IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 184/18P

In the matter between:

KZN OILS (PTY) LTD **APPLICANT**

and

NELTA (PTY) LTD t/a KEYWAY MOTORS **RESPONDENT**

ORDER

The following order is issued:

Main application

(a) The respondent and anyone occupying through it are hereby ordered to vacate the premises situated at Portion 4 of Erf 731, Madadeni Road, Newcastle, KwaZulu-Natal within 30 days of the date of the grant of this order;

(b) The respondent is directed to pay the costs of the main application.

The conditional counter-application

(c) The conditional counter-application is dismissed with costs.

JUDGMENT

HENRIQUES J

Introduction

[1] This is an opposed application for the ejectment of the respondent from business premises situated at Madadeni Road, Newcastle where it conducts the business of a retail fuel service station. The respondent opposes the ejectment for the reasons set out in its conditional counter-application.

[2] The respondent has also instituted a conditional counter-application in which it seeks relief in the event of the court declining to dismiss the main application or to stay the main application pending arbitration in terms of section 12B of the Petroleum Products Act 120 of 1977 ('the PPA'), and arbitration in terms of clause 20 of the original franchise agreement.

[3] The relief foreshadowed in the conditional counter-application is the following, namely:

'(a) the Applicant is directed to provide the Respondent for signature a franchise agreement substantially the same as Chevron's standard franchise agreement.

(b) an Order declaring that:-

(i) The Respondent is entitled the right to conduct the businesses currently conducted on the premises of the KEYWAY MOTORS for a period of five years commencing on 1 March, 2018;

(ii) the Respondent shall pay the Applicant rent and all other fees due by a franchisee, calculated on the basis of the standard Chevron agreement referred to in (a) above;

(c) an Order directing the Applicant to pay the Respondent's costs on the scale as between Attorney and client.'

The issues that require determination

[4] In respect of the applicant's case, the court is required to determine whether:

(a) the applicant has proved that it is the owner of the premises, and is entitled to evict the respondent from the premises on the basis that the lease and franchise agreements have terminated by the effluxion of time on 10 July 2016; and

(b) it has been proven that the respondent is occupying the premises against its will.

[5] In respect of the opposition raised, the court has to determine whether the respondent has discharged the onus to establish that it has a right of continued occupation based on the following, namely:

(a) that the application should be stayed pending the determination of an arbitration in terms of section 12B of the PPA;

(b) that the application should be stayed in terms of clause 20 of the franchise agreement, which is the arbitration clause;

(c) whether the respondent has been subjected to an unfair or unreasonable contractual practices, which is linked to the issue in paragraph (a) above;

(d) whether the respondent's constitutional rights have been infringed;

(e) whether this court has jurisdiction to issue an order of eviction in light of the decision of the Constitutional Court in *The Business Zone 1010 CC t/a Emmarentia Convenience Centre v Engen Petroleum Ltd & others*[1] ('*Business Zone*'); and

(f) whether the decisions in *Former Way Trade and Invest*[2] and *Crompton Street Motors*[3] are bad in law.

[6] As the respondent has indicated that it takes no issue with the common cause facts as set out by the applicant, and given the issues raised by the respondent, it is necessary to refer to the factual background in order to place in context the issues which have to be determined, and also to deal with the agreements which governed the relationship between the parties.

Common cause facts

[7] On 11 July 2001, Caltex Oil SA (Pty) Ltd (Caltex)[4] entered into a franchise and a lease agreement with the respondent. In terms of such agreement, the respondent was entitled to operate a retail petrol station on the premises. The duration of such agreement was for a period of 15 years with the agreement to terminate on 10 July 2016.

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[1] *The Business Zone 1010 CC t/a Emmarentia Convenience Centre v Engen Petroleum Ltd & others* 2017 (6) BCLR 773 (CC).
[2] *Bright Idea Projects 66 (Pty) Ltd v Former Way Trade and Invest (Pty) Ltd* 2018 (6) SA 86 (KZP).
[3] *Bright Idea Projects 66 (Pty) Ltd t/a All Fuels v Crompton Street Motors CC t/a Wallers Garage Service Station* [2019] ZAKZPHC 39.
[4] Caltex subsequently changed its name to Chevron South Africa (Pty) Ltd and then to Zastron.

[8] On 14 September 2011, the applicant and Chevron concluded a branded marketer agreement and a sale agreement for the purchase of assets in the northern area of KwaZulu-Natal, being the service station and the immovable property on which the premises are situated. In terms of the branded marketer agreement, Chevron granted the applicant the exclusive right and licence to sell to the retail sector, petroleum and lubricant products within a defined territorial area which included the area where the premises are situated. The agreement defined the assets as property and equipment, with property being defined to mean the land and buildings. Consequently, in terms of the sale agreement, the applicant is the owner of the premises.

[9] On 5 April 2016, a representative of the applicant, one Anisa, attended at the respondent's premises in Newcastle and advised the respondent that the lease was not going to be renewed. Subsequently on 6 April 2016, the respondent sent an email to the applicant, expressing its surprise and disappointment that the lease agreement would not be renewed. The respondent appealed to the applicant to reconsider the decision not to renew the lease, alternatively, for time to 'Get our affairs in order'.

[10] On 10 July 2016, the lease and franchise agreements terminated through the effluxion of time. On the expiry of the franchise and lease agreements, the respondent was invited by the applicant to make commercial proposals if it wished to secure a new agreement and to continue with the business. At the time, the applicant was under pressure from Chevron and the Department of Energy to ensure transformation of the energy sector, a priority being the transformation of retail petroleum sites.

[11] It was for this reason that the respondent was invited to submit a Black Economic Empowerment plan (BEE plan), which would meet the requirements of both Chevron and the Department of Energy. Time frames were set in terms of which the respondent was placed on terms and given a month to revert with a detailed business plan and to make proposals in respect of a BEE plan. Monday, 22 August 2016 was set as the date for submission of the respondent's final proposals. If the respondent was successful, a new agreement would be concluded during October 2016. If the respondent was not successful, it would be required to vacate the premises.

[12] The respondent submitted a proposal. After considering the proposal, the applicant's attorneys wrote to the respondent on 8 September 2016, notifying the respondent that it would not conclude any new agreement with the respondent. It would seem that the reason was the failure by the respondent to include a BEE plan in either its written proposal or verbal presentation made to the applicant on 29 August 2016.

[13] The respondent was required to make arrangements to vacate the site by the end of October 2016. To this end, and on 26 September 2016, the applicant's attorneys notified the Regional Energy Director - KZN: Department of Energy that it was not concluding a new lease with the respondent. Prior to the rejection of the respondent's proposal, the respondent had made a presentation to the applicant's representatives on 29 August 2016, in a panel interview, but did not present a BEE plan. In the letter of 26 September 2016, the Regional Energy Director – KZN was notified that the applicant had concluded an operating lease agreement with an entity named Key West Petroleum (Pty) Ltd.

[14] On 4 October 2016, the respondent wrote to the Department of Energy, Pretoria, requesting an arbitration in terms of s 12B of the PPA. This request for arbitration appears to have been refused.

[15] On 12 November 2016, the respondent's attorneys wrote a 'without prejudice' letter to the applicant's attorneys containing a new proposal relating to the purchase of the premises. The applicant's attorneys responded, indicating that the proposal was not acceptable and the respondent was given notice to vacate the premises by 31 March 2017. This was followed by a further 'without prejudice' letter dated 9 December 2016 from the respondent's attorneys containing an offer to purchase the premises. This was responded to on 11 January 2017 and the respondent was advised that the offer was not acceptable.

[16] The respondent was advised to engage an expert to assist in formulating its proposals and it was suggested that it engage business brokers and property experts specialising in valuing and putting together transactions to acquire service stations. The respondent's attorneys responded in a letter dated 18 January 2017, advising that

the respondent intended taking up the suggestion and employing experts in the industry, and requested certain documentation from the applicant which was provided.

[17] The applicant's attorneys wrote to the respondent's attorneys on 23 January 2017, calling upon them to submit the amended offer. In addition, it indicated that the respondent's right to operate the business would terminate on 28 February 2017. Once again, on 21 February 2017, a further letter was addressed to the respondent's attorneys advising that the respondent's tenure had expired and it remained in occupation of the premises on a strictly month-to-month basis. This was pending a decision to be made about the respondent's application for a new operating lease based on the experts it had engaged.

