying the proceedings and referring to arbitration." [Emphasis Added]

[133] Similarly, in the Singapore High Court decision in *Amoe Pte Ltd v. Otto Marine Ltd* [2014] 1 SLR 724 (HC), Lee Seiu Kin J observed at p 729 as follows: "[14] In my view, **if a party files and serves a notice to produce under O 24 r 10 of the ROC for inspection of documents referenced in pleadings, and had done so to ascertain the nature of the claim before it to see if arbitration was an option, this act by itself is not a step in the proceedings, even without an express reservation of the right to seek a stay.**"

[Emphasis Added]"¹⁷

[33] In grounds 8 and 9 I erred to not find that respondent was non-suited in its application because it has not raised, identified or articulated a genuine arbitral dispute capable of being appropriately and competently referred to arbitration and failed to make out its case in its founding affidavit for the relief sought. Furthermore, that I erred and/or misdirected myself failing to articulate and/or identify the issues in dispute and applicant relied on the "PLC case"¹⁸ in this regard.

[34] In the *PCL* case it was said:" [7] The mere fact that parties have agreed that disputes between them shall be decided by arbitration does not mean that court proceedings are incompetent. If a party institutes proceedings in a court despite such an agreement, the other party has two options:

It may apply for a stay of the proceedings in terms of s 6 of the Arbitration Act 42 of 1965; or it may in a special plea (which is in the nature of dilatory plea) pray for a stay of the proceedings pending the final determination of the dispute by arbitration.

The definitive statement of the law in this regard is to be found in *Rhodesian Railways Ltd v Mackintosh*¹⁹ where Wessels ACJ said:'All that sec 6(1) lays down is that you cannot adopt the cheaper and speedier procedure therein provided when once you have delivered pleadings or taken any other step in the proceedings. If you have taken any step in the proceedings, then you can no longer adopt the speedier and less costly procedure of applying to the Court to stay proceedings but you must file your pleadings in the ordinary way. In pleading, however, you can raise the defence that the case ought to be decided by arbitration; this can be done by a special preliminary plea.' In the present proceedings, the defendant has simply pointed out that the lease contains an arbitration clause in wide terms. That is not sufficient. The defendant was obliged to go further and set the terms of the dispute. As Didcott J succinctly pointed out in *Parekh v Shah Jehan Cinemas (Pty) Ltd and Others*:²⁰ 'Arbitration is a method for resolving disputes. That alone is its object, and its justification. A disputed claim is sent to arbitration so that the dispute which it involves may be determined. No purpose can be served, on the other hand, by arbitration on an undisputed claim. There is then nothing for the arbitrator to decide. He is not needed, for instance, for a judgment by consent or default. All this is so obvious that it does not surprise

¹⁷ See also *Tomolugen Holdings Ltd and Another v Silica Investors Ltd and other Appeals* [2015] SGCA 57 at paras 29 and 57 to 59.

¹⁸ *PCL Consulting (Pty) Ltd t/a Phillips Consulting SA v Tresso Trading 119 (Pty) Ltd* 2009 (4) SA 68 (SCA)

¹⁹ 1932 AD 359 at 370-371.

²⁰ 1980 (1) SA 301 (D) at 304E-G.

one to find authority for the proposition that a dispute must exist before any question of arbitration can arise. It includes *Re Carus-Wilson and Greene* (1887) 18 QBD 7 (CA); *London and Lancashire Fire Assurance Co v Imperial Cold Storage and Supply Co Ltd* (1905) 15 CTR 673; *King v Harris* 1909 TS 292.' The passage just quoted was approved by this court in *Telecall (Pty) Ltd G v Logan*²¹ and Plewman JA went on to say: '[12] I conclude that before there can be a reference to arbitration a dispute, which is capable of proper formulation at the time when an arbitrator is to be appointed, must exist and there cannot be an arbitration and therefore no appointment of an arbitrator can be made in the absence of such a dispute. It also follows that some care must be exercised in one's use of the word "dispute". If, for example, the word is used in a context which shows or indicates that what is intended is merely an expression of dissatisfaction not founded upon competing contentions no arbitration can be entered upon.' I would merely emphasise that a failure to pay does not without more imply that there is a dispute as to liability." (Own emphasis)

[35] Respondent, as the other party, acted in terms of the first option.

[36] Furthermore, an articulated and identified dispute must exist before arbitration proceedings can be pursued. Respondent has identified the nine disputes in its founding affidavit which are the same as the nine pleaded claims in applicant's summons. The disputes and the claims are the same, word for word.

