REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 11752/2020

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

14 / 10 / 2021
SIGNATURE DATE

In the matter between:

ENGEN PETROLEUM LIMITED SOUTH AFRICA Applicant

and

JAI HIND EMCC CC
(Trading as Emmarentia Convenience Centre, previously the Business Zone 1010 CC) First respondent

ORCA INVESTMENTS (PTY) LTD Second respondent

J U D G M E N T

KEIGHTLEY, J:

INTRODUCTION

1. The applicant in this matter is Engen Petroleum Limited South Africa (Engen). The first respondent is Jai Hind EMCC CC, which was previously Business Zone 1010 CC. I will refer to it as Jai Hind. Engen is a wholesaler, and Jai Hind a licensed retailer, of petroleum products. The second respondent is Orca Investments (Pty) Ltd (Orca). Orca has played no active role in these proceedings.

2. For many years Jai Hind has operated an Engen branded fuel service station in Emmarantia under an agreement of lease and operation with Engen. This relationship has spawned previous litigation. The parties have litigated against each other in arbitrations proceedings instituted under s 12 B of the Petroleum Products Act (the PPA),[1] as well as at every level of the superior courts, including the Constitutional Court. In a dispute that was the forerunner to the present one, the Constitutional Court handed down a judgment which is reported as *Business Zone*.[2] That Court found that the arbitrator had jurisdiction to deal with the s 12B arbitration dispute between the parties and directed it back to the arbitrator for determination.

3. What transpired is that Engen and Jai Hind subsequently reached a settlement at the proverbial door of those arbitration proceedings. They entered into a settlement agreement on 23 May 2019 recording, among many other things, that the terms constituted a full and final settlement of all disputes between them. The settlement agreement was made into an arbitrator's award on that day, and an order of court on 16 October 2019. At issue in this case is the proper interpretation and application

[1] 120 of 1977

[2] *Business Zone 1010 CC t/a Emmarentia Convenience Centre v Engen Petroleum Limited and Others* 2017 (6) BCLR 773 (CC)

of the settlement agreement, which was made an order (the settlement agreement, or the settlement order).

4. More specifically, the dispute concerns Engen's right under the settlement order to enforce Jai Hind's vacation of the premises by 31 March 2020. But for this provision of the settlement order, Jai Hind's right of occupation, under its pre-existing lease agreement with Engen, would be 31 July 2022. Engen contends that Jai Hind is in breach of the settlement order in that it has remained in occupation beyond the date upon which it was obliged to vacate the premises under that order. It seeks an order that Engen vacate the premises, together with ancillary relief.

5. What Engen seeks is an order:

   5.1. declaring Jai Hind to be in unlawful occupation of the business premises in that it failed to conclude an agreement of sale with a purchaser on or before 31 December 2019 in terms of the settlement order;

   5.2. declaring Jai Hind to be in unlawful occupation of the business premises in that Orca failed to lodge an application for a retail licence with the Department of Energy on or before 31 December 2019;

   5.3. declaring Jai Hind to be in contempt of the settlement order and directing it to vacate the premises within five days of an order of this court;

   5.4. directing Jai Hind to pay a holding over fee to Engen under clause 12 of the settlement order for each month that it remains in unlawful occupation of the business premises.

6. Although Engen described its application as being one of contempt of court, on closer examination of the relief sought, and the averments made by each party, it is

clear that its true nature is an application for enforcement of the settlement order. Both parties before me approached the matter on this basis, rather than on the basis of contempt of court. Insofar as the third form of declaratory relief described above refers to Jai Hind's alleged "*contempt*" of the settlement order, it would be more correct to frame that relief as being for a declarator that Jai Hind is in breach of the settlement order.

7. Jai Hind relies on a different interpretation of the settlement order. On its interpretation, it denies that it was obliged to conclude an agreement of sale by 31 December 2019. It also denies that Orca was required to apply for a retail fuel licence by that date. It contends that the only time bar to concluding an agreement with Orca was that this should occur by 31 March 2020. It avers that it did so, and that Engen thereafter repudiated the settlement order. Accordingly, says Jai Hind, it was under no obligation to vacate the business and the premises by that date. It accepted Engen's repudiation and cancelled the settlement agreement. In the circumstances, it contends that it may lawfully occupy the premises and conduct the business there until 31 July 2022 when the pre-existing lease agreement with Engen expires.

8. Jai Hind not only opposed the application but instituted a counterapplication. In that application, Jai Hind sought to hold Engen in contempt of the settlement order. It also sought an order directing Engen to enter into a dealership agreement with Orca. Subsequent events overtook the counterapplication after Orca made it plain that it no longer wished to be considered as a potential purchaser and dealer of the business.

9. Essentially, then, this case is between the old foes, Engen and Jai Hind. At its heart lies the settlement order, and its interpretation. This is where I begin.

