IN THE HIGH COURT OF SOUTH AFRICA

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(SOUTH GAUTENG HIGH COURT, JOHANNESBURG)

CASE NO: A0319/12

DATE: 2012/10/17

In the matter between

ENGEN PETROLEUM LIMITED Applicant

and

BUSINESS ZONE 10 CC 1st Respondent
MICHAEL KUPER SC 2nd Respondent

J U D G M E N T

WILLIS J:

[1] The applicant seeks an order which will review and set aside a ruling made by the 2nd respondent, Mr Michael Kuper SC, on 13 February 2012 in arbitration proceedings that are taking place between the applicant and the 1st respondent.

[2] The arbitration proceedings arise between the parties in terms of section 12B of the Petroleum Products Act No. 120 of 1977. The arbitration is in a very embryonic stage. The 1st respondent applied for leave to amend its statement of claim. The applicant raised eight objections to the proposed amendment, four of which are relevant in this particular matter before me today, and relate to the question of jurisdiction.

[3] On 13 February 2012, Mr Kuper SC gave his ruling in the matter and granted the 1st respondent leave to amend its statement of claim. On 22 March 2012 the applicant launched the present application to review and set aside Mr Kuper's ruling. Counsel for the applicant, Mr *Thompson*, has fairly conceded that the ruling as one granting leave to amend is generally regarded as procedural only. Despite this, although the ruling is one granting leave to amend, he has nevertheless submitted that the ruling is fundamental, as it relates to the arbitrator's determination of his own jurisdiction.

[3] Mr *Thompson* has submitted that, in exceptional circumstances, the court may intervene and review a procedural ruling, while the arbitration is still in progress. Mr *Thompson* has also submitted that an arbitrator cannot allow an amendment which would introduce issues that fall beyond his jurisdiction. That, according to Mr *Thompson*, is the point of the review. I am in agreement with the submission that an arbitrator cannot allow an amendment which would introduce new issues that fall beyond his

jurisdiction.

[4] Mr *Thompson* has submitted:

> "- the arbitrator cannot enlarge his jurisdiction by allowing an applicant to amend so as to introduce an alleged unfair or unreasonable contractual practice that was not referred to the controller."

This much is common cause. We all agree. The difficult question in this particular matter, is whether it can be found that Mr Cooper did in fact so enlarge his jurisdiction by allowing the applicant to amend so as to introduce an alleged or unreasonable contractual practice that was not referred to him by the controller in terms of the Petroleum Products Act.

[5] I wish to emphasise that I make no definitive finding on that point whatsoever. In other words, I accept that it may ultimately turn out that Mr Cooper impermissibly allowed the amendment so as to enlarge his jurisdiction. Nevertheless, the point is so shrouded in legal uncertainty and is such a complex point of law that it would be entirely wrong for me to making a finding to this effect at this stage. I do not think this is one of those exceptional and rare circumstances where one is justified in intervening while the parties are midstream, crossing the river.

[6] It is far from certain who will get to the other side of the river first and that may well have a bearing on the matter ultimately. I have referred in other cases to the case of *Wahlhus v Additional Magistrate,*

Johannesburg 1959 (3) SA 113 (A) at 115. It is a case that is particularly topical today in view of certain expected announcements by the Judicial Service Commission. This case of *Wahlhus v Additional Magistrate, Johannesburg* makes clear that it is an utterly undesirable practice to call upon courts to intervene in proceedings that are on progress before other tribunals prior to those proceedings having been completed. This is not one of those cases where it can be said with confidence so clearly that Mr Kuper was wrong that intervention would be justified.

[7] I have agonised over the question of costs. I am troubled by the fact that if I award costs today, it may ultimately seem that it was wrong not to put these "in the pot", in the event that the applicant, (that is Engen Petroleum Limited) is successful. On the other hand, one must be careful to depart from what established rules of law, such as the one that costs should follow the result. If costs do not follow the result in this matter, one is in danger of sending out a signal to parties that there is nothing to lose by approaching the court to intervene in proceedings before another tribunal while these proceedings are in progress. That is a practice to be deprecated, and on this basis alone, I am persuaded, narrowly, that this is an appropriate matter in which to award costs at this stage.

[9] Mr *Suttner*, who together with Mr *Redman*, has appeared for the 1st respondent, has submitted that the cost of two counsel should be allowed. I agree, this is a weighty matter and much is, "*op die spel*" to use a classic, a very expressive Afrikaans idiom.

[10] Accordingly, the following is the order of the court:

> The application is dismissed with costs, which costs are to include the costs of two counsel.

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Counsel for the Applicant: Adv. *A.C Thompson* S.C

Counsel for the 1st Respondent: Adv. *J.M Suttner* S.C. (with him, Adv. *N.P.G*. Redman)

No appearance for the 2nd Respondent

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