[37] In ground 10 I have erred and/or misdirected myself to have due and proper regard to applicant's notice of intention to amend whereby challenging the validity and enforceability of respondent's arbitration provisions in its franchise agreements, specifically clause 29. Applicant relies in this regard on the decision of *North East Finance (Pty) Ltd*.²² It is to be noted that in the *North East Finance* case the arbitration clause could not be invoked while under challenge as a result of a case that turned on fraud, distinguishable from the papers before me. Respondent's unilateral election to make use of clause 29 cannot result that a deduction can be made of fraud.

[38] On the papers before me, the amendment was only a proposed amendment and not perfected yet. I am bound by the pleadings before me and the respondent's franchise agreement as is.

²¹ 2000 (2) SA 782 (SCA) in para 11.

²² *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* 2013 (5) SA 1 (SCA)

[39] In the case of *Canton Trading 17 (Pty) Ltd t/a Cube Architects v Hattingh NO 2022 (4) SA 420 (SCA)* it was said:"[34] Two approaches have been adopted by the

courts so as to assist in deciding challenges to arbitration that are brought by a litigant at the commencement of a dispute. The first approach is based on separability. Ordinarily, the parties enter into a contract that contains an arbitration clause. If the challenge is that the contract is invalid, unenforceable, or, as here, the contract never came into existence, then it may appear logical that the arbitration clause must fail, if the contract falls to be impugned. But, that is not inevitably so. The arbitration clause may give expression to the intention of the parties that the question of validity, enforceability or, indeed, the very existence of the main contract, is to be submitted to arbitration. If that is how the arbitration clause is properly interpreted, then the court may be inclined to conclude that the parties concluded an arbitration agreement that is separate from the main agreement. What the parties consented to was that the arbitrators should determine the question of the validity or the existence of the contract, and the court should then give effect to their consent. Absent a direct challenge to the validity or existence of the arbitration clause, the court will in these circumstances require the parties to submit the existence or validity dispute to arbitration.

[35] The other approach is based on the principle of competence-competence, also known as '*kompetenz-kompetenz*' (referring to its German origins), or the principle of '*compétence de la compétence*'.²³ This principle has a positive and a negative aspect. The positive aspect is largely uncontroversial. Arbitrators enjoy the competence to rule on their own jurisdiction and are not required to stay their proceedings to seek judicial guidance. The negative aspect of the principle may be formulated as follows. Where the dispute has already been referred to an arbitrator, the court will not rule upon the validity, existence or scope of the arbitration agreement, but will leave these questions of jurisdiction for the arbitrator to decide, at least initially. But, even if the dispute has not yet been referred to arbitration, the court may be

²³ "*Kompetenz-kompetenz* is a jurisprudential doctrine whereby a legal body, such as a court or arbitral tribunal, may have competence, or jurisdiction, to rule as to the extent of its own competence on an issue before it. Regarding its German origin, see P Landolt 'The Inconvenience or Principle: Separability and *Kompetenz-Kompetenz*' *Journal of International Arbitration* 30 No 5 (2013) 511 – 30 at 513 fn 4:

'This German name for the principle has established itself in English usage. In its original German usage, it designated not the general notion of the arbitral tribunal's powers to come to a determination on its own jurisdiction but a more specific notion, ie, a variant of the general notion.'

Furthermore, E Gaillard & J Savage (*Fouchard, Gaillard and Goldman on International Commercial Arbitration*) (Kluwer Law International, The Hague, 1999) at 396 – 7) explain:

'German legal terminology lends a meaning to the expression which differs substantially from that which the expression is intended to convey when used in international arbitration. If one were to follow the traditional meaning of the expression in Germany, "*kompetenz-kompetenz*" would imply that the arbitrators are empowered to make a final ruling as to their jurisdiction, with no subsequent review of the decision by any Court. Understood in such a way, the concept is rejected in Germany, just as it is elsewhere. From a substantive viewpoint, the paradox is all the more marked for the fact that in Germany the question of whether the courts should refuse to examine the jurisdiction of an arbitral tribunal until such time as the arbitrators have been able to rule on the issue themselves (the negative effect of the competence-competence principle), has never been accepted.'

disinclined to decide the question of jurisdiction, unless the arbitration agreement is manifestly void. Once the arbitrator has ruled and rendered an award, the courts may finally decide any issue of jurisdiction, if the award is brought on review or its enforcement is sought. In this formulation, the principle of competence-competence gives effect to the principle of judicial restraint. The jurisdiction that has most plainly adopted negative competence-competence is the French Code of Civil Procedure²⁴ “.