THE SETTLEMENT ORDER

10. Given the centrality of the terms agreed upon by the parties, it is necessary to set out the material terms in full:

> "INTRODUCTION
>
> *1. The (Parties) agree to settle*
> *1.1. the arbitration due to commence before Advocate Kuper SC on 27 May 2019 ("the Arbitration") and*
> *1.2. the litigation referred to at clause 14 below ("the Litigation") on the terms set out below*
>
> *SALE OF BUSINESS*
>
> *2. Subject to clause 9 below, (Jai Hind) is afforded until 31 March 2020 to dispose of its interest in the fuel filling and service station, together with ancillary businesses, known as the Emmarentia Convenience Centre ("the Business"), situated at corner Barry Hertzog Avenue and Tana Road, Emmarentia, Randburg, 2195 ("the Premises").*
>
> *3. The sale of the Business shall be subject to the provisions contained in Schedule 3 of (Engen's) standard Agreement of Lease and Operation of Service Station ("the Schedule") (a copy of which is annexed hereto), save that:*
> *3.1. The Claimant shall be entitled to set whatever sale price it deems appropriate for the disposal of its interest in the Business, and the Claimant shall accordingly not be bound to a sale price as contemplated by the entrenched value calculation contained in the Schedule;*
> *3.2. The time period provided for the Defendant to communicate its acceptance or rejection of any proposed purchaser as set out in the Schedule will be 21 calendar days, as opposed to the 30 days contemplated in the Schedule;*
> *3.3. The defendant shall not advise in respect of the price as contemplated in clause 7.4 of the Schedule; and*
> *3.4. Clause 10 of the Schedule shall not apply.*
>
> *4. Any agreement of sale concluded by (Jai Hind) shall be subject to*
> *4.1. (Engen's) approval of the purchaser, which approval shall not be unreasonably withheld; and*
> *4.2. The purchaser obtaining a fuel retail licence to operate the service station.*
>
> *……..*
> *6. (Jai Hind) undertakes to co-operate with the purchaser to assist it to obtain the fuel retail licence referred to in clause 4.2 above*
>
> *7. (Jai Hind) will surrender its fuel retail licence against the grant of the fuel retail licence to the purchaser.*

8. Subject to clause 9 below, (Jai Hind) will vacate the Premises by no later than 31 March 2020 whether or not the Claimant has sold the Business.

9. Notwithstanding the provisions of clause 8 above, in the event that (Jai Hind) has concluded an Agreement of Sale with the purchaser and the purchaser has lodged an application for its fuel retail licence with the Department by no later than 31December 2019 (Jai Hind) shall be entitled to remain in occupation of the Business until the later of:

9.1. 31 March 2020; or

9.2. two weeks after the date upon which the Department announces its decision on the purchaser's application for the fuel retail licence.

…

11 If (Jai Hind) has not sold the Business by 31 March 2020 or, if it has sold the Business by 31 March 2020 and the Department subsequently refuses to grant a fuel retail license to the purchaser, then

11.1 (Engen) shall have the right to appoint a new dealer and (Jai Hind) shall be obliged to vacate the Premises with immediate effect. This clause 11.1 does not affect the obligation to vacate in Clause 8.

11.2 (Jai Hind) shall be entitled to negotiate the terms of any take-over stock and/or equipment belonging to (Jai Hind) on the Premises with such newly appointed dealer and/or to remove any such stock or equipment owned by itself; and

11.3 (Jai Hind) shall not have any right of compensation in relation to the loss of the Business.

12 If (Jai Hind) remains in occupation beyond the period allowed in terms of clauses 8 to 10 above it will be liable to pay Engen a holding over penalty in the amount o R250 000 (two hundred and fifty thousand Rand per month pro-rated for any period less than a month, which amount shall become due and payable on the last day of each month in respect of which (Jai Hind) remains in the premises.

13 (Jai Hind) warrants and the purchaser will warrant in its Agreement of lease and Operation of Service Station with Engen that (Jai Hind) and all persons with a direct or indirect interest in (Jai Hind)-

13.1 will have no interest in the purchaser;) and

13.2 will play no role in the management of the Business after the purchaser takes transfer of the Business."

…

FULL AND FINAL SETTLEMENT

16 The terms of this agreement shall constitute a full and final settlement of all disputes between the Parties save as otherwise specifically stated in this agreement.

…

WHOLE AGREEMENT/NON-VARIATION

19 This agreement constitutes the whole agreement between the Parties and, save to the extent otherwise provided herein, no undertaking, representation,

term or condition not incorporated in this agreement shall be binding on any of the Parties.

20 No addition to, variation, novation, deletion or agreed cancellation of all or any clauses or provisions of this agreement (including this clause) shall be of any force or effect unless reduced to writing and signed by the Parties.

WAIVER/INDULGENCE

21 No waiver of any of the terms and conditions of this agreement will be binding or effectual for any purpose unless in writing and signed by the Party giving the same. Any such waiver will be effective only in the specific instance and for the purpose given. Failure or delay on the part of any Party to exercise any right, power or privilege hereunder will not constitute a waiver thereof, nor will any single or partial exercise of any right, power or privilege preclude any other or further exercise thereof."

