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

Case No: 4881/2022P

In the matter between:

BRIGHT IDEA PROJECTS 66 (PTY) LTD t/a ALL FUELS

APPLICANT

and

**ROSEVILLE PROJECTS (PTY) LTD t/a SONDELA
SERVICE STATION**

RESPONDENT

ORDER

The following order is granted:

1. It is declared that:

(a) the respondent's right of occupation of the premises described as Lot 60 and Rem Lot 61 Ladysmith and situated at 2[...] P[...] Road, Ladysmith, KwaZulu-Natal, terminated by no later than 31 July 2021; and

(b) the respondent's right of operation upon the aforesaid premises of the retail fuel service station using the brand name Caltex, or any other name incorporating the word Caltex, terminated by no later than 31 July 2021.

2. The respondent together with all person/s and all entity/ies occupying by or through the respondent be forthwith evicted from the premises.

3. In the event of the respondent failing to comply with paragraph 2 above, the Sheriff or his Deputy be and is hereby authorized and directed to take all steps and to do all such things as may be necessary, to evict the respondent from the said premises.

4. The respondent be and is hereby ordered to pay the costs of this application, such costs to be taxed on the scale as between attorney and client, including the costs consequent upon employment of senior counsel.

JUDGMENT

ZP Nkosi J

Introduction

[1] The applicant seeks an order in the following terms:

(a) that the respondent's right of occupation of the premises described as Lot 60 and rem Lot 61 Ladysmith and situated at 2[...] P[...] Road, Ladysmith, KwaZulu-Natal ("the premises"), terminated by no later than 31 July 2021;

(b) that the respondent's right of operation upon the aforesaid premises of a retail fuel service station using the brand name 'Caltex', or any other name incorporating the word Caltex, terminated by no later than 31 July 2021;

(c) that the respondent together with all person/s and/or entity/ies occupying by or through the respondent be forthwith evicted from the premises;

(d) in the event of the respondent failing to comply with paragraph (c) above, the Sheriff or his Deputy be and is hereby authorised and directed to take all steps and

to do all such things as may be necessary, to evict the respondent from the said premises; and

(e) the respondent be and is hereby ordered to pay the costs of this application, such costs to be taxed on the scale as between attorney and client, including the costs consequent upon the employment of senior counsel.

The parties

[2] The applicant is Bright Idea Projects 66 (Pty) Ltd t/a All Fuels ("All Fuels"), a company duly registered and incorporated in accordance with the Corporate Laws of the Republic of South Africa. It has its principal place of business situated at Unit 13, Lakeside Office Park, [...] D[...] D[...], Westville, Durban, KwaZulu-Natal. The applicant carries on business as the Branded Marketer of Chevron SA (Pty) Ltd (formerly known as Caltex Oil SA (Pty) Ltd which has changed its shareholding and name to Astron Energy (Pty) Ltd), under the name and style of All Fuels in respect of KwaZulu-Natal South Cluster.

[3] The respondent is Roseville Projects (Pty) Ltd t/a Sondela Service Station ("Roseville"), a company duly registered and incorporated in accordance with the Corporate Laws of the Republic of South Africa. It conducts business as a Caltex Retail Service Station from premises situated at 2[...] P[...] Road, Ladysmith, KwaZulu-Natal.

[4] The relief sought by All Fuels is assailed or resisted by Roseville on various grounds, including the absence of locus standi to bring the action. Such grounds are dealt with later in the judgment.

Historical background (with applicant's case)

[5] On 28 June 2004, Caltex Oil SA (Pty) Ltd ("Caltex") concluded a written franchise agreement ("the franchise agreement") with Thorneys Family Restaurant CC ("Thorneys") in which the franchisor Caltex granted the franchisee, Thorneys the right to operate a Caltex service station upon the premises forming the subject of the

application.¹ The period of the franchise agreement was for five years commencing on 1 July 2004 with two options to renew for further periods of five years each. Thus, the total duration of the franchise agreement inclusive of the option period was 15 years (i.e. 1 July 2004 to 30 June 2019). Caltex changed its name to Chevron South Africa (Pty) Ltd ("Chevron") on 1 October 2005.

[6] On 23 December 2011 All Fuels and Chevron concluded a written cession and assignment sales agreement ("the resale assignment agreement") in terms of which Chevron ceded and assigned various retail agreements, one of which was the franchise agreement. On the same date, All Fuels and Chevron also concluded a written branded marketer agreement in terms of which, inter alia, All Fuels was appointed by Chevron as a wholesaler to promote and sell petroleum and lubricant products using the Chevron system within the KwaZulu-Natal South geographical area. To that end, Chevron granted the exclusive right and licence to All Fuels to sell Chevron petroleum products to the retail sector i.e. the consumer market within KwaZulu-Natal South geographical area.

