Synopsis

The Constitutional Court of South Africa

THE BUSINESS ZONE 1010 CC t/a	Applicant
EMMARENTIA CONVENIENCE CENTRE	
ENGEN PETROLEUM LIMITED	First Respondent
CONTROLLER OF PETROLEUM PRODUCTS	Second Respondent
MINISTER OF MINERALS AND ENERGY	Third Respondent

Neutral citation: *The Business Zone 1010 CC t/a Emmarentia Convenience Centre v Engen Petroleum Limited and Others*

1. Background.

In 2005, Business Zone purchased a fuel and service station business and concluded a lease agreement for 3 years with Engen for the lease and operation of a service station. In terms of the agreement Business Zone would sell petroleum products exclusively supplied by Engen under its brand name.

During 2008 the parties concluded a second lease period and in February 2010 the parties concluded an addendum to the lease agreement in terms of which Engen made certain undertakings. Engen undertook, amongst other things, to provide Business Zone with premises in accordance with the sited development plan and two additional access points to the site in accordance with the provisions of the site development plan.

On the 20th of September 2010 Business Zone wrote to Engen advising that the two additional access and entry points on Barry Hertzog Avenue and Crocodile Road were not provided in accordance with the addendum. Business Zone called upon Engen to remedy the breach whereupon Engen did not respond.

On the 12th of October 2010 Engen wrote to Business Zone and claimed that Business Zone had breached the addendum by affecting alterations to the leased premises without its written consent and in contravention of the law or contrary to Engen's guidelines. Engen called on

Business Zone to remedy the breach within seven days, failure of which Engen would be entitled to cancel the lease agreement.

On the 15th of October 2010 responded to Engen's letter and conceded that installations had been implemented without Engen's prior written consent but averred that Engen had been aware of the installations and that reasons for the installations had been furnished. Business Zone provided a detailed explanation in respect of the installations and in the process sought Engen's written consent for the installations.

Engen chose to ignore Business Zone's letter and on the 22nd of October 2010 addressed a letter to Business Zone and stated that it has failed to comply timeously with the requirements to remedy the breach of the addendum. Engen stated that this constituted a repudiation of the lease agreement and noted that Engen had accepted the repudiation. On this premise Engen accordingly notified Business Zone that the agreement had been cancelled.

Business Zone immediately responded to Engen's cancellation letter and recorded that it was of the view that Engen's conduct amounted to unfair or unreasonable contractual practice. In turn Business Zone indicated that it would make a formal referral for adjudication to the Department of Mineral Resources and Energy under section 12B(1) of the Act.

Engen continued to supply Business Zone with petroleum products under an interim arrangement until the 24th of March 2011 and on that date gave Business Zone 48 hours' notice of its intention to terminate the supply of petroleum products. It also terminated Business Zone's rights under the lease agreement to sell Woolworths product from the leased premises.

On the 30th of March 2011 Engen, for a second time in writing, cancelled the lease agreement on the premise that Business Zone had started storing and selling petroleum products purchased from a source other that Engen and that this sale of foreign products constituted passing-off and an infringement of Engen's marks.

On the 1st of April 2011, Business Zone sought relief from the High Court of South Africa, Gauteng Local Division, Johannesburg and obtained an interdict pending its referral under Section 12(B) of the Act. The interdict directed Engen to continue supplying Business Zone with petroleum products on standard terms and conditions and in accordance with the previous practice between the parties. Engen was also ordered not to interfere with the arrangement between Business Zone and Woolworths.

2. Section 12B(1) Referral

On the 4th of April 2011, Business Zone lodged its request for a referral to arbitration with the Controller under section 12B(1) of the Act setting out the background of the matter and the problems it experienced. Business Zone contended that Engen had made every effort to cancel the lease agreement between the parties on spurious grounds.

Engen responded by contending that an arbitrator could not determine a dispute between parties when one of the parties alleged that the contract had been cancelled and that an arbitrator could not adjudicate a dispute where the validity of the cancellation of the contract was contested.

Business Zone submitted three claims with regard to Engen's unfair practice

1. The first claim was with regards to the addendum to the lease agreement and improvements made to the premises. Engen failed to provide access points in terms of the agreement and therefore breached the agreement. They persisted with the breach and failed to take any steps to remedy the breach.
2. The second claim was with regards to Engen's failure to give consent to the improvements made by Business Zone. Although it was an express term of the agreement that Business Zone would obtain Engen's consent before affecting the improvements, which Business Zone didn't adhere to, Business Zone argued that it was an implied term of the agreement that Engen's consent would not be unreasonably withheld. The failure to consent was unfair and unreasonable.
3. The third claim was with regards to Engen's conclusion of a lease agreement with a KFC franchise without prior consent from Business Zone which was unfair and unreasonable.