11. It is also important to refer to the relevant provisions of Schedule 3 of Engen's standard Agreement of Lease and Operation of Service Station, which terms are incorporated, with changes, into the settlement order under clause 3:

11.1. Schedule 3 applies in circumstances where a dealer, like Jai Hind, wishes to sell the business during the currency of its agreement with Engen.

11.2. Clause 1.3 permits the dealer to suggest a proposed purchaser to Engen. If satisfied, Engen will "*generally*" consider the proposes purchaser as a candidate for a new operating lease for the premises. It will *"generally"* be willing to prefer the proposed candidate to any other if it meets all Engen's selection criteria.

11.3. Clause 1.4 notes that a dealer is generally able to realise a market related price for the sale of the business. However, "*the fact remains that a Dealer has no right to confer on or transfer to anyone else any right to occupy the Premises without the prior written approval of the Company. The right of any third party to operate the Business at the premises is subject to the company concluding an operating lease with that third party.*"

11.4. Clause 2 is important. It records that:

> "*2.1. The Dealer is prohibited from selling or otherwise disposing of the Business, directly or indirectly, without the prior written approval by the Company of both the prospective acquirer of the Business and the terms and conditions of the proposed disposal.*
>
> *2.2. Any approval by the Company in terms of sub-clause 2.1 of this Schedule 3 or clause 22 of Schedule 2 of this Agreement for the Sale of the Business, whether so expressed or not, shall be conditional (amongst other matters) on—*
>
> *(a) the conclusion by the Company of an operating lease for the Premises with the prospective acquirer of the Business;*
>
> *(b) the grant to the prospective acquirer of the Business of a Retail Licence (even if only a temporary licence) in terms of the provisions of the Petroleum Products AN, 1922.*
>
> *2.3. No such approval shall be of any force or effect whatsoever unless and until each such condition shall have been fulfilled or waived in writing, and until then any such approval may be revoked by the Company. …*"

11.5. Clauses 3 and 4 deal with the "*entrenched value policy*". In essence, its aim is to provide a balance between the interests of a seller-dealer in getting fair market value for the business, on the one hand, while preventing the seller-dealer from concluding an agreement at a price that may be: "*so high as to be likely to render the purchaser's investment unsustainable*", on the other. The purpose of the policy, and the formula devised in clause 4 are stated to be: "*to guide the Company and the Dealer as to the maximum purchase price allowed for the approval of a proposed disposal of the Business.*"

11.6. Clause 6 is also important. It deals with the purchaser's tenure of the premises on which the business is established. Clause 6.1 is particularly relevant to this matter, in that it is this clause that provides the basis for Jai Hind's contention that Engen repudiated the settlement agreement. Clause 6.1 provides:

> "*Subject to sub-clause 6.2 …, if a purchaser … and the sale of the Business is approved by the Company in terms of this Schedule 3, the Company will offer to conclude with such approved purchaser … of the Business an operating lease of the Premises for a period of at least five years … . Such five year tenure may, in the discretion of the Company, be included in a new five year operating lease … .*"

11.7. Clause 7 deals with applications for approval. It requires certain information to be provided about the business and the proposed purchaser to be delivered to Engen. It provides that Engen will be under no obligation to consider the application until the expiry of a period determined in clause 20 of Schedule 2, which is 30 days. Clause 7.3 obliges Engen to respond to the dealer within a further 30 days after the initial 30 days for consideration.

11.8. Lastly, clause 10 gives Engen "*absolute and unfettered discretion*" in the exercise of any discretion given to it under the Schedule.

12. In terms of the settlement order, clause 10 was specifically excluded from operation in relation to any prospective purchaser introduced by Jai Hind to Engen. The same applied to the entrenched value provisions in clauses 3 and 4. The settlement order recorded expressly that Engen would not advise on the price contemplated between the dealer and the prospective purchaser. In addition, the second 30-day period referred to in clause 7.3 was reduced to 21 days. Save for these identified provisions, the remainder of Schedule 3 applied to any prospective purchaser identified by Jai Hind.

13. This, then, is the framework that governs the present dispute. But what led to it, and what is the dispute about? The affidavits that were filed (particularly those filed by Jai Hind) were long and detailed. Jai Hind included chapter and verse about the history of the relationship, litigious and otherwise, between the two parties. Both parties attached letter after letter that was exchanged between the legal

representatives of each. These exchanges provide a useful framework for explaining the lead-up to the dispute in more detail.

THE FACTUAL FRAMEWORK

14. To recap, the settlement agreement was signed on 23 May 2019. It was made into an arbitration award at more or less the same time. And it was made an order of this Court on 16 October 2019.

15. It is common cause that one of the objectives of the settlement reached between the parties was to permit Jai Hind a specific period of time within which to dispose of its interests in the business conducted on the premises. Clause 2 of the settlement order pegged the end of this period at 31 March 2020, some nine months from the date that the parties reached agreement. What is more, Jai Hind was given freer rein in negotiating the sale with any prospective purchasers by virtue of the express exclusions set out in clause 3 of the settlement order. In particular, it would not be held to the maximum purchase price limitations ordinarily imposed on a seller-dealer.