[7] Also on the same date, as mentioned above, Chevron and All Fuels concluded a further written agreement described as an agreement for sale and purchase of assets in KwaZulu-Natal South Cluster South Africa ("asset purchase agreement") in terms of which Chevron sold various immovable properties and equipment comprising machinery, tanks and other similar articles to All Fuels. Such sale included the premises, tanks, machinery, equipment and the like upon the premises occupied by Thorneys.

[8] Chevron informed Thorneys that it had appointed and granted to All Fuels, inter alia, the right and licence to sell to and through retail outlets within the geographical area identified in the marketer agreement and assigned all its rights and obligations in terms of the franchise agreement to All Fuels. All Fuels secured registration of transfer of the immovable property occupied by Thorneys into its name, on 24 April 2013.

¹ Annexure "AF1" to the founding affidavit.

[9] On 20 May 2014, Roseville concluded a written purchase and sale agreement with Thorneys for the acquisition of the service station. It is averred that Roseville so concluded the written purchase and sale agreement with Thorneys knowing full well that the franchise agreement would terminate by the effluxion of time on 30 June 2019.

[10] On 2 June 2014, in pursuance of the acquisition of the service station by Roseville, All Fuels delivered a letter to Roseville which letter documented, inter alia, that Roseville's application for the Caltex franchise for the service station was successfully completed. As at 2 June 2014 and in terms of the written franchise agreement, the remaining term of the franchise agreement, namely Option 2 due to commence on 1 July 2014 was for a further period of five years with the franchise agreement terminating on 30 June 2019.

[11] On the same date (2 June 2014) the franchise agreement between Chevron and Thorneys was ceded and assigned to Roseville with effect from 2 June 2014. Chevron changed its name to Astron (Pty) Ltd ("Astron") on 16 October 2018.

[12] On 18 January 2019, upon impending termination (by the effluxion of time) of the franchise agreement on 30 June 2019, All Fuels (apparently as a measure *ex abundanti cautela*) delivered a letter to Roseville, in terms of clause 3.4 of the franchise agreement in terms of which Roseville was reminded that the franchise agreement expired by the effluxion of time on 30 June 2019. And it further advised that the franchise agreement which was due to expire would not be renewed or continued after the expiry date and further stated that the consequence and obligation of the termination of the franchise agreement upon expiry thereof was set out in terms of clause 11 of the franchise agreement.

[13] During March 2019 Roseville's duly authorised director, namely Yusuf Vawda ("Vawda"), made a request to All Fuels for an extension of the franchise agreement for a further period of five years. After a consideration of Roseville's request, All Fuels agreed to extend the franchise agreement only for an additional two-year period to 31 July 2021.

[14] On 30 June 2019 the franchise agreement terminated by the effluxion of time after a period of 15 years. In confirmation of the extension of the two years that was afforded to Roseville, All Fuels forwarded a letter to Roseville's representatives advising it of the same.

[15] On 25 January 2021, All Fuels again reminded / notified the Roseville that the further two years' extension terminated at midnight on 30 July 2021. The letter advised Roseville and recorded that upon termination, the extended franchise agreement shall not be renewed or continued after the expiry date and that Roseville agreed to forthwith surrender the possession of the premises to All Fuels.

[16] On 2 February 2021, following upon All Fuels letter, Vawda sent an email enclosing a letter to All Fuels in terms of which he requested an urgent meeting with All Fuels' representatives. The requested meeting was held on 17 February 2021 at All Fuels offices where certain issues were discussed and conveyed as between the parties' representatives.

[17] It was reiterated and conveyed by All Fuels that the franchise agreement had terminated and it would not be granting any further extension. Other Issues discussed were that the site needs to go under a revamp and All Fuels would have to put out the new franchise agreement to the open tender/market process, which will take into account, inter alia, transformation and black empowerment. That Roseville was not excluded from the open tender/market process and was invited and more than welcome to tender for the conclusion of a new franchise agreement. Further that All Fuels would have to comply with its requirements, which entailed that a fair, objective, and transparent process be followed to conclude a new franchise agreement with a new prospective franchisee.

[18] At the said meeting, Roseville was advised that they were not entitled to an automatic renewal, as the agreement was for a fixed term. It appears that Roseville believed they were entitled to a renewal and that All Fuels could not cancel or refuse renewal of the franchise agreement.