[18] On 28 February 2017, the respondent's attorneys made a further 'without prejudice' offer. In such offer, the respondent did not address the issue of the BEE plan, and it appeared that the parties had obtained valuations, which were markedly different. The respondent was informed on 29 March 2017 that the offer was not acceptable and there was no basis for the parties to engage in further negotiations. The respondent was given notice to vacate the premises by no later than 30 April 2017.

[19] On 6 April 2017, the respondent wrote to Chevron complaining about the applicant and suggesting that it had been unfairly treated, contrary to the manner in which Chevron treated its retailers. A request was made to Chevron to intervene in the matter, which Chevron declined. On 3 May 2017, the applicant advised the respondent directly that it continued to occupy the premises despite the right of occupation having terminated and that its occupation of the premises was unlawful.

[20] On 11 September 2017, a round table meeting was convened at the offices of the applicant's attorneys. At such meeting, the applicant had made available to the respondent, a report of its independent valuers relating to the valuation of the business and of the site. A letter was dispatched on 12 September 2017, recording that the respondent was given a further opportunity to reconsider its position against the report, as its previous offers were not market related and had not been accepted. It was once again emphasised in such correspondence that it was necessary for the applicant to

show its commitment to the transformation of its retailer base and to allow previously disadvantaged persons to bid for sites where tenure had expired. The respondent was once again requested to consider the transformation policies of the Department of Energy as well as the enquiries from BEE entities which were interested in becoming involved in the petroleum business.

[21] At the end of such meeting, the respondent requested time to consider its position until the end of September 2017 which extension was agreed to by the applicant, it emphasising that this was the last extension which would be provided. At the end of September 2017, no proposal was forthcoming from the respondent. The respondent's attorneys requested various further extensions which were granted until the end of October 2017. Despite these extensions, no further proposal was forthcoming from the respondent and it remained in occupation of the premises.

[22] As a consequence of non-compliance with the extensions and requests for further proposals, the applicant engaged its legal representatives to institute the eviction application. The founding affidavit was deposed to on 22 December 2017 and the application papers were issued on 19 January 2018, although the notice of motion was signed on 11 January 2018. On 26 January 2018, the application papers were served on the respondent's attorneys of record and on 29 January 2018, on the respondent directly. A notice of opposition was filed on 12 February 2018. The answering affidavit and counter-application were served on 26 March 2018 although the filing slip is dated 16 March 2018. On 23 March 2018, the respondent submitted a further request for arbitration in terms of section 12B of the PPA. Such referral was granted on 3 July 2018, subsequent to the institution of the eviction application and the filing of the conditional counter-application and the respondent's answering affidavit.

Submissions of the parties

[23] At the hearing of the matter, Mr Savvas, who appeared for the respondent, adopted a somewhat unusual approach. He sought a directive from the court allowing the respondent to only make submissions in respect of the point of law raised, namely the competency of the court to grant an eviction order once there was a referral to arbitration in terms of section 12B of the PPA. He informed the court that this approach

had been communicated to the respondent and his instructing attorney. He would not address the court and make any submissions relating to the main application and conditional counter-application and the merits thereof as these would have to be dealt with by the arbitrator.

[24] His approach was based on his interpretation of *Business Zone,* which was that the jurisdiction of the high court was ousted once there was a referral to arbitration, and that this court could not deal with any issues arising from the eviction proceedings. He asserted that it was inappropriate to make any submissions relating to the legal points raised in opposition, in a court which could not determine the issues between the parties as the court did not have jurisdiction. He stressed however that he was not abandoning them, but he wanted to record that he is 'being super cautious about not prejudicing his client in what he considers to be an irregular proceeding' consequent upon the *Business Zone* decision, and would not be drawn into any debate with the court regarding these.

[25] After considering this request, I refused to issue such a directive as I was of the view that the issues could not be separated, and that in deciding whether to grant an eviction order one had to consider all the defences raised in the affidavits filed. I was left with no alternative but to consider these issues based on the papers filed by all the parties, the heads of argument and the submissions of the applicant's counsel.

[26] In summary, Mr Savvas submitted the following:

(a) Once the respondent has elected to refer a matter for arbitration in terms of section 12B of the PPA and there has been such a referral by the Controller, the high court's jurisdiction is ousted. This is the effect of the judgment in *Business Zone*.

(b) As a consequence, the high court should not and cannot deal with the *rei vindicatio* as this would negate any order that an arbitrator may issue in the section 12B arbitration proceedings.

(c) The respondent was not required to bring an application in terms of section 6 of the Arbitration Act 42 of 1965, to stay the eviction proceedings, as on a proper interpretation of *Business Zone,* the Arbitration Act does not apply.

(d) Clause 20 of the franchise agreement provides for resolution of disputes between the parties, first by negotiation, failing which by arbitration.

(e) The decisions in *Former Way Trade and Invest*[5] and *Crompton Street Motors*[6] are bad in law and contrary to the principles set out in *Business Zone,* and the precedential value of *Former Way Trade and Invest* has been diminished as an application for reconsideration of the refusal of leave to appeal was pending before the Supreme Court of Appeal.[7]

[27] Mr Van Niekerk SC, who appeared for the applicant, submitted the following, namely:

(a) The factual matrix is relevant to the determination of the eviction application. It reveals that the applicant did not deal with the respondent in a high-handed manner once the lease and franchise agreements expired, and that the applicant was at pains for a period in excess of 18 months, to conclude a new franchise and lease agreements with the respondent. Over such period, the applicant, on several occasions, requested the respondent to provide a business plan in compliance with the BEE imperatives. As the parties were unable to negotiate a new franchise and lease agreement, due to non-compliance with the applicants BEE imperatives, it was only then that the applicant instituted the eviction proceedings. Although disputed by the respondent, the reasons for this were due to the respondent's non-compliance with the BEE imperatives of the applicant and the difference in the valuation of the property provided by the various experts.

(b) It is common cause that the respondent's right of occupation terminated through the effluxion of time. Consequently, the franchise agreement and lease agreement are no longer extant. The respondent consequently has no further right to occupy the premises.

(c) The respondent has not submitted any authority for the submission that the jurisdiction of the high court has been ousted by *Business Zone*. In fact, the high water mark of Mr Savvas submission is: 'that is the unavoidable legal effect of the *Business Zone* decision.' However, Mr Savvas has not been able to refer to any authority which supports this.

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[5] *Bright Idea Projects (Pty) Ltd v Former Way Trade and Invest (Pty) Ltd* 2018 (6) SA 86 (KZP).
[6] *Bright Idea Projects 66 (Pty) Ltd t/a All Fuels v Crompton Street Motors CC t/a Wallers Garage Service Station* [2019] ZAKZPHC 39.
[7] At the time of penning this judgment, the Constitutional Court will consider an appeal in respect of the judgment of Ploos Van Amstel J in *Crompton Street Motors*.

(d) The applicant submits that on a proper interpretation of *Business Zone*, the jurisdiction of the high court has not being ousted and the section 12B referral runs parallel to high court proceedings in the absence of a request for the stay thereof.

(e) The respondent's reliance on clause 20 of the franchise agreement is misplaced and it ought to have applied for a stay of the eviction proceedings in terms of section 6 of the Arbitration Act.

(f) The judgments of D Pillay J and Ploos van Amstel J are on all fours with the decision in this matter and consequently, the main application must succeed as there is no merit in the opposition and the conditional counter-application falls to be dismissed with costs.

Analysis

[28] I have considered the written and oral submissions of the parties. In addition, I have also had the benefit of considering the relevant additional judgments delivered subsequent to the hearing. I am indebted to the parties for drawing same to my attention. I propose to now deal with the issues for determination.

Is the applicant entitled to the eviction order?

[29] It is common cause that the applicant is the lawful owner of the premises and that the respondent is in occupation of the premises against the will of the applicant. It is further common cause that the lease and franchise agreements terminated through the effluxion of time on 10 July 2016.

[30] *Graham v Ridley*[8] confirmed the common law position that all an applicant has to prove to obtain an eviction order is that it is the lawful owner of the premises and that the respondent is in occupation of the premises against its will. This was reinforced in *Chetty v Naidoo*[9] where the court held the following:

'The owner, in instituting a *rei vindicatio,* need, therefore, do no more than allege and prove that he is the owner and that the defendant is holding the *res* – the *onus* being on the defendant to allege and establish any right to continue to hold against the owner. . .'.

[8] *Graham v Ridley* 1931 TPD 476.
[9] *Chetty v Naidoo* 1974 (3) SA 13 (A) at 20A-E.