16. It is also clear that the settlement order drew a line as to when Jai Hind would be required to vacate the premises, regardless of whether or not it had managed to sell the business. This date was also pegged at 31 March 2020. To complicate matters, clause 9 of the settlement contained provisions that imposed further timelines on the process of the sale of the business and Jai Hind's occupation of the premises. Specifically, it required that the agreement of sale be concluded, and the purchaser apply for a fuel retail license, by 31 December 2019.

17. I will deal later with the proper interpretation of the relevant provisions, as this is a central part of this case. For present purposes, the point is that Jai Hind had a

limited, although relatively long, period within which it could court potential purchasers for the business at a price acceptable to Jai Hind and the purchaser. On the other hand, it reduced Jai Hind's tenancy of the premises from the period prescribed in the current operational lease agreement with Engen. Under that agreement, Jai Hind's tenancy extended to 30 July 2022, and under the settlement order, it was reduced to 31 March 2020.

18. From May 2019 until August of that year, there did not appear to be any prospective purchasers interested in acquiring Jai Hind's interests. On 15 August 2019, Jai Hind's attorney, Mr Naidoo, delivered an agreement of sale to Engen concluded between his client and Arrow Retail Group (Pty) Ltd. The agreement did not lie long on Engen's table, as Mr Naidoo informed Engen on 27 August that the deal was off owing to a dispute having arisen between the contracting parties.

19. After a lull of some months, another prospective purchaser entered the arena. This was Orca, the second respondent. On 21 November 2019 Jai Hind and Orca entered into an agreement of sale for the business for a purchase price of R22 million. The following day the agreement was forwarded to Engen for its consideration.

20. Engen wrote a ten-page letter to Jai Hind's attorney on 11 December listing all of the reasons why Engen was not willing to consent to the terms of the agreement of sale. It is not necessary to set the reasons out in full. However, they included the following:

    20.1. Engen was concerned that the definition of the business in the sale agreement included the Woolworths Food Stop operating from the premises. Engen pointed out that as there was no agreement relating to the operation of the Food Stop, it could not properly be included in what was

being sold. The purchaser would have to apply to Woolworths to operate the Food Stop. The agreement of sale did not properly accord with the factual position in this, and other respects.

20.2. The agreement of sale also recorded that: "*Upon approval … Engen will conclude an Agreement of Lease with the Purchaser for a minimum period of 5 (FIVE) years, and renewable for a further minimum period of 5 (FIVE) years … .*" This was identified as being a suspensive condition of the agreement. Engen pointed out that under Schedule 3, the standard term of a lease was five years, with a discretion, and not an obligation, on Engen to renew for a further five years. Engen indicated it could not approve an agreement of sale which included a clause to the contrary.

20.3. Engen expressed a concern at clause 8 in the agreement of sale. Under this clause Jai Hind would be available to assist the purchaser for a period of six weeks after the purchaser took transfer of the business. Engen pointed out that under clause 13 of the settlement order, Jai Hind undertook to warrant that Jai Hind would not play any role in the management of the business after transfer to a purchaser. Clause 8 of the agreement of sale was contrary to this provision.

21. As I have said, there were further concerns and objections raised by Engen. It was clear from this letter that Engen would not approve the agreement of sale in its original terms. Mr Naidoo responded that same day in a letter to Engen's attorneys. He was clearly not happy with Engen's letter, saying that the issues raised appeared to relate "*more to form than to substance*". He also indicated that Engen did not offer alternative wording to amend those aspects with which it had objections. He intimated that Engen should be aware that under the settlement order it could not

unreasonably withhold consent. Finally, he reminded Engen's attorneys that Orca was required to "*lodge with the DOE this month*" and that there were only a few business days left within which to do so. This can only have been with reference to clause 9 of the settlement order, which placed an obligation on the purchaser to lodge an application for a fuel retail licence with the Depart of Energy (DOE) by 31 December 2019.

22. Mr Naidoo requested a meeting with Engen in order to inquire what precisely Engen had issues with, in the agreement of sale. A telephone conversation was held between Mr Pierce, Engen's primary attorney, and Mr Naidoo on 12 December 2019. In a follow-up email dated 13 December, Mr Pierce told Mr Naidoo that Engen's view was that it was not necessary to meet, as Engen had already adequately indicated what aspects of the agreement it had issues with. However, Mr Pierce then set out further points, "*to provide you with more specificity*", which Jai Hind would have to address in the agreement of sale before Engen would consider it necessary to meet. The list of issues took up about two pages of the email message. The message ended with the injunction that Engen required these issues to be remedied before it would consider approving the agreement of sale.