[19] On 16 March 2021 Roseville delivered a request in terms of s 128(1) of the Petroleum Products Act² ("PPA") to the Controller of Petroleum Products ("Controller") for arbitration of the various complaints it made against All Fuels. On 4 May 2021, All Fuels attorney, Brian Denny ("Denny") telephonically contacted Roseville's attorney, Matthew Robson ("Robson") and proposed that the Roseville's application for referral be suspended pending the outcome of the judgments by the Constitutional Court in the two matters of *Former Way Trade and Invest (Pty) Ltd v Bright Idea Projects (Pty) Ltd t/a All Fuels and Another* and *Crompton Motors CC v Bright Idea Projects 66 (Pty) Ltd*.

[20] On 5 May 2021, Robson addressed a letter to Denny stating, inter alia, that "we see no harm in suspending proceedings pending the outcome of the Constitutional Court matters...". Denny acknowledged the letter stating that he would accordingly advise the Controller of the parties' arrangement/agreement to suspend Roseville's referral pending the outcome of the Constitutional Court judgments.

[21] On 31 July 2021, Roseville's right of occupation of the premises terminated according to the two-year extended franchise agreement. On 5 August 2021 Denny sent an email to Robson stating, inter alia, that the franchise agreement extended to 30 July 2021 terminated by the effluxion of time and further that All Fuels was surprised to receive an order of fuel on 2 August 2021.

[22] On 6 August 2021, and in response to the letter, Robson stated, inter alia, that All Fuels specifically requested the Controller to abate Roseville's request for a s 12B arbitration. On 11 August 2021, Robson sent an email to the Controller requesting that he direct All Fuels' attorney and Astron's attorney to file their submissions in response to Roseville's request for arbitration.

[23] On 12 August 2021, Denny sent an email to Robson to voice his displeasure at the development in spite of the parties' agreement to abate until such time as the Constitutional Court has handed down its judgments. Astron emailed its letter of opposition to the request for referral to the Controller, on 24 August 2021. On 25

² Petroleum Products Act 120 of 1977.

August 2021 Denny emailed a letter to the Controller documenting All Fuels' bases and grounds of opposition to the request for referral made by Roseville to the Controller.

[24] On 3 September 2021, the Constitutional Court delivered its judgment 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*.³ In terms thereof, Crompton Street Motors' application for leave to appeal was granted but the appeal was dismissed, thereby upholding the eviction order that was granted by this court on similar grounds to this application.

[25] On 6 September 2021, Roseville submitted to the Controller its responses to both All Fuels and Astron's written objections. On the same date, the Controller approved Roseville's request for referral to arbitration.

[26] On 9 September 2021, and in consequence of Roseville's acceptance that it would for all intents and purposes abide by the decision of the Constitutional Court, Denny emailed a letter to Robson to record the Constitutional Court's findings in the Crompton case and demanding that Roseville vacate the premises by no later than 4.00 pm on Wednesday, 15 September 2021. The letter further recorded that the franchise agreement terminated by effluxion of time on 31 July 2021.

[27] On 28 September 2021 the Constitutional Court delivered its judgment in the matter of *Former Way Trade and Invest (Pty) Limited v Bright Idea Projects 66 (Pty) Limited and Another*.⁴ In terms thereof, the Court dismissed Former Way's application for leave to appeal.

[28] On 5 October 2021 Robson emailed a letter to Denny in which he recorded, inter alia, that pending the finalisation of all issues (relating to Roseville's request for arbitration and any litigation that might occur) Roseville was:

³ *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).

⁴ *Former Way Trade and Invest (Pty) Limited v Bright Idea Projects 66 (Pty) Limited and Another* 2021 (12) BCLR 1388 (CC).

- (a) prepared to buy exclusively from All Fuels;
- (b) continue to pay applicable rentals;
- (c) contract whatever standard franchise agreement that was in place with All Fuels; and
- (d) while in possession of All Fuels' property adhere to present and applicable terms of franchise operations.

[29] On 15 October 2021, All Fuels lodged its appeal against the Controller's decision, dated 6 September 2021, referring Roseville's complaint to arbitration. On 20 October 2021 Roseville emailed its letter of opposition to All Fuels appeal.

The respondent's case

[30] At the outset Roseville avers that there is no *vinculum iuris* in the form of any formal contract between All Fuels and itself. The franchise agreement which seems to be central to the All Fuels' case is between Chevron and Thorneys.