[31] The respondent conceded that its original right to occupy had terminated through the effluxion of time. Furthermore, the agreement concluded between the parties also makes provision for the respondent to vacate the premises on termination of the agreement. Clause 11.1 of the franchise agreement provides that:

'11. Consequences of termination

11.1 upon the termination of this contract for whatever reason:

11.1.1 . . .

11.1.2 The franchisee and its permitted assigns, heirs and executors will forthwith surrender possession of the premises to the franchisor. . . '

[32] Based on clause 11.1 of the franchise agreement, the respondent had agreed that on termination thereof, it would hand possession of the premises to the applicant by, at the very latest, the end of 10 July 2016, thus vacating the premises. The respondent has not vacated the premises, and based on the above, *Graham v Ridley* applies and the respondent is required to prove the existence of a further right of occupation.[10] It is the respondent who bears the onus of proving a continued right to occupy the premises and the basis therefore.

[33] I propose to deal with the bases advanced by the respondent on which it alleges it has a continued right of occupation. One basis advanced by the respondent was that it received an alleged assurance by Chevron that at the end of the franchise period, if the franchise agreement was not renewed, the respondent would be entitled to sell the business, as was historically always the case, to the next retailer.[11] The applicant denies that any such assurance was given and indicates that such assurance as alleged in the papers is vague, embarrassing and unenforceable and in addition, is

[10] This approach was applied in *Chevron South Africa (Pty) Limited & another v Kiribati Traders CC* [2016] ZAGPJHC 342 paras 22 and 23.

[11] Volume 3, page 202 para 27 of the indexed papers, which reads as follows: '. . . I was always assured by Chevron representatives and management that if, at the end of the franchise period, the franchise agreement was not renewed, I would be entitled to sell the business off as was historically always the case, to the next retailer. . . '

struck by the entire agreement clause[12] as it was not reduced to writing in order to make it binding on the parties.

[34] Having regard to the answering affidavit, it is apparent that such alleged assurance was made prior to the termination of the franchise agreement, and consequently the respondent's reliance on the assurance as a basis for continuing to occupy the premises is misguided. I agree that the details relating to the alleged terms of such assurance are vague and that based on the entire agreement clause, as no agreement was reduced to writing, there is no binding agreement between the parties and no right of continued occupation.

The stay of the eviction proceedings

[35] The respondent in its papers avers that the eviction application ought to be stayed pending either arbitration in terms of clause 20 of the franchise agreement or pending the arbitration already referred in terms of section 12B of the PPA. In addition, it alleges that it need not have instituted an application to stay in terms of section 6 of the Arbitration Act as the provisions of such Act do not apply. This the respondent submits is as a section 12B referral automatically stays these proceedings and ousts the jurisdiction of the high court.

[36] In essence, the applicant submits that the eviction application ought not to be stayed pending arbitration. The lease and franchise agreements terminated through the effluxion of time on 10 July 2016, and there is no agreement entitling the respondent to continue to occupy the premises or to invoke clause 20 of the franchise agreement. This is what distinguishes the current matter from *Business Zone.*

[37] Secondly, the applicant submits that an arbitrator only has jurisdiction to determine whether an alleged contractual practice is unfair or unreasonable. The PPA does not confer the arbitrator with powers to make a contract for the parties and to

[12] Clause 19.2 of the franchise agreement reads as follows:
'The contract constitutes the entire agreement between the parties who acknowledge that there are no other oral or written understandings or agreements between them relating to the subject matter of this contract. No amendment or other modification of this contract shall be valid or binding on a party hereto unless reduced to writing and executed by both parties hereto'.

direct the applicant to conclude either a franchise or lease agreement with the respondent. The Constitutional Court in *Beadica 231 CC & others v Trustees for the time being of the Oregon Trust & others*[13] confirmed the decision in *Trustees, Oregon Trust & another v Beadica 231 CC & others*[14] to that effect.

[38] It follows that the applicant does not agree with the respondent's submissions that the effect of the section 12B referral is to automatically stay the proceedings and oust the jurisdiction of the court.

The Arbitration Act

[39] I propose to deal with the applicability of the Arbitration Act. Counsel for the respondent submitted that based on *Business Zone*, once there was a referral to arbitration in terms of section 12B, these proceedings were automatically suspended and thus an application to stay these proceedings was unnecessary. He relied on para 58 of *Business Zone*[15] in support of this contention which reads as follows:

'. . . Reliance on the section 12B arbitration procedure can more accurately be understood as arbitration is ordinarily in contract: it suspends the institution of court litigation.'

[40] Having regard to the applicable rules of interpretation,[16] in my view on a proper interpretation of *Business Zone*, a referral in terms of section 12B would have suspended the institution of litigation had same not commenced and had a party applied for a stay of the proceedings. However, in this matter the eviction proceedings had already been instituted and the request for a section 12B referral was made simultaneously with the filing of the answering affidavit. What was required of the respondent is to then apply to stay the proceedings immediately once it had filed an intention to oppose. I say so, as what the respondent fails to consider is the reference in para 58 of *Business Zone* to footnote 33. This footnote makes specific reference to section 6 of the Arbitration Act and the 'general position'.

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[13] *Beadica 231 CC & others v Trustees for the Time Being of the Oregon Trust & others* [2020] ZACC 13; 2020 (5) 247 (CC).
[14] *Trustees, Oregon Trust & another v Beadica 231 CC & others* [2019] ZASCA 29; 2019 (4) SA 517 (SCA).
[15] *The Business Zone 1010 CC t/a Emmarentia Convenience Centre v Engen Petroleum Ltd & others* 2017 (6) BCLR 773 (CC).
[16] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA); *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2013] ZASCA 176; 2014 (2) SA 494 (SCA).

[41] Section 6 of the Arbitration Act reads as follows:

'**6 Stay of legal proceedings where there is an arbitration agreement**

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

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

[42] The section enjoins a party to apply for the stay of any legal proceedings which have been instituted pending finalisation thereof, that is, pending the outcome of the section 12B arbitration. I do not agree with the submission that a section 12B referral automatically stays or suspends the eviction proceedings. I am fortified in this view having well regard to the decision of Ploos Van Amstel J in *Crompton Street Motors* which found that although the court has a discretion to stay the proceedings, the facts of the matter did not warrant the court exercising such discretion, given that the respondent in that matter did not immediately bring the application to stay the proceedings and filed extensive answering affidavits and a counter-application.[17] Of further relevance which influenced the court against exercising such discretion to stay the proceedings, was that the Controller had at the time of the matter being argued not made a decision to refer the matter to arbitration in terms of section 12B.

[43] In addition, what the submissions of the respondent fail to consider in suggesting that the Arbitration Act does not apply, in my view, are the provisions of section 40 of the Arbitration Act which read as follows:

'40 Application of this Act to arbitrations under special laws

This Act shall apply to every arbitration under any law passed before or after the commencement of this Act, as if the arbitration were pursuant to an arbitration agreement and as if that other law were an arbitration agreement: Provided that if that other law is an Act of

[17] *Bright Idea Projects 66 (Pty) Ltd t/a All Fuels v Crompton Street Motors CC t/a Wallers Garage Service Station* [2019] ZAKZPHC 39 paras 14-17.

Parliament, this Act shall not apply to any such arbitration in so far as this Act is excluded by or is inconsistent with that other law or is inconsistent with the regulations or procedure authorized or recognized by that other law.'

[44] A proper reading of the PPA does not contain a provision specifically ousting the applicability of the Arbitration Act, and had it been the intention of the legislature for the Arbitration Act not to apply, the PPA would have expressly said so.

[45] At this juncture, I must point out that the distinguishing feature of *Business Zone* from this particular matter is that in *Business Zone*, no action was instituted for the eviction of the respondents, and the matter dealt with the cancellation of an agreement. The cancellation occurred after the referral to arbitration.

[46] In the current matter, one has a situation where the action was instituted in January 2018 and the referral for arbitration occurred subsequently in March 2018, and the referral was approved in July 2018. It is common cause that the eviction application was instituted after the lease and franchise agreements had terminated, prior to the second request for a referral in terms of section 12B, and after the respondent had filed its answering affidavit and conditional counter-application. Consequently, there was no referral to arbitration at the time when this action was instituted.