23. On the same day, being 13 December 2019, Mr Naidoo responded. He again reminded Engen that it could not unreasonably withhold its approval of the agreement of sale. He added that: "*We are of the view that your client's correspondence setting out its alleged/purported queries does not constitute a sufficient basis for your client to simply refuse to approve the Sale agreement*." Mr Naidoo recorded that they had sought an opportunity to meet with Engen or to discuss the matter with the company "*on numerous occasions*". He expressed that: "*The urgency of this matter has been laboured to the extent that we are fast*

approaching close of business, 13 December 2019, which is the final date upon which hour client is required to approve the Agreement."

24. The letter ended with the threat, not unusual between two parties who have a history of litigation, that should he not hear from Mr Pierce by the close of business, "*we will be forced to take such urgent action as may be reasonable and necessary to ensure that our client's rights are protected*."

25. The date of 13 December 2019 does not appear in the settlement order. It can only have been used with reference to the date upon which most businesses, legal firms and government Departments close or slow down before the festive season. The December date referred to in clause 9 of the settlement order was 31 December 2019.

26. In the interim, on 15 and 16 December 2019, Mr Naidoo sent emails to Mr Pierce enclosing copies of amended agreements of sale and requesting Engen's approval. Mr Pierce had indicated in his letter of 13 December that he was scheduled to take leave from that date, and for this reason he might be difficult to contact. He did not respond to Mr Naidoo's two emails. It does not appear that Mr Naidoo sent them directly to Engen.

27. Engen wrote directly to Mr Naidoo on 17 December. No mention is made of the amended agreements of sale. The letter was in response to Mr Naidoo's letter of 13 December. Engen took issue with the averments Mr Naidoo had made in that letter. It inquired whether Jai Hind intended to proceed with litigation as threatened in the 13 December letter. Further, Engen asked whether Jai Hind: "*… has given any consideration to approaching Engen with a request that it consider a waiver which might enable your client to submit an amended Agreement of Sale … which*

amended agreement may be subject to a shorter time period than that contemplated by clause 3.2 of the Agreement of Settlement?"

28. It seems that Engen must have been provided with the two emails of 15 and 16 December with the amended agreements in the interim. On about 18 December, Mr Naidoo received feedback directly from Engen on the submitted agreements. Engen had made further amendments to these documents. In a letter dated 19 December 2019, a candidate attorney in Mr Naidoo's practice wrote a letter to Engen's attorneys. The letter said that as a result of Engen's amendments, the agreement of sale sent to Mr Pierce on 15 and 16 December had been "*absurdly amended in its entirety, with material changes being made … . The changes made do not in any way take the matter further and only serve to delay the finalisation of our client's Sale of Business.*"

29. Having said this, and having recorded that these matters could all have been addressed at the round-table meeting that Mr Naidoo had requested on 13 December, the letter went on to point out that both and Mr Pierce and Mr Naidoo were on leave. Consequently, the writer requested confirmation that the parties would hold a round-table meeting on 6 or 7 January 2020. Further, the writer requested that the parties agree to: "*extending the time periods stipulated in clauses 8 to 11 of the Agreement of Settlement … by a minimum of 1 calendar month from 31 March 2020 to 30 April 2020*".

30. And for the moment, that is how matters stood until early January 2020, when the communications, other interactions and further amendments of the agreement of sale commenced once again.

31. The parties met on 14 January 2020 for the purpose, as Mr Naidoo put it, of attempting to resolve the impasse between the parties on the terms of the

Agreement of Sale. I should perhaps indicate that Mr Naidoo acted for both Jai Hind and Orca in the transaction and in his dealings with Engen. Mr Naidoo requested in an email dated 15 January that, in view of the limited time available for Orca to make application to the DOE for a fuel retail licence, Engen consider giving approval to the agreement of sale within a shorter period, being 5 days.

32. Mr Pierce did not respond directly to this request. However, on 22 January, he sent through to Mr Naidoo a revised version of the agreement of sale, together with a covering letter explaining the revisions.

33. The most relevant of these was Engen's continued insistence that the agreement of sale should not include a provision for Jai Hind to provide take-over assistance to Orca for 6 weeks after the take-over date. Engen recorded its insistence that Jai Hind should vacate the premises on or before the effective (take-over) date, to ensure compliance with the settlement order.

34. Engen also inserted a provision that, among other things, recorded the regulatory obligations of Orca. The revised provision stated that: "*… the purchaser shall have no entitlement to operate the Business prior to … the Operating Lease coming into force and effect; and … having been issued a retail license as prescribed by the Petroleum Products Act 120 of 1977*".

35. Jai Hind and Orca negotiated these revised provisions between themselves, ultimately settling on most of them, including the removal of the take-over clause. The purchase price was reduced from the original R22 million to R17, 250 million. The consensus between Orca and Jai Hind was conveyed to Mr Pierce on 5 February 2020.