[31] Roseville also avers, in particular, that All Fuels has not 'stepped into the shoes' of Chevron to the extent that entitled it to the relief claimed. That is so, it is claimed, because in terms of annexures "AF9-11" ("the triad agreements") All Fuels, as far as both property and business rights are concerned, has a very narrow and restricted title and entitlement which (a) keeps it bridled by and to, at least, Chevron and (b) does not give it independent authority or right to make claims it is making herein as against Roseville.

[32] Roseville also submits that All Fuels is non-suited by reason of the non-joinder of Astron, Chevron-Pakistan Africa (Pty) Ltd, licensor of Astron; Controller and Minister. Furthermore, All Fuels has no rights of action as far as the trade names and trademarks of Caltex product is concerned or for the use thereof.

[33] Roseville concedes that the franchise agreement has expired. It contends, however, that this alone does not in this case summarily lead to unlawful possession of the property by Roseville or to the right to evict by All Fuels.

[34] Roseville centers its argument on the right which emanates from the licensing system and its laws to any party or person to be in or participate in the industry and business of supplying and selling petroleum products to the public. It submits that these licences define the legal standing as well as rights of parties per se in the petroleum business and in certain instances such as s 128 of the PPA which is relevant in this case.

[35] Roseville believes strongly that since All Fuels is a licensed wholesaler it is irrelevant that, at the same time, it happens to be a landowner. Its land ownership rights have been subordinated to its legal obligations and constraints as a licensed wholesaler (who is prohibited by the PPA (in s 2A(5) from holding retail licences save in specified cases listed therein).

[36] As a plea in limine, Roseville contends that All Fuels' application ought to be stayed pending the arbitration proceedings that have already been ordered in terms of s12B. It submits that the arbitration has been set up and structured so as to deal with most, if not all of the issues between the parties. It indicates that the terms of reference thereof are contained in annexures "AF17" and "AF29".

[37] It is common cause that Roseville is in occupation of All Fuels property against the will of All Fuels. It is also common cause that the franchise agreement terminated by the effluxion of time, on 30 June 2019, and was thereafter by consent extended for a further two-year period until 31 July 2021. The franchise agreement was not renewed thereafter.

The issues

[38] The main issue is whether All Fuels, as a licensed wholesaler and landowner of the premises where Roseville operates its service station is entitled to evict Roseville from the premises upon the expiry of the extended franchise agreement. The following sub- issues also require determination:

- (a) whether Roseville has been subjected to an unfair or unreasonable contractual practice;
- (b) whether Roseville's referral of issues to the Controller has any merit; and
- (c) whether All Fuels has contravened s 2A(5)(a) of the Petroleum Products Amendment Act.

[39] A determination of these sub-issues seems to be dispositive of the case since the facts on the main issue appear to be indisputable or common cause. I, therefore propose to deal with the sub-issues first.

[40] Before I deal with the sub-issues in earnest, I propose to address the issues raised in limine, namely, All Fuels lack of locus standi and non-joinder. Roseville contends that All Fuels is non-suited by reason of the lack of jurisdiction and non-joinder of Astron and Chevron-Pakistan Africa (Pty) Ltd, the licensor of Astron; Controller; and the Minister of Mineral Resources and Energy. And the argument is propounded that All Fuels has no rights of action not only as far as the right to evict Roseville but also to trade names and trademarks of Caltex product or for the use thereof, which forms part of the relief sought by All Fuels.

[41] All Fuels claims to have "stepped into the shoes" of Astron in terms of the triad agreements, being the RA Assignment Agreement ("RAAA"); the Branded Marketer Agreement ("BMA"); and the Agreement for the Sale and Purchase of Assets ("ASA"). Roseville contends that these agreements, as a matter of interpretation and application only creates a "master-servant" relationship - *locatio conductio operis* - of ongoing works and services that All Fuels as branded marketer must deliver to its master and overseer, Astron.

[42] Roseville submits in its heads of argument as follows:

"6.5.3 Clause 3.4 of the "sale of assets agreement" (**annexure AF11** at p 331) quite rightly recognizes that "3rd party consents" are needed as regards what it defines as

the "contracts" being "*collectively all agreements and contracts to be assigned by Chevron to Marketer in terms of the RA Assignment Agreement*" which agreement in turn "assigns" (as between Chevron and Applicant), "*all its rights and obligations under each of the RA's*" the RA's being "*the retail agreements details of which are set out in Schedule 1*".

6.5.4 Both Applicant and **Chevron/Astron** are seeking in this Court - deliberately and craftily and seemingly in *fraudem legis* - to run away from the consequences that the aforesaid clause imposes on the failure of consent. The arbitration however directly addresses this aspect which is a trial of fact.