[47] I consequently agree with the submission of Mr Van Niekerk that the provisions of the Arbitration Act certainly apply to these proceedings, and that the respondent was required to bring an application for the stay of these proceedings in terms of section 6 of the Arbitration Act, pending the finalisation of the section 12B arbitration. There is no such application and consequently the respondent is not entitled to a stay of the proceedings on the basis that the section 12B referral automatically stays the eviction proceedings.

The section 12B referral in terms of the PPA

[48] A further reason why I am of the view that the section 12B referral does not stay the eviction proceedings in this matter, is based on what has been referred to the arbitrator to determine, and the powers conferred on the arbitrator by that section.

[49] Section 12B of the PPA provides that a referral to arbitration can be made by the Controller of Petroleum Products on request by a licensed retailer who alleges an unfair or unreasonable contractual practice by a licensed wholesaler.[18] The section does not appear to be pre-emptory and it appears that the Controller has a discretion in this regard. Once a referral has been made, the Controller can submit the matter to arbitration and the provisions of sections 12B(2) and (3) apply.

[50] Section 12B(4) enjoins an arbitrator to:

'(*a*) . . . determine whether the alleged contractual practices concerned are unfair or unreasonable and, if so, shall make such award as he or she deems necessary to correct such practice; and

(*b*) . . . determine whether the allegations giving rise to the arbitration were frivolous or capricious and, if so, shall make such award as he or she deems necessary to compensate any party affected by such allegations.'

[51] Section 12B(5) provides that any award made by the arbitrator is final and binding on the parties and may at the arbitrator's discretion, include an order as to costs against one or more of the parties concerned. Neither the PPA, nor the regulations promulgated under the PPA define what a contractual practice is, or what is deemed to be unfair or unreasonable. Consequently, an arbitrator will decide this, depending on the facts of each case and how an arbitrator is persuaded by the evidence presented by the parties.

[52] In his submissions, Mr Savvas contended that any order for the eviction of the respondent from the property is diametrically opposed to or at loggerheads with the section 12B referral of 3 July 2018. In addition, he submits, relying on *Business Zone,* that the jurisdiction of the high court is ousted once there has been a referral.

[53] It is common cause that on 23 March 2018,[19] a request for arbitration in terms of section 12B of the PPA was submitted by the respondent to the Controller. This was subsequent to the lease and franchise agreements having terminated though the

[18] Section 12B(1).
[19] Annexure 'AH2', volume 3, pages 243-265 of the indexed papers.

effluxion of time and after the institution of the eviction proceedings. On 3 July 2018, the Controller approved the request for arbitration in terms of section 12B of the PPA.

[54] Of relevance in this matter is what has been referred to the arbitrator. This is contained in annexure 'AH25',[20] specifically, paragraph 5 of the letter of referral dated 3 July 2018, which reads as follows:

"5. The request to refer the matter to arbitration is approved for the arbitrator to test, inter alia, the allegations made by the Requestor that KZN Oils has committed an unfair or unreasonable contractual practice:

5.1 By not renewing the Franchise Agreement when it was obliged to do so. The Requester bolsters this averment by stating, among others, that it (the Requester) purchased the retail business (Keyway Motors) in 1993 for a sum of R300 000 and the Requester has been a Chevron dealer for about 25 years and in accordance with the established practice, KZN Oils is obliged to treat the Requester fairly, reasonably and in good faith by entering into new agreements or extending the existing agreements as Chevron has been accustomed to so doing with its retailers. In amplification thereof, the Requester states that Chevron had not been notified of the KZN Oils' intention not to renew or extend the franchise and lease agreements as provided for in the agreements entered into between Chevron and KZN Oils.

5.2 By not allowing the Requester to sell its business even where the Franchise period has run out. The Requester augments its averment by stating that Chevron had in the case of Bulwer Park Service Station and Main Road Motors, Pinetown allowed them to sell their retail businesses. The Requester avers further that this is a blatant attempt by KZN Oils to acquire the Requester's retail business potentially in contravention of section 2A(5)(a) of the Act, which conduct is also inimical to the provisions of section 25 of the Constitution of the Republic of South Africa, 1996 as it amounts to arbitrary deprivation of property, namely retail business and goodwill.

5.3 By short delivering petroleum products over a period of time. Over the whole period, so aver the Requester, they have made meter-less delivery trucks or trucks with dysfunctional meters and even in some circumstances after they

[20] Volume 5, pages 496-497 of the indexed papers.

have had deliveries, they are expected to use their dipsticks to work out what the delivery volume is. In this respect, the total loss experienced by the Requester during the period January 2016 up to January 2018 is R391, 755.52 and the Requester wishes to recover this amount to KZN Oils.

5.4 By unjustifiably increasing the rental for both Keyway Motors and Park Motors far beyond the allowed 9% per annum increase as stipulated in the rental worksheet contained in the Franchise Agreement. Despite this and the fact that the forecourt rental is no longer part of the rent to be paid by the Retailer as this component was replaced by the Regulatory Accounting System Pricing Mechanism ('RAS'), invoices were received for Keyway Motors for March 2018 for an amount of R100,390.00 instead of the usual amount of R12,907.00 and the rental invoice for Park Motors also represented an increase from R12,844.00 to R53,400.01.

5.5 By requiring the Requester to pay KZN Oils a Brand Fee or Goodwill Royalty which is contrary to the Agreement as the goodwill vests in Chevron. The Requester avers further, inter alia, that it is common cause in the fuel industry that the value of the business accrues to the retailer whereas the intellectual property / Brand Goodwill accrue to the Wholesaler. The retailer realizes its business value when it sells the business.*'*

[55] What is noteworthy about the referral is that it does not relate to the termination of the franchise agreement and lease agreement insofar as the right of occupation is concerned. It does not ask the arbitrator to deal with the *rei vindicatio* nor does it deal with the applicant's ownership of the property. Consequently, the eviction is not a referral before the arbitrator. The arbitrator is not required to deal with this aspect in the section 12B referral.

[56] At the hearing of the matter, I raised with Mr Savvas, depending on the court's interpretation of *Business Zone,* if it did not agree with the submissions that the jurisdiction of the high court was ousted, whether an order for the eviction would be a bar to the section 12B proceedings. His submission in this regard was that the effect of the high court's order for the eviction of the respondent would be to negate any order which an arbitrator could make. I disagree.

[57] The arbitrator, in terms of section 12B, as well as in terms of the referral, is required to determine whether the applicant engaged in any unfair and unreasonable contractual practices in relation to the respondent. The referral is clear: the arbitrator is not required to deal with any eviction proceedings nor with the applicant's rights of ownership of the property. In any event, I do not believe that in the face of the authorities on this aspect an arbitrator would, on the facts of this matter, especially in circumstances where the right of occupation has terminated, be empowered to revisit the aspect of the eviction but more importantly, make any order denying the applicant its common law right to eviction.

[58] I am not required to deal with whether or not its failure to negotiate and conclude a new franchise agreement and/or whether its failure to pay the respondent any amount of compensation in respect of the goodwill of the business constitute unfair or unreasonable business practices, and I need not say anything more in relation to this despite it being raised on the papers. That falls squarely within the terms of the referral before the arbitrator.

[59] I venture to add that I do not believe that the powers of the arbitrator extend to making a new contract for the parties and directing the applicant to conclude either a franchise or lease agreement with the respondent. The applicant's counsel's reliance on the respective judgments in *Beadica* is clear authority for this conclusion.

[60] During the course of argument, I was referred to two decisions in this division, one of them being that of *Former Way Trade and Invest,*[21] a judgment by D Pillay J. Among the issues she was required to decide, was whether eviction proceedings ought to be stayed pending the outcome of section 12B arbitration proceedings in terms of the PPA. D Pillay J was of the view that *Business Zone* was the first judgment dealing with the interpretation of section 12B to establish legal certainty in a large and regulated sector of the economy. This was to give recognition to the unequal bargaining power in the petroleum industry between franchisee and franchisor.

[21] *Bright Idea Projects (Pty) Ltd v Former Way Trade and Invest (Pty) Ltd* 2018 (6) SA 86 (KZP).

[61] She took the view that the powers conferred on an arbitrator in terms of section 12B(4) of the PPA, are limited. Consequently,

'Whether an arbitrator's powers go beyond declaring a practice to be unfair or unreasonable, to creating new contracts for the parties, is doubtful in view of the constitutional right to individual freedom to contract; after all, the courts have no powers to create contracts for parties; nor can they refuse to give effect to agreements if, in the opinion of the court, they are unfair or unreasonable'.[22] (Footnotes omitted.)