Engen's Response

Engen argued that because the contract had been cancelled an arbitrator could not determine a dispute between parties. It also argued that the cancellation of a contract did not amount to unfair and unreasonable contractual practice.

Engen had also launched an application in the High Court where it sought cancellation of the lease agreement on the grounds that Business Zone was dealing in foreign products. As this action was pending, Engen contended that if the court found that the cancellation of the lease agreement was valid, any arbitration would be academic.

Response of the Controller

The controller refused the request to refer the dispute to arbitration on the grounds that the lease agreement had been cancelled and therefore, in the absence of an existing lease agreement, does not satisfy the minimum requirements in terms of section 12B. He also contended that Business Zone's allegations of unfair and unreasonable contractual practices are currently before the High Court and the matter can therefore not be considered for arbitration. It therefore held that Business Zone failed to meet the minimum requirements for a section 12B(1) referral.

Response of the Minister.

The minister refused the referral on the same grounds as the Controller and added that because the matter was currently before the High Court, a referral to arbitration would not be proper.

3. The High Court Pretoria.

Business Zone approached the High Court with an application for the review of the Controller and Minister's decisions. The application was opposed by Engen.

The court dismissed Engen's argument that the Minister and Controller's decisions was not capable of review in terms of the Promotion of Administrative Justice Act as their decisions were preliminary in nature and thus did not amount to "administrative action" capable of review in terms of PAJA.

The court found that with regards to the interpretation of section 12B it was not the place of the controller to decide that there is no longer a valid agreement between the parties. The court concluded that it was procedurally more appropriate that an arbitrator be appointed to adjudicate a section 12B issue and make a decision so that the pending High Court proceedings could proceed. The court relied on the principles of labour law and the same court's decision in *Maphango v Aengus Lifestyle Properties (Pty) Ltd (2012) ZACC 2; 2012 (3) SA 531 (CC); 2012 (5) BCLR 449 (CC)* to conclude that a single act may amount to a "practice". The court rejected Engen's reliance on the *Engen Petroleum Ltd v Tlhamo Retail (Pty) Ltd 2010 JDR 0958 (GSJ)* case and found that it had been wrongly decided.

4. The Supreme Court of Appeal

Engen appealed to the Supreme Court of Appeal who disagreed with the findings of the Pretoria High Court that the Controller should decline a request "only in the rarest and most exceptional of circumstances" and held that this amounted to an unnecessary fettering of the Controller's discretion. The Supreme Court of Appeal rejected the Pretoria High Court's

interpretation of section 12B and held that section 12B could not confer jurisdiction on an arbitrator to decide a dispute where a contract between the parties had been terminated.

The Supreme Court of Appeal also held that "unfair or unreasonable contractual practice" should also derive meaning from its context, namely the regulation of petroleum products and therefore only those aspects can be subject to arbitration under section 12B. The court noted that Business Zone's complaints related to other matters beyond the supply of petroleum products.

The Supreme Court Concluded that the *Engen Petroleum Ltd v Tlhamo Retail (Pty) Ltd 2010 JDR 0958 (GSJ)* case was correctly decided and that there was no error of law on the part of the Minister and the Controller. The court therefore upheld Engen's appeal and set aside the decision of the Pretoria High Court.

5. The Constitutional Court.

Business Zone appealed to the Constitutional Court where it was necessary to decide whether the decisions of the Controller and the Minister amounted to administrative action for purposes of PAJA and if so, were these decisions subject to review under PAJA.

Decision of the Controller

The Constitutional court held that the Controller erred in its belief that he did not have the power/discretion to refer the dispute to arbitration on the grounds that the contract between the parties had been cancelled and also on his belief that he could not refer a matter for arbitration that was pending before the Johannesburg High Court. The Controller believed that these issues precluded him from referring the matter to arbitration. The Controller was clearly wrong as the provisions of section 12B did not require him to ascertain the existence of these two requirements. The only jurisdictional requirement is an allegation by a retailer that a wholesaler has committed an unfair or unreasonable contractual practice. This misunderstanding of his powers under section 12B was clearly a material error of law and his refusal to refer the dispute for arbitration constituted a ground for review under section 6(2)(d) of PAJA.