6.6 It is also indisputable that Applicant itself has no independent rights to and in the "**Caltex**" name, brand or related intellectual property - these are "owned" by some American concern operating via **Chevron-Pakistan**. In juxta position to this, what the deals, agreements and transactions between Applicant and the owners or representatives of the Caltex-brand amount to for Applicant, is the **obligation, as a servant to a master, to ensure the successful perpetuation of the Caltex brand and incumbent franchisee's.**

[43] From the foregoing, it is Roseville's case that from the triad agreements alone All Fuels has no locus standi, no independent rights to evict but rather an obligation to renew the franchises it took over and thus there has been a fatal non-joinder of Astron (which in turn has remained accountable to Roseville) and Chevron-Pakistan.

[44] As to the non-joinder, Roseville submits as trite law that the party that was to have been joined must have a substantive legal interest in the order that is being sought. And it further submits that Astron has a legal interest in its "real" rights as espoused in *Willow Waters Homeowners Association (Pty) Ltd v Koka NO and Others*.⁵

[45] For the determination of the current issues, I consider that nothing turns on the points raised in limine. For all intents and purposes All Fuels "stepped into

⁵ *Willow Waters Homeowners Association (Pty) Ltd v Koka NO and Others* 2015 (5) SA 304(SCA) para 22.

thesoes" of Astron and thus has locus standi to seek eviction and to vindicate its ownership rights. I believe that none of the parties proposed to have been joined have a substantive legal interest, above that of All Fuels, *which is likely to be prejudiced in the order that is sought.*

Sub-issues determination

[46] I now turn to deal with the sub-issues referred to above. Because the sub-issues are intertwined, I propose to deal with all of them as one.

[47] The principles pertaining to the sub-issues have found expression in a multitude of litigation involving All Fuels and the kindred entities in this court and various other courts. The judgments emanating from the courts seem conclusive and definitive of the issues.

[48] In *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another*,⁶ per Brand AJ, the importance of the doctrine of precedent was aptly restated as follows:

'[28] ... "(C)ertainty, predictability, reliability, equality, uniformity, convenience: these are the principal advantages to be gained by a legal system from the principle of stare decisis". Observance of the doctrine has been insisted upon, both by this Court and by the Supreme Court of Appeal. And I believe rightly so. The doctrine of precedent not only binds lower courts, but also binds courts of final jurisdiction to their own decisions. These courts can depart from a previous decision of their own only when satisfied that that decision is clearly wrong. Stare decisis is therefore not simply a matter of respect for courts of higher authority. It is a manifestation of the rule of law itself, which in turn is a founding value of our Constitution. To deviate from this rule is to invite legal chaos.' (Footnotes omitted.)

[49] As regards the doctrine, this court per Henriques J has correctly expressed itself in *KZN Oils (Pty) Ltd v Neita (Pty) Ltd t/a Keyway Motors*⁷ as follows:

⁶ *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another* 2011 (4) SA 42 (CC).

⁷ *KZN Oils (Pty) Ltd v Neita (Pty) Ltd t/a Keyway Motors* [2021] 2 All SA 478 (KZP).

'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 judgements 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 judgments 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.'

I share the sentiment expressed above.

[50] Section 12B(4) of the PPA provides that an arbitrator shall determine whether the alleged contractual practice is unfair or unreasonable and if so "shall make such award as he or she deems necessary to correct such practice". Roseville submits that since the referral to arbitration was done before these proceedings were instituted, such warrants a stay of these proceedings since the arbitration has been set up and structured so as to deal with most, if not all of the issues between the parties.

Is there any merit to the referral?

[51] The core issue, in terms of Roseville's submissions, is about the "renewability of franchises" and the matter of fairness and reasonableness of it, and nothing should turn on the franchise agreement as such.

[52] In this regard, and in annexure "AF17", constituting the reference to arbitration and under its heading "REMEDIAL AND CORRECTIVE ACTION PROPOSED BY THE REQUESTER" Roseville states:

'A. **Astron** and/or **All Fuels**, depending of which of the two is found to have that power, should offer the Requester the standard current franchise agreement as

applied by them to all "**Caltex**" franchises. This is very clearly a "contractual" matter and a "contractual practice".