[62] She confirmed that section 12B(4) of the PPA deals with the substantive powers of the arbitrator and are limited as to the relief which an arbitrator can grant. At para 37 of her judgment, D Pillay J concluded that arbitration under section 12B does not automatically suspend litigation that,

'What s 12B arbitration is not, is a stratagem to delay litigation, or to have two bites at the cherry. The finality of arbitration awards and the risk of punitive costs awards aim to discourage abuse of arbitration.'[23] (Footnote omitted.)

[63] In considering *Future Phambili Petroleum (Pty) Ltd v Chamdor Service Station CC,*[24] she found such decision to be distinguishable. The eviction in *Phambili* emanated from disputes between the parties which could not be separated from the issues referred to arbitration. In addition, the parties in that case were bound by an agreement to refer disputes to arbitration and consequently were not prejudiced by the stay of proceedings to give effect to section 12B. D Pillay J was of the view that the facts in *Former Way Trade and Invest* were distinguishable from that in *Phambili* and absent a request to the arbitrator to pronounce on the applicant's rights of ownership of the premises and to evict the respondent who occupied against the applicant's will, no finding will emanate from the arbitration relating to the eviction proceedings before court. Consequently, nothing prevented her from dealing with the eviction application.

[64] In *Phambili,* the issue which the court was required to adjudicate on was whether the application for the eviction of the respondent from the premises ought to be stayed pending the finalisation of the disputes at arbitration. Among the specific contractual provisions which had been agreed between the parties was the

[22] Ibid para 32.
[23] Ibid para 37.
[24] *Future Phambili Petroleum (Pty) Ltd v Chamdor Service Station CC* [2017] ZAGPPHC 1206.

applicability of section 6 of the Arbitration Act. In *Phambili*, the agreement was still extant and there was no attempt by the parties to resolve the disputes in terms of clause 20 of the agreement. The application for the eviction in *Phambili* of the respondent was instituted without invoking the provisions of clause 20.

[65] The court took the view that the issue of the eviction could not be separated from the disputes which the respondent had requested should be referred to arbitration. Because the eviction application was launched whilst the agreement was still in force, the issues in the eviction proceedings could not be separated from those referred for arbitration. Consequently, because clause 20 of the agreement made provision for disputes to be resolved through negotiation or arbitration, a stay of eviction proceedings was warranted pending the invocation of clause 20 of the agreement. The court, in considering *Business Zone,* was of the view that there was value in allowing a party to resolve a dispute through arbitration rather than court proceedings.

[66] I align myself with the findings of D Pillay J and the distinguishing facts of *Phambili.*

Stay of proceedings based on clause 20 of the agreement

[67] As part of its defence to the eviction proceedings, the respondent submits that clause 20 of the franchise agreement[25] makes provision for the resolution of disputes between the parties, and provides that disputes are to be resolved, firstly, by negotiation[26] and failing that, arbitration.[27] Clause 20.6 specifically allows a party to apply for a stay of proceedings pending resolution of the dispute by means of arbitration in the event of either legal proceedings or eviction proceedings being instituted and the respondent filing a notice of intention to oppose.

[68] The preamble to clause 20 which is clause 20.1 reads as follows:

‘Should any dispute arise between the parties concerning this agreement, the dispute shall be resolved in terms of the procedures set out in this clause’.

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[25] Annexure B, volume 1, pages 22-86 of the indexed papers.
[26] Clause 20.2.
[27] Clause 20.3.

[69] Essentially the provisions of clause 20.1 set the tone for the invocation of the remainder of the provisions involving the resolution of disputes in clause 20. I am of the view that the respondent is not entitled to a stay of the eviction proceedings on this basis. Firstly, it seeks to invoke the provisions in the answering affidavit and after the filing of the answering affidavit and counter-application. It is common cause that there is no dispute between the parties concerning the franchise agreement. There is no clause in the franchise agreement which provides for arbitration on any of the grounds advanced by the respondent. Consequently, clause 20 does not apply to the proceedings.

[70] I am fortified in this view, having regard to the decision of Ploos van Amstel J in *Crompton Street Motors* in which he specifically found that the arbitration contemplated in clause 20 could only be invoked in relation to a dispute between the parties 'concerning the agreement'.[28] As in this particular matter, what is an issue and which certainly forms part of the section 12B referral is whether or not the applicant undertook to conclude new agreements after the effluxion of time.

[71] The respondent has not referred any dispute to arbitration in terms of clause 20 of the agreement and accepts that both the franchise and lease agreements have terminated. Consequently, it cannot invoke clause 20 of the franchise agreement at this stage of the proceedings, more so in light of the fact that it did not do so, prior to filing its answering affidavit and conditional counter claim nor are there any allegations in the answering affidavit that it invoked clause 20 either by calling for negotiation or for mediation.

The ousting of the high court's jurisdiction and the decision in Business Zone

[72] Among the issues I was required to determine is whether or not the section 12B arbitration ousts the jurisdiction of the high court. I was referred to various paragraphs in the *Business Zone* judgment of the Constitutional Court by the respondent in support of this contention. In considering this issue I also had regard to the additional written submissions which the parties filed.

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[28] *Bright Idea Projects 66 (Pty) Ltd t/a All Fuels v Crompton Street Motors CC t/a Wallers Garage Service Station* [2019] ZAKZPHC 39 para 20.

The decision in Business Zone

[73] I have carefully considered this judgement and I am of the view that the facts in *Business Zone* are distinguishable from the current matter. *Business Zone* dealt with the review of decisions by the Controller and the Minister of Minerals and Energy not to refer an alleged unfair or contractual practice to arbitration in terms of section 12B of the PPA, the unfair and unreasonable practice alleged to be a single cancellation.

[74] In my view, the section 12B arbitration process does not oust the jurisdiction of the high court nor does it constitute a bar to eviction proceedings. Each matter must be decided on its own set of facts. The effect of *Business Zone* is that arbitration proceedings are a parallel process to already instituted proceedings. In some instances, a stay of proceedings may be warranted. However, the referral cannot as a blanket rule stay legal or eviction proceedings, nor have the effect of ousting the jurisdiction of the court. An applicant must bring an application to stay the eviction proceedings for reasons already dealt with earlier on in this judgment.

[75] I do not regard *Business Zone* as ousting the jurisdiction of the high court and I must add that during the course of his submissions, Mr Savvas was not able to refer me to any legal authority which said this, either in his written heads or with reference to the judgment itself.

[76] The court in *Business Zone* was required to consider the proper interpretation of section 12B of the PPA. Having regard to what is recorded at paragraph 45 of the judgment, the court was at pains to point out that the enactment of section 12B entitled an aggrieved party to request the Controller to refer a dispute to arbitration rather than resolving the dispute through litigation. The court, in my view, also appears to agree that a fairness and equity standard ought to apply in the negotiation of contracts, specifically in the petroleum industry. The court remarked that one of the purposes behind the PPA was to transform the petroleum industry but to also ‘provide for appeals and arbitrations’.[29]

[29] *Business Zone 1010 CC t/a Emmarentia Convenience Centre v Engen Petroleum Ltd & others* 2017 (6) BCLR 773 (CC) para 57.

[77] At paragraph 58, the court remarked as follows:

'Section 12B arbitration presents an additional route for licensed retailers and wholesalers alike to have their disputes adjudicated quicker within rules and processes of their own design.' (My emphasis, and footnote omitted.)

And further in the same paragraph, the court held the following:

'Reliance on the section 12B arbitration procedure can more accurately be understood as arbitration is ordinarily in contract: it suspends the institution of court litigation.'

[78] The court was at pains to point out that the threshold which forms the basis, upon which a Controller exercises their discretion to refer the matter to arbitration, is an extremely low one:

'All that is required is that the request for a referral must contain an allegation of an unfair or unreasonable contractual practice, which the Controller in turn refers to arbitration.'[30]

[79] There is nowhere in the judgment nor was I referred to any passage in the judgment, which indicates that once a referral to arbitration has been made, the jurisdiction of this court is ousted. In my view, what the Constitutional Court had in mind was that in the event of a referral being made, after the institution of legal proceedings, the proper procedure to follow is to request a stay of proceedings pending the outcome of the arbitration, which is the most logical interpretation that can apply to the dictum of this judgment.

[80] Had the Constitutional Court intended to oust the jurisdiction of the high court, it would have no doubt pertinently said so.