[40] The arbitrator in the first instance is to rule on the scope and validity of the very clause conferring jurisdiction and the principle of competence-competence is recognized in this jurisdiction.

[41] In grounds 11, 11.1 to 11.5, I additionally erred and/or misdirected myself. It was contended the relief respondent seeks under Sections 48, 52 and 72 of the CPA and Section 12B of the PPA falls outside the jurisdiction of any arbitrator. The stay was granted under clause 29.1 of the franchise agreement which deals with private consensual arbitration. Section 12B of the PPA deals with statutory arbitration under clause 29.2 of the franchise agreement. Section 40 of the Arbitration Act extends the Act to every arbitration under any law and neither the CPA nor the PPA excludes its application.

[42] In the case of *Mfoza Service Station (Pty) Ltd v Engen Petroleum Ltd and Another* **2023 (6) SA 29 (CC)** it was said:” [37] In sum, the features of the s 12B arbitral system reflect a mechanism that is limited in its scope and application. It is confined to dealing only, with contractual practices that are alleged to be unfair or unreasonable and then to correct those practices. The jurisdiction of the High Court is not ousted by s 12B, and what emerges are parallel systems whose scope and reach may differ, but share a common adjudicative standard. It is within this context that I proceed to deal with the interpretation of s 12B(4)(a).

[40] Section 12B(4)(a) requires an arbitrator to establish whether the alleged contractual practices are unfair or unreasonable and, if so, to correct such practice by the making of an award. It follows that all that an arbitrator is required to do is to make a determination whether a contractual practice is unfair or unreasonable. There is no power or requirement for the

²⁴ “Article 1458 of the French New Code of Civil Procedure (1981) reads as follows:

“Whenever a dispute submitted to an arbitral tribunal by virtue of an arbitration agreement is brought before a court of the state, such court shall decline jurisdiction. If the arbitral tribunal has not yet been seized of the matter, the court should also decline jurisdiction unless the arbitration agreement is manifestly void.”

arbitrator to go beyond that and matters of fault, causation, loss or damage fall outside of the enquiry. Once an arbitrator has made a determination that a contractual practice is unfair or unreasonable then the arbitrator has wide powers, but they are confined to correcting the practice. One must therefore distinguish the limited nature of the determination that an arbitrator is required to make and the wide powers of redress following such a determination. The purpose of making the award is that it must be *necessary to correct such practice*. The arbitration model is a creation of statute and the power of the arbitrator is derived from the PPA. It is a power that must be exercised within its lawful parameters and for the purpose it has been given.²⁵

[43] It therefore confirms parallel jurisdiction and not exclusive jurisdiction and does not render the pleaded contractual complaints incapable of arbitral determination. No substance was proffered that the disputes fell outside an arbitrator's power. Applicant also relies on the *Steinberg case*²⁶ that statutory arbitration provisions are not mandatory. The *Steinberg case* dealt with the CPA and its Regulations and validity of a single franchisee's franchise agreement not signed by the franchisor, para 25. The case, furthermore, also dealt with Section 1 and 7 of the CPA and did not deal with Section 12B of the PPA, Section 70 of the CPA, or whether statutory arbitration is compulsory or elective.

[44] Applicant also contends that I failed in finding that Section 70 of the CPA²⁷ does not empower nor authorize an alternative dispute resolution agent to determine or

²⁵ *Minister of Public Works v Haffejee* NO 1996 (3) SA 745 (A) ([1996] 4 All SA 355; [1996] ZASCA 17) para 11.

²⁶ *Steinberg v Tammy Taylor Nails Franchising No 45 (Pty) Ltd* (23655/2021) [2023] ZAGPPHC 537 (3 July 2023)

²⁷ 70. Alternative dispute resolution

(1) A consumer may seek to resolve any dispute in respect of a transaction or agreement with a supplier by referring the matter to an alternative dispute resolution agent who may be-

- (a) an ombud with jurisdiction, if the supplier is subject to the jurisdiction of any such ombud;
- (b) an industry ombud accredited in terms of section 82 (6), if the supplier is subject to the jurisdiction of any such ombud;
- (c) a person or entity providing conciliation, mediation or arbitration services to assist in the resolution of consumer disputes, other than an ombud with jurisdiction, or an accredited industry ombud; or
- (d) applying to the consumer court of the province with jurisdiction over the matter, if there is such a consumer court, subject to the law establishing or governing that consumer court.