It further contends in its heads of argument as follows:

'6.5 It is clear that the **franchise agreement** lays numerous "obligations" on the Franchisor as to, for instance, the maintenance of supply of proprietary products, use of intellectual property and quality controls use of cards - matters which reciprocate to and address the ability of the Franchisee to carry out its obligations and for the agreement to attain the mutual objective of the Franchise. Both parties however are committed to and indeed subservient to the interests of the "Brand" - the "Caltex flag". As the Preamble, Items 1 to 4 ably shows - the "franchise agreement" is fully a reciprocal two-way street which obligates the Franchisor to do a host of things for the executability and performability of the contract by its Franchisee.' (Footnotes omitted.)

[53] In instances where the franchise agreement has lapsed, as agreed in this matter, it is my considered view that the above submissions are misplaced. Nothing should arise from an agreement that has admittedly lapsed.

[54] In *Bright Idea Projects 66 (Pty) Ltd t/a All Fuels v Crompton Street Motors CC t/a Wallers Garage Service Station*⁸ it was held (per Ploos van Amstel J) that a party's refusal to conclude a new contract does not constitute or amount to an unfair or unreasonable contractual practice. It is aptly stated in his judgment as follows:

'[18] I found it difficult to get to grips with counsel's submissions as to the nature of the contractual practice which is said to be unfair or unreasonable as contemplated in s 12B, and should go to arbitration. As I understood the argument the conduct on the part of the applicant which is said to be unfair or unreasonable is its refusal to extend the existing franchise and lease agreement, or conclude new ones. I do not see how its refusal to do so can be said to be a "contractual practice" which can be "corrected" by an arbitrator as contemplated in s 12B.'

⁸ *Bright Idea Projects 66 (Pty) Ltd t/a All Fuels v Crompton Street Motors CC t/a Wallers Garage Service Station* (1916/201SP) [2019] ZAKZPHC 39 (6 June 2019).

[55] In *KZN Oils* this court said the following:⁹

'[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.

...

[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.'

[56] The aforesaid judgments are on all fours with the facts and Roseville's arguments in this case. I cannot accept the contention that the refusal to extend the lease in the circumstances qualifies as "an unfair or unreasonable contractual practice". The refusal to grant an extension does not qualify as a "practice" in terms of the PPA. The purpose of the PPA was to address the imbalances of the past and to address the unequal bargaining power in the petroleum industry. A fairness standard is imposed on contractual relationships between retailers and wholesalers in order to remove unequal bargaining power.

[57] Roseville does not enjoy any prospects of success in the arbitration for "remedial and corrective action". The arbitrator is not empowered to order All Fuels and Roseville to conclude a new franchise agreement. Nor does the PPA provide

⁹ *KZN Oils* above fn 7.

that an arbitrator may make an award which constitutes a declaratory order as to whether or not a contract was concluded. No contract is extant in this case and the arbitrator has no power to create one.¹⁰

[58] I also believe that the arbitrator is not given any power to override the rights of ownership and the rights of owners to obtain eviction orders against persons occupying property against the will of the owner.¹¹ In any event Roseville has not asked for any such award in its referral.

[59] Accordingly, s 12B of the PPA, in the absence of express powers to that effect, is not to be interpreted as depriving All Fuels of its rights to possession of the premises, and is not to be interpreted as affording an arbitrator a right to do so. Reference was made by Roseville to the judgment of *The Business Zone 1010 CC t/a Emmarentia Convenience Centre v Engen Petroleum Ltd and Others*,¹² a matter concerned with the cancellation of the franchise and operation agreement in consequence of an alleged breach by the retailer operating the franchise business. The cancellation by the franchisor was challenged by the retailer as constituting an unfair contractual practice within the meaning of s 12B; hence the application to the Controller to refer the matter to arbitration in terms of s 12B(1). The Constitutional Court effectively found that the Controller was obliged to refer the alleged unfair or unreasonable contractual practice to arbitration in terms of s 12B(1).

[60] The facts and circumstances of the present case are far removed from those in the *Business Zone* matter in the following respects:

(a) the facts are wholly distinguishable; the latter case did not deal with possession rights and eviction (as set out in paragraph 37 of the judgment);

(b) instead, it dealt with a situation where there was an existing contract between the parties and what was in dispute was cancellation;

¹⁰ See *Sasol Oil (Pty) Limited v Eurozar (Pty) Ltd and Others* (56719/2021) [2022] ZAGPJHC 17(19 January 2022); and *Mannere Beleggings CC v Minister of Energy and Others* (51067/15) [2018] ZAGPPHC 93 (22 March 2018).

¹¹ *Bright Idea Projects 66 (Pty) Ltd v Former Way Trade and Invest (Pty) Ltd* 2018 (6) SA 86 (KZP).