36. In this email, Mr Naidoo highlighted that the revised agreement allowed for the handover of the business operations, on the effective date, to the purchaser upon the issue of a retail licence to Orca. This was a suspensive condition of the agreement. Mr Naidoo pointed out that the settlement order "*requires the seller to dispose of the business and exit the site by 31 March 2020*". He said that Orca would not be issued with a licence by that date, and that: "*it is not out of the ordinary for a purchaser to take over the business operation whilst it's application for a retail license is being processed*". Furthermore, he said that the inclusion of this provision was contrary to the terms of the settlement order, and that the prospect of concluding any agreement of sale on these terms would be non-existent. He recorded that the attention of the DOE would be brought to the terms of the settlement order "*so that it is aware of the purchaser's operation of the business pending the issue of the retail licence*".

37. He ended by requesting a response as a matter of extreme urgency: "*as the parties are ready to conclude your revised agreement pending Engen's position in relation to the above conditions*." He also asked for Engen's response as to a possible waiver of the 21-day period for approval.

38. Engen was unmoved by these requests. In a reply by Mr Pierce dated 10 February, it was stated that Engen: "*has no intention to negotiate any amendment to the Agreement of Settlement nor waive any of its rights as contemplated … at this time*." However, the letter recorded that Engen would give priority to the approval of the agreement of sale: "*in light of the fact that the terms of the Agreement of Settlement contemplate your client's departure from the premises by 31 March 2020*."

39. Mr Naidoo's attention was also drawn to s 2A(1)(d) of the PPA, which provides that: "*A person may not retail prescribed petroleum products without an applicable retail*

license". Mr Pierce recorded that the operation of the business without a valid retail licence would be prohibited under this statute, subject to the possibility of an application under s 2A(2)(b), which gave the DOE a discretion to permit such operation in certain circumstances.

40. In the closing paragraph of the letter, Mr Pierce recorded that: "*All of the above notwithstanding, our Client has further advised that subject to it approving the potential purchaser for appointment, it will consider affording your client an additional period of 3 months, that is to say until 30 June 2020 to finalise the sale of the business. The aforementioned extension shall however be subject to the application of clause 12 of the Agreement of Settlement*". Mr Pierce requested confirmation of Jai Hind's preferred course of action. Clause 12 of the settlement order is the provision dealing with the penalty payment due to Engen in the event that Jai Hind did not vacate the premises on the date determined therein, that is, 31 March 2020.

41. On 10 February 2020 Jai Hind and Engen concluded the agreement of sale without further revision. In other words, they accepted the revisions Engen had made to the agreement. On 21 February 2021 Engen notified Mr Naidoo of Engen's approval of the sale of the business to Orca, "*subject, of course, to the provisions (of) the settlement agreement*".

42. It is common cause that Orca submitted its application for a licence to the DOE on 28 February 2020. On 3 March Engen forwarded to Orca a letter of appointment as a provisional dealer (the letter of provisional appointment). The letter of provisional appointment recorded in clause 4.1 that: "*Engen hereby provisionally appoints (Orca) to conduct the business of the Service Station … for the Dealer's own account and at the Dealer's sole risk and expense, subject to all the terms and*

conditions herein contained." Clause 4.2 noted that the appointment was subject to the suspensive conditions therein. Clause 4.3 recorded that:

> "*… should an Agreement of Lease and Operation of Service Station be duly signed and executed in the form contemplated above, the Dealer's appointment in terms thereof shall endure only for the period and subject to the terms and conditions contained therein. For the avoidance of doubt, there shall be no obligation on Engen to conclude such an agreement and in the event that an Agreement of Lease and Operation of Service Station is not duly signed and executed by the Dealer and Engen, in the form contemplated above, within 30 days of the granting of the Retail Licence to the dealer, for any reason whatsoever (including and without detracting from the generality hereof, as a result of Engen's intentional act or omission or its negligence or gross negligence) or the Agreement of Lease and Operation of Service Station does not come in to force for any reason whatsoever, Engen shall be entitled to terminate the Dealer's provisional appointment in terms hereof … .*"

43. Clause 5 dealt with the suspensive conditions. The most relevant for present purposes is clause 5.1 which provided that the appointment was subject to the fulfilment of the following suspensive condition:

> "*The dealer obtaining the relevant licences as issued by the Department of Energy, and any other licenses and or permissions (including certificates and permits) required by law, in respect of the activities to be conducted at the premises as envisaged by this Letter of Appointment on or before 31 March 2020.*"

44. Neither Jai Hind nor Orca were happy with Engen's letter of provisional appointment, and particularly the suspensive condition in clause 5.1. In a letter to Mr Pierce on 11 March, Mr Naidoo recorded all of the steps taken to date by Orca for the granting of a retail fuel licence. He reported that the application was complete and that a decision would be delivered within the time period stated in the Act, being 90 days. This being the case, he said that the matter of the licence was now beyond the control of the parties.

45. Mr Naidoo acknowledged in the letter that Engen had previously been open to consider affording the seller an additional period of three months to complete the

process of the sale of the business, subject to the holding over fee being paid under clause 12 of the settlement order. Mr Naidoo requested Engen to: "*… consider the extension as aforesaid until 30 June 2020 in the absence of a holding over fee having regard to the good faith demonstrated by the parties taking all necessary steps including those suggested by Engen to ensure timeous compliance with their obligations.*" There is no record that Engen agreed to this request.