[81] The crux of the issue in *Business Zone* concerned the proper interpretation of section 12B. The Constitutional Court, in dealing with the proper interpretation of section 12B of the PPA held the following at para 46 of the judgment:

'When interpreting a statutory provision the point of departure is that the words employed must be construed in accordance with their ordinary grammatical meaning provided an absurdity does not result. The jurisprudence is clear that this is subject to the requirement that statutory provisions must be interpreted purposively and be properly contextualised'.

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[30] *Business Zone* para 64.

[82] At para 55 of the judgment, the court attempted to address the concern raised by the Supreme Court of Appeal that the failure to define the jurisdiction of an arbitrator would result in anomalous consequences and held as follows:

‘Section 12B of the Act holds no pretence to giving effect to a particular constitutional right nor can it, by any stretch of the imagination, be seen as establishing a separate adjudicative hierarchy’.

[83] Further, at para 57 the court held the following:

‘The purpose of the Act is not only to transform the petroleum industry but "to provide for appeals and arbitrations". Section 12B introduces an equitable standard in the framework of the statutory arbitration mechanism under section 12B. If the same adjudicative standard can be relied on in section 12B arbitration proceedings and court litigation alike, would that detract from the purpose of the Act to provide for arbitrations? I think not’.

[84] At para 58 the court goes on to hold as follows:

‘Section 12B arbitration presents an additional route for licensed retailers and wholesalers alike to have their disputes adjudicated quicker within rules and processes of their own design. Section 12B offers a statutory guarantee of a mechanism that has become ubiquitous in contract, which may otherwise not exist possibly due to the unequal bargaining position retailers *vis a vis* wholesalers find themselves in. Reliance on the section 12B arbitration procedure can more accurately be understood as arbitration is ordinarily in contract: it suspends the institution of court litigation. In turn the section 12B arbitral mechanism is insulated from becoming a mere preliminary, strategic step to court litigation in that section 12B (5) speaks to the finality of such an award.’ (Footnotes omitted.)

[85] At para 59 the following was further stated:

‘The purpose of the Amendment Act "to provide for appeals and arbitrations" through section 12B cannot be overlooked. The inherent value of section 12B enabling a party to resolve a dispute through arbitration rather than court proceedings must be recognised. Arbitration offers an expedient, specialised and procedurally flexible forum to resolve disputes’.

[86] For the provisions of section 12B to apply, the Controller does not have to be satisfied that there is an underlying contract which still exists between the parties. This was endorsed in *Business Zone* at para 64.

[87] In *Business Zone,* the first cancellation by Engen had taken place after Business Zone had referred a request for arbitration to the Controller. In my view, the decision in *Business Zone* is distinguishable on the facts from the current matter and a section 12B referral does not have the effect of ousting the jurisdiction of the court to deal with the eviction application. One of the features of the current matter which distinguishes it from *Business Zone* is the fact that the Controller of Petroleum Products has appointed an arbitrator, Advocate Maleka, in respect of the section 12B arbitration.

[88] I am fortified in this view, having regard to the decisions of D Pillay J and Ploos Van Amstel J, as well as the Supreme Court of Appeal in *Former Way Trade & Invest (Pty) Ltd v Bright Idea Projects 66 (Pty) Ltd*[31] delivered on 1 October 2020. The full court of the SCA, in a reconsideration of its refusal of leave to appeal, issued an order confirming the previous order of the court, dismissing the application for leave to appeal and directing the applicant to pay the costs of such application for reconsideration. This judgment accordingly confirmed the findings in the judgment of D Pillay J.

[89] The application for reconsideration of the order refusing leave to appeal concerned the judgment of D Pillay J[32] in which she granted an eviction order after the expiry of a franchise agreement, having found that no new franchise agreement had been concluded, and refused a stay of the eviction proceedings pending arbitration. Leave to appeal had been refused by the high court, as well as by the Supreme Court of Appeal on petition. The applicant then applied for a reconsideration of the refusal of leave to appeal in terms of section 17(2)*(f)* of the Superior Courts Act 10 of 2013. In his judgment, Goosen AJA writing for the full court found that the PPA, specifically section 12B, did not contain any provision which ousted the high court's jurisdiction.

[90] At para 32 he held as follows:

'The Act contains no provision which, in unequivocal terms, ousts the jurisdiction of a court of law. Whether it does indeed oust the court's jurisdiction is therefore a matter of construction and interpretation. In deciding whether the legislative provision ousts the court's jurisdiction,

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[31] *Former Way Trade & Invest (Pty) Ltd v Bright Idea Projects 66 (Pty) Ltd* [2020] ZASCA 118.
[32] *Bright Idea Projects 66 (Pty) Ltd v Former Way Trade and Invest (Pty) Ltd* 2018 (6) SA 86 (KZP).

all circumstances must be considered to determine whether the necessary implication arises that its jurisdiction is either wholly or partially excluded.' (Footnote omitted.)

[91] In interpreting the effect of *Business Zone*, and whether the ratio of the judgment was that the resolution of disputes by way of arbitration applied exclusively, he held the following at para 35:

'That finding is not itself relevant to the present case, but the Constitutional Court's view of what constitutes a contractual practice for the purpose of the Act is important. It made it clear that although the arbitrator in an arbitration under s 12B applies a standard informed by fairness and reasonableness, which foreshadows the possibility that they may invalidate conduct that strictly speaking is permitted by the contract, their jurisdiction does not extend to making a contract for the parties other than the one they actually concluded. This emerges from the following passage in the judgment:

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

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[92] What was emphasized by the SCA in para 36 of the judgment was that the Constitutional Court confirmed the fact that the arbitrator can only exercise powers in terms of the contract between the parties.

[93] Then further at para 37, the court held the following:

'Counsel's reliance on the judgment was based on the Constitutional Court's treatment of the introduction of a normative equitable standard in arbitral proceedings under s 12B of the Act. The reliance was misplaced. The Constitutional Court dealt with the notional 'conflict' between court adjudication of disputes and arbitral dispute resolution based on an equitable standard with reference to an assessment of similar developments under the Labour Relations Act 66 of 1995 and Rental Housing Act 50 of 1999. The Constitutional Court concluded that no such conflict arises since there is no reason why a normative equitable standard should not also apply to court adjudication.' (Footnote omitted.)

[94] The court at para 38 also found that this conclusion by the Constitutional Court 'militates against a finding that arbitration proceedings [in terms of] s 12B of the Act serve as an exclusive forum for the adjudication of disputes arising between

wholesalers and retailers of petroleum products'. It relied on this conclusion that arbitral proceedings do not constitute an exclusive mechanism for dispute resolution with the reference to the passage in *Business Zone* at para 58 which reads as follows:
'Section 12B arbitration presents an additional route for licensed retailers and wholesalers alike to have their disputes adjudicated quicker within rules and processes of their own design. Section 12B offers a statutory guarantee of a mechanism that has become ubiquitous in contract, which may otherwise not exist possibly due to the unequal bargaining position retailers *vis a vis* wholesalers find themselves in. Reliance on the section 12B arbitration procedure can more accurately be understood as arbitration is ordinarily in contract: it suspends the institution of court litigation. In turn the section 12B arbitral mechanism is insulated from becoming a mere preliminary, strategic step to court litigation in that section 12B (5) speaks to the finality of such an award.'

[95] The Supreme Court of Appeal also found that the submission by counsel for Former Way that arbitration suspends the institution of court litigation, which then also pointed to an ousting of the jurisdiction of the court, was unsound specifically in light of the reference in the judgment of Mhlanta J to s 6 of the Arbitration Act. The SCA concluded that what Mhlanta J had in mind, was that a party may seek a stay of litigation pending arbitration, and not an automatic stay of litigation in favour of arbitration under section 12B. Here the court relied specifically on para 56 of *Business Zone* where the Constitutional Court held the following:
'Forum-shopping between these two different systems of law applied in different institutions will disappear. Instead, what remains is only the choice of arbitration rather than adjudication in the courts, a procedure well known to our law.'

[96] At para 40 of the judgment, the SCA concluded that there were
'. . . no circumstances which warrant a finding that a referral to arbitration under s 12B of the Act ousts the court's jurisdiction to adjudicate a dispute. Where . . referral to arbitration occurred after the commencement of the litigation it fell within the discretion of a court below to stay proceedings pending the arbitration'.

[97] In the result, the respondent does not have a right of continued occupation on this basis either.

The Constitutional Challenge

[98] The respondent avers that its constitutional rights have been infringed. Having regard to the answering affidavit, the respondent contents itself with vague, ambiguous, generalised and unfocused contentions to support the alleged breach of its constitutional rights. As a consequence, in my view, I agree with the submission of the applicant that these assertions are untenable and unsustainable, both in law and fact.