(2) If an alternative dispute resolution agent concludes that there is no reasonable probability of the parties resolving their dispute through the process provided for, the agent may terminate the process by notice to the parties, whereafter the party who referred the matter to the agent may file a complaint with the Commission in accordance with section 71.

(3) If an alternative dispute resolution agent has resolved, or assisted parties in resolving their dispute, the agent may-

- (a) record the resolution of that dispute in the form of an order, and
- (b) if the parties to the dispute consent to that order, submit it to the Tribunal or the High Court to be made a consent order, in terms of its rules.

adjudicate upon a dispute. In my judgment it is stated that applicant elected to also not make use of this alternative remedy, a non-exhaustion of available alternative remedies.

[45] In grounds 11.6 to 11.9 applicant contends that I failed to find that the nature of the issues raised and claims articulated in applicant's particulars of claim are complex, systemic and constitutionally impacted, matters of public policy, public importance and statutory rights, and implicates public policy, which by their very nature are not arbitrable and an arbitrator cannot develop the common law. Furthermore, it was constitutionally, procedurally and practically improper for respondent to demand that the applicant's collective and complex case be determined in private and split and pursued in multiple statutory and/or private *fora*.

[46] The claims pleaded are contractual and statutory complaints about provisions of the respondent's franchise agreement and its products agreement which falls within the ambit of clause 29.1 of respondent's franchise agreement. In my judgment, only the nine disputes were referred to arbitration and the action stayed pending the outcome.

[47] This is not inconsistent with clause 29 of the franchise agreement regulating the commercial relationship between the parties. In the case of *Cosco Shipping Specialized Carriers Co, Ltd v PT OKI Pulp & Paper Mills and Others* **[2024] SGCA 50** it was said by the Singapore Court of Appeal:⁴ In other words, the inquiry *does not* start with any presumption that the parties must have intended for all their competing claims to be decided in the same forum, because that would depend on the nature of the competing claims and the express language of the agreement as rightly observed by the Judge below. For this reason, we emphasise that care should be exercised to avoid over-reliance on any presumption that parties must have intended that *all* disputes are to be heard together. After all, forum fragmentation is a fact of life with dispute resolution agreements, and one must not overstate the strength of the "one-stop shop" presumption articulated in *Fiona Trust & Holding Corporation and others v Privalov and others* **[2008] 1** Lloyd's Rep 254 (*"Fiona*

(4) With the consent of a complainant, a consent order confirmed in terms of subsection (3) (b) may include an award of damages to that complainant.

Trust”) where Lord Hoffmann explained (at [13]) that: [T]he construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator’s jurisdiction.

5 As we observed in *Rals International Pte Ltd v Cassa di Risparmio di Parma e Piacenza SpA* **[2016] 5 SLR 455** (“*Rals International*”) at [34]:... the rule of construction formulated in *Fiona Trust* is not to be applied irrespective of the context in which the underlying agreement was entered into or the plain meaning of the words. Where there are compelling reasons, commercial or otherwise, that may displace any assumed intention of the parties that claims of a particular kind are to fall within the scope of an arbitration clause, the court should be slow to conduct the exercise of contractual construction from that starting point. [emphasis added] If upon examining the text of the agreement and the nature of the competing claims, a claim is not within its ambit, then forum fragmentation is inevitable and the courts should not steer away from that outcome: see this court’s recent decision in *Asiana Airlines, Inc v Gate Gourmet Korea Co, Ltd and others* [2024] SGCA(I) 8 at [88].”

[48] In grounds 12, 12.1 to 12.4, it was said that respondent did not raise nor rely on considerations or arguments of prematurity nor alternative remedies in its founding affidavit and thereby deprived applicant of its right in terms of Section 34 of the Constitution to a fair hearing and an opportunity to be heard thereon. Applicant misconstrued my judgment for reasoning on this in the alternative.

[49] Applicant’s answering affidavit and heads of argument canvassed the existence and non-exhaustion of alternative statutory remedies under the CPA and the PPA. Section 34 was also dealt with in the case of *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* **2009 (4) SA 529 (CC)** where it was said: “[216] If we understand s 34 not to be directly applicable to private arbitration, the effect of a person choosing private arbitration for the resolution of a dispute is not that they have waived their rights under s 34. They have instead chosen not to exercise their right under s 34. I do not think, therefore, that the language of waiver used by both the European Court of Human Rights in *Suovaniemi* and by the Supreme Court of Appeal in *Telcordia* is apt. Indeed, it may not be apt in relation to constitutional rights at all,²⁸ but that is a topic for another day.