46. Orca wrote a letter to Engen on 12 March. It referred to the milestone dates contained in the letter of provisional appointment, all of which depended on Orca obtaining a licence on or before 31 March 2020. Orca stated that it was neither privy nor party to the settlement order. It was under no obligation to take over the business prior to the granting of a licence, nor to take over the business on or before 1 April 2020, nor to obtain a licence by 31 March. It stated that it had not agreed to these milestone dates which seemed to have been informed by the settlement order between the other two parties. Orca requested Engen to waive the specific milestone dates and periods contained in the letter of provisional appointment. It recorded that it could not agree to certain of the terms as they currently were stated in that document.

47. In response, Engen corresponded directly with Orca on the same date. It noted Orca's advice that it could not agree to certain of the terms of the letter of provisional appointment. Further, it confirmed Orca's "*repudiation*" of its appointment as provisional dealer. It ended the letter by saying that Engen would advise Jai Hind and the DOE accordingly.

48. As expected, there followed a flurry of correspondence between the parties in the remaining days of March 2020. In summary, on 18 March Engen's attorneys advised Mr Naidoo that Orca had not agreed to certain provisions in the letter of

appointment. They reiterated that under clause 9 of the settlement order Jai Hind was required to vacate the premises by 31 March 2020 in view of the fact that Orca had not made its application for a licence by 31 December 2019. It gave notice to Jai Hind that should it fail to vacate by that date, Jai Hind would be liable for the holding over fee.

49. On the same date Engen confirmed to Orca that the letter of appointment was to be treated as never having come into effect. This was after Orca had requested it to "*place a hold on the provisional appointment*" until Engen and the Seller had engaged over the 31 March milestone.

50. Mr Naidoo responded to Engen's attorneys on 23 March. In this letter, Mr Naidoo expressed the view that:

> *"The Arbitrator's Award contained no condition that the Purchaser should obtain a Fuel Retail Licence on or before the 31 March 2020. Indeed, the Arbitration Award clearly contemplates that the Fuel Retail Licence may well only be granted to the Purchaser after that date. Accordingly, the attempt to introduce a condition in the Agreement of Appointment that a retail Licence must be obtained by 31 March 2020 (is) contrary to the Arbitration Award and a repudiation of the terms thereof."*

51. Mr Naidoo suggested that the most practical and reasonable solution to the matter was for Engen to allow Orca to operate the Service Station under Jai Hind's current licence, or to allow Jai Hind to continue to operate the business until a licence was granted to Orca. In the event that Engen persisted with its current stance, Mr Naidoo threatened that Jai Hind would have no option but to seek urgent relief.

52. Engen responded through its attorneys on the same date, advising that it was unwilling to divert from the provisions of the settlement order. It said that as the proposals fell outside the parameters of that order, Engen rejected them. The letter repeated the request for Jai Hind to vacate the site by 31 March.

53. What then transpired was that the President announced a nationwide lockdown under the Disaster Management Act arising out of the Covid pandemic. On 24 March Mr Naidoo told Mr Pierce by letter that in these circumstances it was not possible for a licence to be granted to Orca by 31 March, nor would it be possible for Jai Hind to vacate the premises on that date. Jai Hind could not vacate "*until the lockdown is uplifted*". He accused Engen's insistence of this condition as being unfair and unreasonable, and requested an urgent meeting.

54. On 18 March Orca sent to Engen a signed copy of the letter of provisional appointment, but with the deletion of the suspensive condition in 5.1, an amendment of the commencement date, and other related amendments. Engen's response was to advise Orca that in terms of its conduct, Orca had confirmed its rejection of the letter of provisional appointment. Engen rejected the amended letter of appointment.

55. On 31 March, Engen's attorneys wrote to Mr Naidoo recording their client's position that in terms of clause 8 and clause 9 of the settlement order, Jai Hind was required to vacate on 31 March 2020. The response by Jai Hind, in a letter from Mr Naidoo on the same date placed on record his view that:

55.1. "*(T)he essence of the settlement agreement … lies in your client affording our client until 31 March 2020 to sell its interest in the business subject to the provisions of the Agreement of Lease and Operation of Service Station*."

55.2. It was implicit from this that Engen would not conduct itself or take any steps which would in any way impeded Jai Hind from selling its interest.

55.3. Engen had "*expressly and by its conduct prevented and or frustrated (Jai Hind) from selling the business by 31 March 2020*."

55.4. Engen's conduct of "*unilaterally imposing unreasonable terms as well as conditions not capable of being fulfilled in both the Agreement of Sale and the Appointment Agreement (was) wrongful … (and) has prevented our client from selling the business*."

55.5. Such conduct constituted a repudiation of the settlement agreement, which repudiation was accepted by Jai Hind. Furthermore, Engen was notified of the cancellation of that agreement.