[99] Having regard to *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd*,[33] which dealt with the similar contentions as advanced by the respondent, indicated the following:

(a) 'It was impermissible for the high court to develop the common law of contract by infusing the spirit of ubuntu and good faith so as to invalidate the term or clause in question';[34]

(b) It would be untenable to relax the maxim *pacta sunt servanda* in this particular matter as it would result in the court making an agreement for the parties which was contrary to the SCA decision and dictum in *Oregon Trust v Beadica* 231 CC;[35]

(c) Even though a term in a contract operates unfairly or harshly, this does not by itself lead to the conclusion that it would offend the values of the Constitution or that it would be against public policy.[36]

[100] In any event, if one has regard to the relief which the respondent seeks in the counter-application, what in effect the relief effectively boils down to is the respondent requiring the court to make a contract for the parties which is impermissible.

[101] What was envisaged by the parties would be that a new franchise agreement would be concluded, and despite several attempts, no new franchise agreement was ever signed by the parties. This is self-evident from the referral to arbitration in which the respondent contends that the applicant has engaged in an unfair and unreasonable practice, in that it has failed to provide a new written franchise agreement for signature.

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[33] *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* 2018 (2) SA 314 (SCA).
[34] Ibid para 30.
[35] Ibid para 32.
[36] Ibid para 30.

[102] The effect of the decision of the SCA in *Beadica 231 CC*, is that the court found that there was 'no consideration of public policy permits the making of contracts for parties by a court',[37] and to permit a respondent to occupy the leased premises for a further period of five years, was tantamount to a court making a new contract for the parties which was impermissible. In my view, this is precisely what the respondent contends for, if one has regard to the counter-application.

The Judgments of D Pillay J, Ploos van Amstel J and Bezuidenhout J

[103] Among the submissions of the respondent was the diminished precedential value of the decisions in this division of the three judgments of my colleagues mentioned in this judgment, the submission being that I was not bound by the findings in these judgments as they are wrong. All three judgements emanate from this division, and in terms of the principle of *stare decisis* I am bound by them unless they are wrongly decided or distinguishable in some other way. I have had regard to all three of these decisions and I am of the view that they were, given the facts of each matter, correctly decided and there is no basis to depart from them.

The respondent's conditional counter-application

[104] The applicant submits that the judgments of D Pillay, J and Ploos van Amstel, J are fatal to the respondent's case, I agree. The defences and relief claimed in the conditional counter-application raised by the respondent in the current matter were similarly raised and relied upon in *Former Way Trade and Invest* and *Crompton Street Motors*. In both these matters, the respondents raised identical conditional counter-applications. On 10 July 2018, D Pillay J delivered her judgment in *Bright Idea Projects 66 (Pty) Ltd v Former Way Trade and Invest (Pty) Ltd*,[38] in which she issued an eviction order and dismissed Former Way's conditional counter-application. Similarly, on 6 June 2019, Ploos van Amstel J delivered his judgment in *Bright Idea Projects 66 (Pty) Ltd t/a All Fuels v Crompton Street Motors CC t/a Wallers Garage*,[39] in which he also granted an eviction order and dismissed the conditional counter-application.

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[37] *Trustees, Oregon Trust & another v Beadica 231 CC & others* [2019] ZASCA 29; 2019 (4) SA 517 (SCA) para 42.
[38] *Bright Idea Projects 66 (Pty) Ltd v Former Way Trade and Invest (Pty) Ltd* 2018 (6) SA 86 (KZP).
[39] *Bright Idea Projects 66 (Pty) Ltd t/a All Fuels v Crompton Street Motors CC t/a Wallers Garage Service Station* [2019] ZAKZPHC 39.

[105] I was also referred to a decision of Bezuidenhout J of 15 June 2020,[40] involving an application for the eviction of a retailer in which the respondent in that matter similarly instituted a conditional counter-application in the event of the eviction application being dismissed. Bezuidenhout J found that *Business Zone* was distinguishable on the facts of the matter and granted an order *inter alia* for eviction.

[106] Bezuidenhout J, in his judgment was referred to the directions from the Constitutional Court dated 29 May 2020.[41] In his judgment, Bezuidenhout J elected to follow the judgments of *Former Way Trade and Invest* of D Pillay J and *Crompton Street Motors* per Ploos Van Amstel J. All three of these judgments, all emanating from the KwaZulu-Natal High Court, found that *Business Zone* is distinguishable and that an arbitration in terms of section 12B of the PPA does not suspend pending litigation in the high court.

[107] In the matter which served before Ploos van Amstel J, the applicant sought the eviction of the respondent by way of a declaratory order that the lease agreement terminated on 28 February 2018 through effluxion of time. The respondent opposed the application on the basis that the proceedings be stayed pending arbitration in terms of section 12B of the PPA, alternatively in terms of clause 20 of the original franchise agreement on the basis that the applicant had undertaken to renew the franchise agreement for a further five year period. The respondent also delivered a conditional counter-application in which it sought an order directing the applicant to provide it with a new franchise agreement and an order declaring that it was entitled to conduct business on the premises for a further five year period.

[108] In his judgment, in dealing with the stay of the eviction proceedings pending arbitration, Ploos van Amstel J referred to the provisions of section 6 of the Arbitration Act and was of the view that the application to stay the proceedings should have been brought after the delivery of the notice of intention to oppose but prior to taking any further steps in the proceedings, and it would not have to deliver a comprehensive

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[40] *KZN Oils (Pty) Ltd v KZN Motors (Pty) Ltd* (KZP) unreported case no 7444/19P.
[41] These directions are discussed later on in my judgment.

answering affidavit. He took the view that he ought not to exercise the discretion in terms of section 6(2) of the Arbitration Act, as there was no sufficient reason for the dispute to be referred to arbitration.

[109] The dispute before him was one which concerned the law of contract and whether or not the applicant bound itself contractually to conclude a new franchise and lease agreement. He took the view that those issues had nothing to do with an unfair or unreasonable contractual practice as envisaged in section 12B of the PPA. In addition, in relation to the stay pending an arbitration in terms of clause 20 of the agreement, he found that there was no evidence on the papers that the respondent had initiated a procedure in clause 20 by calling for negotiation and then mediation. In addition, the wording of clause 20 contemplated a dispute between the parties concerning the agreement. As both the franchise agreement and lease agreement had expired through the effluxion of time, clause 20 was of no application.

[110] D Pillay J found that the decision of *Business Zone* was distinguishable from the matter she was dealing with on several fronts. She is correct in finding that the Constitutional Court interpreted the provisions of section 12B of the PPA, in the context of an application to review the decision of the Controller and the Minister of Mineral and Energy not to refer an alleged unfair or unreasonable contractual practice to arbitration. *Business Zone* identified three claims for unfair or unreasonable contractual practices, stipulated in the request for the referral to arbitration. None of the claims in the referral involved the ejectment or a failure to establish a renewal agreement. The Constitutional Court also did not order a stay of the litigation in the high court.

[111] Pillay J found that a referral in terms of section 12B of the PPA did not automatically suspend litigation and that an agreement to refer a matter for arbitration entitles a party to apply to court for a stay of such litigation. In addition, in dealing with the alternative request for a stay, relying on clause 20 of the franchise agreement which provided for negotiation and mediation in the event of any dispute arising between the parties concerning the agreement, she took the view that the agreement referred to was a franchise agreement and consequently dismissed the application for a stay on such ground.

[112] On 11 October 2020, I was provided with correspondence and two further cases which the parties brought to the attention of the registrar assigned to me on 9 October 2020. These were two recent decisions, the first, a judgment handed down by Ploos van Amstel J in the Durban High Court on 30 September 2020 in the matter between *KZN Oils (Pty) Ltd vs Frenserve CC t/a John Ross Service Station*[42] and the judgment in an application for reconsideration of the refusal of leave to appeal in terms of s 17(2)*(f)* of the Superior Courts Act, delivered on 1 October 2020 in the Supreme Court of Appeal.[43]

[113] *Frenserve* concerned an application for the eviction of the respondent from premises based on the effluxion of the lease agreement. The respondent, apart from opposing the eviction application, sought a stay of the proceedings pending the outcome of the arbitration referred in terms of section 12B of the PPA by the Controller of Petroleum Products dated 12 March 2020. One of the issues in the referral concerned the refusal by the applicant to renew and/or extend the agreement.