²⁸ **2007 (5) SA 525 (CC)** (2007 (2) BCLR 125; [2006] ZACC 13).

The relevance of the Constitution to the terms of arbitration agreements

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

[50] In ground 13, I erred and/or misdirected myself in finding that a referral of the disputes to arbitration will not necessarily exclude the development of the common law and that applicant was required to plead the development of the common law in circumstances where the relief it seeks in its action indubitably requires the development of the common law. In my judgment I stated that this issue was not pleaded and would not necessarily be excluded by a referral to arbitration. The issue of the common law development is left undetermined and in a vacuum. The common law can be developed after the arbitration is over.

[51] Furthermore, Section 12B of the PPA is a statutory arbitration mechanism the legislator created to extend contractual intervention and advance the PPA's transformative purpose. A rule that made transformative claims non-arbitrable would place them beyond the reach of the mechanism enacted to give effect to that purpose.

[52] In ground 14, I erred and/or misdirected myself in failing to judicially exercise my discretion by failing to find that there are good and sufficient reasons for a court to determine applicant's claims and the relief it seeks in its action. Applicant's claims were stayed pending the outcome of the interim relief sought. It was not before this court to make a finding on applicant's claims and relief in its action.

[53] In grounds 15 to 17 applicant relied on Section 17(1)(a)(ii) and the consequences of my judgment and orders. I have dealt with the *Lufuno* case, therefore applicant's averment that it is deprived of its Section 34 constitutional right is ill-conceived and cannot be regarded as a compelling reason.

[54] In ground 15.2, the constitutional development of the common law is not precluded as averred and the reasoning appears from my judgment.

[55] In ground 15.3, the constitutional and inherent supervisory jurisdiction of the court to develop the common law is not ousted as averred.

[56] In ground 15.4 the averment that applicant is required to split and pursue different claims and different relief in different *fora* is misconstrued. Applicant's claims and relief in the particulars of claim are stayed (all in one *fora*) and the disputes in respondent's application is referred to arbitration.

[57] In ground 16 it is averred that my judgment is in conflict with the legal precedent in "*North East Finance, PLC Consulting, Mfoza, and Tammy Taylor Nails*" cases. The *Tammy Taylor Nails* case did not deal with arbitration at all and the other three cases are distinguishable.

[58] In ground 17 it is averred that an inherent constitutional-, judicial-, legal-, industry-, and wide-public interest and importance in the claims and relief that form the subject matter of applicant's action and the relief sought by applicant may impact on respondent's franchisees who are not its members and also the broader petroleum industry. The franchisees are unknown and not disclosed. Applicant is confined to the disputes raised as a matter of contractual construction and confined to those disputes, including the agreed procedure to resolve those disputes.

[59] The interlocutory proceedings to stay applicant's action pending the outcome of the arbitration does not take away any substantive right of applicant, but fixes the forum in which those rights and associated disputes are to be decided in accordance with the parties' contractual choice. The court's powers of supervision and intervention is not excluded by this election between the parties. In the instant case nothing was raised to disturb the result.

CONCLUSION

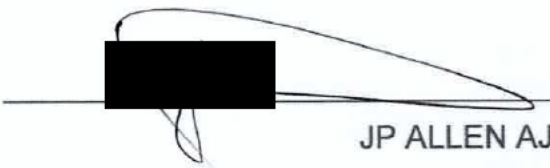
[60] I am not persuaded that the issues raised by the applicant in this application for leave to appeal are issues in respect of which another court is likely to reach conclusions different to those reached by me. I am therefore of the view that there are not reasonable prospects or compelling reasons of another court making factual

findings and coming to legal conclusions at variance with my factual findings and legal conclusions and leave to appeal should not be granted. Costs are to follow the result.

ORDER

[61] In the circumstances, the following order is made:

1. The application for leave to appeal is dismissed.
2. The applicant is to pay the costs of this application on scale C.


JP ALLEN AJ
ACTING JUDGE OF THE HIGH COURT,
GAUTENG DIVISION JOHANNESBURG

This judgment was prepared by Acting Judge Allen. It is handed down electronically by circulation to the parties or their legal representatives by email, by uploading to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 31 August 2026.

HEARD ON: 21 August 2026

DECIDED ON: 31 August 2026

For the Applicant: Adv. G.W. Amm SC
Instructed by: Lanham-Love Inc.

For the Respondent: Adv. H. Louw
Instructed by: Cliffe Dekker Hofmeyr Inc.