¹² *The Business Zone 1010 CC t/a Emmarentia Convenience Centre v Engen Petroleum Ltd and Others* 2017 (6) BCLR 773 (CC).

(c) in casu, the franchise agreement has come to an end by effluxion of time;

(d) the Constitutional Court effectively held that the arbitrator under the PPA could set aside a cancellation of an existing contract with the result that the contract was reinstated. That is different from a finding that an arbitrator may direct parties to conclude a contract that had never been concluded in the first place; and

(e) neither the courts nor the legislature (absent specific and exceptional provisions e.g. erstwhile s 252 of the Companies Act)¹³ make contracts for the parties.

[61] Our law, generally, recognises freedom of contract. See, *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd*;¹⁴ *Trustees, Oregon Trust and Another v Beadica 231 CC and Others*;¹⁵ *Absa Ltd v Moore and Another*;¹⁶ *Natal Joint Municipal Pension Fund v Endumeni Municipality*;¹⁷ and *Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd*.¹⁸

[62] As alluded to above, the arbitration embarked upon by Roseville has no conceivable prospect of success. There is manifestly no contractual practice to speak of, having regard to the expired franchise agreement, that All Fuels could be said to have unreasonably or unfairly committed. This application and arbitration are by no means in *pari materia*.

[63] I am of the view that staying the proceedings would be a waste of judicial resources. The agreement lapsed through the effluxion of time after a two-year extension. It had a fixed termination date which was not challenged at that time but shortly before the expiry of the lease agreement as happened in this case. That

¹³ Companies Act 61 of 1973.

¹⁴ *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* 2018 (2) SA 314 (SCA).

¹⁵ *Trustees, Oregon Trust and Another v Beadica 231 CC and Others* 2019 (4) SA 517 (SCA).

¹⁶ *Absa Ltd v Moore and Another* 2016 (3) SA 97 (SCA) para 42.

¹⁷ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.

¹⁸ *Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd* 2018 (1) SA 94 (CC) para 14.

would have allowed the s 12B process to unfold well before the lease agreement (which entitled Roseville to remain on the property) expired.

[64] Roseville was advised on two occasions about the termination (first when an extension was granted and again before it was due to expire) and that it would not be renewed. It was pertinently pointed out to it that it would be required to vacate the premises upon the termination. It is unclear why Roseville waited until the life of the agreement was to imminently expire to seek relief.¹⁹

[65] The next consideration is whether All Fuels has acted in contravention of s 2A(5)(a) of the PPA. Roseville contends that All Fuels has acted in contravention of s 2A(5)(a) of by holding or intending to hold a retail licence. In this regard it seems to be common cause that All Fuels carries on business as a wholesaler and distributor of petroleum products throughout a national network of Caltex branded service stations. This while Roseville in pursuance of the expired/terminated franchise agreement traded and continues to trade (against the will of All Fuels) as the retailer/franchisee of the service station.

[66] It is unclear in what respects All Fuels is holding or intending to hold a retail licence. I consider the contention to be vacuous and unmeritorious.

[67] In conclusion, the following emerges from the facts of this case and the law:

- (a) Astron ceded and assigned all of its rights, obligations and interests in the franchise agreement to All Fuels;
- (b) the franchise agreement expired by the effluxion of time on 31 July 2021;
- (c) the franchise agreement did not grant any automatic rights of renewal;

¹⁹ *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); *Bright Idea Projects 66 (Pty) Ltd v Former Way Trade and Invest (Pty) Ltd* 2018 (6) SA 86 (KZP) paras 31, 32 and 40; *Engen Petroleum Ltd v Tihamo Retail (Pty) Ltd* 2010 JDR 0958 (GSJ) at 8-9; *Hansco Motors CC v BP Southern Africa (Pty) Ltd* 2011 JDR 1397 (KZP) paras 32-34; and *Astron Energy Ltd v Union West Motors (Pty) Ltd t/a Pinetown Service Station* (Case No: 8149/2019P) (18 September 2020) paras 8-9.