[114] It is common cause in that matter that the application for the eviction was issued on 8 March 2018 and a referral to the Controller of Petroleum Products occurred on 5 May 2018. The counter-application which contained the stay of the eviction application was filed on 10 May 2018. It is common cause that the Controller of Petroleum Products did not respond to the referral and consequently, an appeal was lodged with the Minister on 28 February 2020. The referral to arbitration was communicated to the parties by the Controller of Petroleum Products on 12 March 2020.

[115] In his judgment, Ploos van Amstel J alluded to *Business Zone* in which the Constitutional Court referred to the equitable standard that section 12B imposes. He was of the view that given the arbitrator's powers in terms of s 12B(4)*(a)* of the PPA to make an award to correct the unfair or unreasonable practice, he should not in advance of the arbitration, infringe on the powers of the arbitrator.

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[42] *KZN Oils (Pty) Ltd v Frenserve CC t/a John Ross Service Station* (KZD) unreported case no D2658/2018, delivered on 30 September 2020.
[43] *Former Way Trade & Invest (Pty) Ltd v Bright Idea Projects 66 (Pty) Ltd* [2020] ZASCA 118.

[116] Accordingly, he issued an order staying the eviction application pending the final determination of the arbitration referred in terms of section 12B of the PPA and reserve the aspect of costs.

[117] This decision is not in conflict with the order which he issued in the matter of *Bright Idea Projects 66 (Pty) Ltd t/a All Fuels v Crompton Street Motors CC t/a Wallers Garage Service Station,*[44] in which he granted an eviction order. In such decision, although there had been a request for a referral, at the time of the matter serving before him the Controller had not made a decision to refer the matter for arbitration. In my view the facts in *Frenserve* are distinguishable from *Crompton Street Motors*.

[118] For the reasons already dealt with in this judgment, the defences advanced by the respondent are unsustainable and not tenable. Consequently, it has not discharged the onus to show it has a right of continued occupation. For reasons alluded to in this judgment, similarly the conditional counter-application too must fail.

[119] Consequently, in my view, the applicant is entitled to an order for the eviction of the respondent.

Costs

[120] It is trite that the aspect of costs falls within the jurisdiction of this court. At the hearing, Mr Van Niekerk did not persist in seeking a punitive costs order and was content with a party and party costs order.

Concluding Remarks

[121] This matter was argued on 13 September 2019 and delivery of the judgment has been delayed due to a number of factors. At the time of the hearing, I was advised that a petition was pending before the Supreme Court of Appeal in respect of the judgment of Ploos Van Amstel J in *Crompton Street Motors.* It was subsequently also brought to my attention in October 2019, that the petition to the SCA had been dismissed. In addition, I was also made aware that a petition was likewise pending

[44] *Bright Idea Projects 66 (Pty) Ltd t/a All Fuels v Crompton Street Motors CC t/a Wallers Garage Service Station* [2019] ZAKZPHC 39.

against D Pillay J's decision in *Former Way Trade and Invest* and the application for reconsideration against the refusal of leave to appeal by the SCA. In addition, since October 2019, I have been without permanent secretarial support which was brought to the attention of the Judge President of the division and court management.

[122] The Covid-19 pandemic intervened and the lockdown imposed in March 2020 placed a moratorium on evictions. As the country moved from Alert level 5 to 4, in the interim in May 2020, I was advised of the directives of the Constitutional Court in the matter of *Crompton Street Motors* dated 29 May 2020. These directions concerned an application for leave to appeal which is pending before the Constitutional Court, the Supreme Court of Appeal having refused leave to appeal.

[123] These directions refer the parties to *Business Zone* and they are invited to file written submissions as to whether *Crompton Street Motors* is distinguishable from *Business Zone,* and on what basis 'the alleged unfair or unreasonable contractual practice should not be referred to arbitration?' The directions read as follows:

'1. This Court in *Business Zone 1010 CC t/a Emmarentia Convenience Centre vs Engen Petroleum Limited and Others* [2017] ZACC 2, 2017 (6) BCLR (773) CC (*Business Zone)* held:

(a) A single act outside the actual terms of the contract (in that case cancellation) could fall within the ambit of "an allegation of an unfair or unreasonable contractual practice", which unlocked the arbitration jurisdiction of the Controller.

(b) The determination of fairness and unreasonableness under the Petroleum Products Act 120 of 1977 (PPA) imposes an equitable standard "that overrides the terms of their contract to ensure that fairness and reasonableness prevail".

(c) The Statutory Arbitration process was obligatory and should get precedence "the inherent value of section 12 B enabling a party to resolve a dispute through arbitration rather court proceedings must be recognised".

2. The applicant and the respondent are invited to file written submissions on the following questions:

(a) Is this case distinguishable from *Business Zone?* If so, provide details and extent thereof;

(b) On what basis should the alleged unfair or unreasonable contract practice not be referred to arbitration under the ambit of section 12 B of the PPA?'

[124] Pursuant to receiving such correspondence and documents, the parties were invited, in the interests of justice, to submit any further written representations that they wished to and both parties did so on 26 June 2020. Among the documents submitted was the judgment by Bezuidenhout J in *KZN Oils (Pty) Ltd v KZN Motors (Pty) Ltd supra* delivered on 15 June 2020 in the Pietermaritzburg High Court.

[125] The decision in the application for reconsideration of the SCA decision to refuse leave to appeal was delivered on 1 October 2020.[45] On 9 October 2020 I was made aware of such judgment as well of a further judgment delivered on 30 September 2020 by Ploos Van Amstel J in the matter of *KZN Oils (Pty) Ltd v Frenserve CC t/a John Ross Service Station*.[46]

[126] In the interim, the regulations in terms of the adjusted lockdown alert level 3 have been imposed and are currently in place. Essentially my understanding of such regulations are that they do not prevent a landlord from instituting proceedings for an eviction and a court has a discretion to grant an order of eviction if it is just and equitable to do so.

[127] In *Anchorprops 31 (Pty) Ltd & another v Levin*[47] the court held that, 'the requirements of justice and equity contemplated in regulation 19 overlap with the requirements of justice and equity under section 4(7), (8) and (9) of the PIE Act'. I am of the view that having regard to the wording of regulation 37 of the Disaster Management Act regulations[48] which incorporates the amendments of 1 February 2021, that these do not apply to commercial entities. The wording of the regulation refers to 'A person may not be evicted from his or her land or home or have his or her

[45] *Former Way Trade & Invest (Pty) Ltd v Bright Idea Projects 66 (Pty) Ltd* [2020] ZASCA 118.
[46] *KZN Oils (Pty) Ltd v Frenserve CC t/a John Ross Service Station* (KZD) unreported case no case no D2658/2018 delivered on 30 September 2020.
[47] *Anchorprops 31 (Pty) Ltd & another v Levin* [2020] ZAGPJHC 183 para 4.
[48] Disaster Management Act: Regulations issued in terms of section 27 (2) of the Act, GN R480, GG 43258, 29 April 2020 (as amended).

place of residence demolished'. The factors referred to in regulation 37(2) in addition, refer in the main to a person's residence.

[128] I am of the considered view that it is just and equitable for an eviction order to be granted in this matter. The lease and franchise agreement ended through the effluxion of time in 2016. Despite this, the applicant engaged with the respondent in an attempt to negotiate a new agreement. It was only when these attempts, which lasted a period in excess of 12 months, had failed that it instituted these application proceedings.

[129] The matter has already been referred for arbitration in terms of section 12B of the PPA. The respondent is not without an alternate remedy. It is thus just and equitable for the applicant to be granted the relief it seeks.

Order

[130] Consequently, the following order is issued:

Main application

(a) The respondent and anyone occupying through it are hereby ordered to vacate the premises situated at Portion 4 of Erf 731, Madadeni Road, Newcastle, KwaZulu-Natal within 30 days of the date of the grant of this order;

(b) The respondent is directed to pay the costs of the main application.

The conditional counter-application

(c) The conditional counter-application is dismissed with costs.

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HENRIQUES J

CASE INFORMATION

APPEARANCES

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Date of Hearing	:	13 September 2019
Further written submissions	:	22 June 2020
Date of Judgment in SCA	:	1 October 2020
Date of Judgment	:	12 February 2021

This judgment was handed down electronically by circulation to the parties' representatives by email and release to SAFLII. The date and time for hand down is deemed to be 09h30 on 12 February 2021.