Decision of the Minister

In this regard the court held that the Minister also misunderstood the provisions of section 12A and 12B of the Act by refusing to refer the dispute on the grounds that the contract had been cancelled and that there was a pending action in the Johannesburg High Court with regards to the dispute relating to the cancellation of the contract. It further erred in stating that single act of cancellation does not constitute a contractual practice. Both these issues are not

prerequisites to exercising referral powers under section 12B (1) and, consequently, section 12A. It follows that the refusal to refer the dispute to arbitration constitutes a ground for review under section 6(2)(d) of PAJA.

Secondly the court had to decide on the proper interpretation of section 12B of the Act.

The court decided that one has to take into account the purpose of the Amendment Act which was to promote transformation of the South African petroleum and liquid fuels industry. This transformation was specifically aimed at historically unequal bargaining power in the industry. The inherent value of section 12B would then be to enable a party to resolve a dispute through arbitration rather than court proceedings. The court therefore had to establish what fairness would be in terms of the Act. The standard of fairness in the Act was inspired by unfair dismissal law as provided for by the Labour Relations Act and the fairness required in our labour law jurisprudence is the same as the fairness in section 12B. In labour law a single act of dismissal constitutes an unfair labour practice and therefore a single act of cancellation in terms of section 12B would then also constitute an unfair practice in terms of the Act. The court therefore held that a single act of cancellation does in fact amount to a contractual practice and is susceptible to arbitral correction under section 12B(4)(a).

Section 12B(1) further does not require that the Controller be satisfied before approving a referral that an underlying contract still exists nor does it require the Controller to pre-determine that an award to correct the practice would be issued in the event of a referral being made. It is also clear that the Controller does not have the power to determine whether an allegation is frivolous and capricious which duty vests in the arbitrator in terms of section 12B(4)(b).

The fact that the dispute relating to the validity of the termination of the contract is pending in the Johannesburg High Court is not a ground for the controller to refuse a referral in terms of section 12B of the Act.

The court held that the dispute raised by Engen that the Controller may not refer a dispute where a contract has been cancelled would defeat the purpose of arbitration under section 12B. Retailers would be unable to access their right of referral as Engen or similar wholesalers would oust the jurisdiction of the arbitrator by cancelling the contracts. Wholesalers would hold dealers ransom under threat of cancellation.

Effect of the second cancellation

Engen cancelled Business Zone's lease for a second time. This cancellation was in relation to Business Zone supplying foreign products after Engen cut off Business Zone's supply of fuel, following termination of the interim arrangement. Engen argued that Business Zone failed to

include this cancellation in its section (1) request. This failure was fatal as the second cancellation was pending before the Johannesburg High Court. Engen argued that, should the court find that the second cancellation was valid, it would render the section 12(B) cancellation purely academic. This was because the arbitrator's remedial powers under the section 12B(4)(a) were corrective in nature and thus presumed to remedy a contractual practice against the backdrop of an ongoing contractual relationship. Engen's argument was that even though a remedy was granted to reverse the first cancellation, the second cancellation would still stand and in such a case there would be no lease between Business Zone and Engen which would enable Business Zone to operate its business.

The court held that whilst Engen's argument may have some merit it is not a question that needed to be answered there and then. This was in relation to the fact that the Controller had no duty to consider the merits of the matter as that is the domain of the arbitrator. The court held that regardless of the second cancellation, the arbitrator may have power to grant relief for the intervening period and that Business Zone may still be able to refer the second cancellation to arbitration subject to the provisions of the Act. As a result, Engen's purported second cancellation has no effect on the Controller's ability to refer Business Zone's complaint under section 12B of the Act.

The remedy of the Constitutional Court.

The court supported the conclusion of the Pretoria High Court when it substituted the decision of the Controller and held that, although substitution is an exceptional remedy, it is appropriate in this matter because of the extended period of time that had lapsed since Business Zone brought the referral. The court held that all three claims made by Business Zone will be considered by the arbitrator who will make a determination in terms of sections 12B(4)(a) and (b) of the Act.

As to Engen's concerns referring claim C would be inappropriate as this was concerned with the conclusion of the lease agreement with a KFC franchise on the area that the addendum had specifically carved out from the scope of Business Zone and Engen's relationship the court stepped into the shoes of the Controller by making an order of substitution and indicated that such disputes will be appropriately adjudicated by the arbitral rather than at the referral stage.

Conclusion.

The outcome of the Constitutional Court case had the effect that retailers can now resolve contractual disputes with wholesalers through arbitration in a non-litigious environment without being denied access to such a process by the Controller on the basis of technicalities. This is

the right step towards the eradication of unequal bargaining power between parties in the Petroleum industry, as envisaged by the Act, without getting involved in costly and lengthy litigation where the balance of success was almost always in favour of the entity with the bigger chequebook, the wholesaler.