(d) clause 11.1 of the franchise agreement provides that upon termination of the contract, for whatever reason, the franchisee and its permitted assigns, heirs and executors will forthwith surrender possession of the premises to the franchisor;

(e) clause 19.2 of the franchise agreement provides that the contract constitutes the entire agreement between the parties who acknowledge that there are no other oral or written undertakings or agreements between them relating to the subject matter of the contract and no amendments or other modification of the contract shall be valid or binding on the parties thereto unless reduced to writing and executed by both parties thereto;²⁰

(f) the parties did not conclude any further franchise agreement for the period beyond 31 July 2021;

(g) Roseville's refusal to vacate the premises and surrender its retail licence constitutes unlawful conduct contrary to the terms and conditions of clause 11 of the franchise agreement which was voluntarily and consensually entered into between the parties;

(h) the parties contracted freely and voluntarily and the terms agreed upon are sacred and must be enforced as Roseville has failed to demonstrate any good reason for its failure to comply with its obligation to vacate the premises;

(i) once the franchise agreement terminated by the effluxion of time, Roseville no longer had the business as the business system and procedures for establishing and operating the Caltex franchise as well as all intellectual property rights associated with Caltex brand belongs to Astron. These intellectual property rights were licensed for use for a specified period of time on terms and conditions which are expressed in the franchise agreement and/or supply agreements;

(j) section 12B (4) of the PPA provides that an arbitrator shall determine whether an alleged contractual practice is unfair and unreasonable and if so, to make an award as he or she deems necessary to correct such practice;

²⁰ *Kythera Court v Le Rendez-Vous Cafe CC and Another* 2016 (6) SA 63 (GJ) paras 36-37.

(k) the arbitrator however is not afforded any power in an arbitration under s 12B to make an award which tends to create a contract between the parties where none exists. Nor is an arbitrator entitled to override ownership rights duly entrenched in the Constitution, in regard to any property or to order the continued possession of premises in circumstances where no such right exists or is demonstrated;

(l) an arbitrator, insofar as remedial corrective action in the form of a new agreement is concerned, cannot relax the *pacta sunt servanda* principle as it would be tantamount to the arbitrator making agreements for the parties which is impermissible in law. And so are the courts;²¹

(m) the principles of human dignity and freedom enshrined in the Constitution recognise that parties are entitled to regulate their commercial relationships in terms of contracts electively concluded between them as free agents. The principle of contractual autonomy is central to the constitutional principles of dignity, privacy and freedom. The franchise agreement in the present matter was concluded in the context of such constitutional values;

(n) a contravention of s 2A (5) of the PPA has not been shown to be engaged nor does it constitute a contractual practice which falls under the auspices of a referral in terms of s 12B (1) of the PPA; and

(o) there was no unfair or unreasonable contractual practice committed and Roseville has not proved any case to the contrary.

[68] The franchise agreement having come to an end, it is Roseville's contractual and legal obligation to vacate the premises and to terminate all operations as a Caltex franchisee. Its unlawful holding over of the premises, in circumstances where it has no right of occupation of the same, constitutes an arbitrary deprivation of

²¹ *Trustees, Oregon Trust and Another v Beadica 231 CC and Others* 2019 (4) SA 517 (SCA); *Roazar CC v The Falls Supermarket CC* 2018 (3) SA 76 (SCA) para 24; and *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* 2018 (2) SA 314 (SCA)

property and a subversion of the pristine principles and values of the Constitution which should not be countenanced by this court.

[69] From the foregoing, I believe the referral to an arbitrator is without merit and a stay of the proceedings is unwarranted. The interests of constitutionalism demand that Roseville be held to its contractual obligation to vacate the premises.

Costs

[70] Roseville appears to have obfuscated and distorted the issues pertinent to the determination of the matter by replicating similar failed defences raised in decided matters (referred to above) and in some respects nuanced them hoping a different conclusion would be reached. I find the approach untenable and akin to an abuse of the process of court. The court's displeasure needs be demonstrated in the scale of costs granted.

Order

[71] In the result, the following order is granted:

1. It is declared that:
 - (a) the respondent's right of occupation of the premises described as Lot 60 and Rem Lot 61 Ladysmith and situated at 2[...] P[...] Road, Ladysmith, KwaZulu-Natal, terminated by no later than 31 July 2021; and
 - (b) the respondent's right of operation upon the aforesaid premises of the retail fuel service station using the brand name Caltex, or any other name incorporating the word Caltex, terminated by no later than 31 July 2021.
2. The respondent together with all person/s and all entity/ies occupying by or through the respondent be forthwith evicted from the premises.
3. In the event of the respondent failing to comply with paragraph 2 above, the Sheriff or his Deputy be and is hereby authorized and directed to take

all steps and to do all such things as may be necessary, to evict the respondent from the said premises.

4. The respondent be and is hereby ordered to pay the costs of this application, such costs to be taxed on the scale as between attorney and client, including the costs consequent upon employment of senior counsel.

ZP Nkosi J

Case information

DATE OF HEARING : 17 FEBRUARY 2023

DATE JUDGEMENT HANDED DOWN : 21 JUNE 2023

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