55.6. In the circumstances, Engen "*has no entitlement to enforce any term contained in the Agreement of Settlement and our client is entitled to remain in occupation of the business in terms of the Agreement of Lease and Operation of Service Station, which remains valid and effective*."

56. Mr Naidoo also advised that by 30 April 2020 Jai Hind would lodge a request for arbitration in terms of s 12B of the PPA in respect of Engen's "*manifestly … unfair and/or unreasonable contractual practice*". The request would incorporate a claim for damages, being the purchase price of the business. Finally, Mr Naidoo recorded that Jai Hind would not agree to vacate the premises.

57. It is common cause that Jai Hind has made a request for a referral to arbitration under s 12B of the PPA. I understand that that process is still pending. On 13 May 2020 Engen instituted the present application as an urgent one. However, in view of the length of the papers, particularly once the answering affidavit was filed, the urgency of the matter became moot as it could not be accommodated on the ordinary urgent court roll. The matter instead was referred to case management, and thereafter it was enrolled as a special motion in July 2021.

58. As matters stand, the *status quo* is as it was at the end of March 2020: Jai Hind remains in occupation of the premises and continues to conduct a service station as an Engine-branded outlet. However, it has not paid any of the holding over fees to Engen as provided for in clause 12 of the settlement order, its view being that Engen has repudiated the settlement agreement and accordingly the holding over clause is unenforceable.

59. Orca subsequently withdrew its interest in purchasing the business and in being appointed as a Dealer.

ISSUES IN DISPUTE

60. Engen's case is that on a proper interpretation of the settlement order Jai Hind was required to vacate the premises by 31 March 2020, whether or not it had sold its interests in the business. Its failure to do so means that it is in breach of the settlement order and this court must enforce the order by directing Jai Hind's vacation of the premises, coupled with an order that Jai Hind pay to Engen the amounts due by way of the holding over fee provided for in clause 12.

61. Jai Hind relies on three lines of defence in its opposition to the relief sought. First, it contends that there were material disputes of fact. Second, it submits that Engen's interpretation of the settlement order is incorrect. And third, it contends that even if Engen's interpretation is correct, I should refuse to enforce the settlement agreement. The submission here is that Engen's conduct in its dealings with Jai Hind and Orca in relation to the agreement of sale were so unreasonable and unfair that this court ought to refuse to enforce the terms of the settlement order. Jai Hind relies on s 12B of the PPA and the jurisprudence of the Constitutional Court in *Business Zone*.

62. I consider each of these disputed issues in turn.

MATERIAL DISPUTE OF FACTS?

63. As to the first defence, Jai Hind's case was that Engen had proceeded on motion while knowing that there were material disputes of fact that could not properly be dealt with on affidavit. While Jai Hind did not vociferously advance this defence at the hearing, it did not abandon it.

64. In my view, there is no merit in this contention. This matter turns on the interpretation of the settlement order. While contextual facts and circumstances have a role to play in the interpretational exercise, that exercise is primarily one for the court, and not for the witnesses to carry out. In this matter, we have the benefit of having on the record copious contemporaneous communications exchanged between the parties over the months that the dispute was being played out. These provide ample context for the interpretational exercise.

65. Any disputes between the parties reflected in these exchanges appear to me to be disputes over different points of view as to the meaning and effect of the settlement order. There are no obvious disputes of fact that are irresolvable on the papers, and which should be referred to oral evidence.

PROPER INTERPRETATION OF THE SETTLEMENT ORDER

The competing contentions of the parties regarding the proper interpretation of the settlement order

66. Engen contends that the terms of the settlement order are clear. It gave Jai Hind the opportunity to dispose of its interests in the business by 31 March 2021. However, it was also particularly clear in the timeframes which had to be met, and the date by when Jai Hind had to vacate the premises, being 31 March.

67. On Engen's interpretation, the settlement order required that the licence application by any purchaser had to be filed by 31 December 2019. This was to ensure that the licence application would be approved by, or as near as possible to, the vacation date of 31 March. The only exception to the required vacation date was provided for in clause 9. Its effect was that Jai Hind's occupation would be extended if, despite the application having been filed by 31 December, the decision of the DOE was still outstanding by 31 March 2020. Engen contends that it is common cause that these conditions for the extension of Jai Hind's occupation beyond 31 March 2020 were not met. In the circumstances, Jai Hind must be ordered to vacate and to pay the holding over fee in terms of clause 12.

68. Jai Hind contends that the purpose of the settlement order was to enable it to sell its interests in the business, to get a just return for the investment it had made therein, and then to vacate the premises. It emphasises that it had until 31 March 2020 to dispose of its interests, as expressly stated in clause 2.

69. Jai Hind accepts that it had an obligation to vacate by 31 March 2020. This obligation arose under clause 8 and clause 9 of the settlement order. If Jai Hind entered into an agreement of sale by 31 December 2019, and the purchaser had applied for a licence by that date, it could remain beyond the 31 March 2020 if the retail licence decision was still pending. On the surface it does not appear that Jai Hind differs in this from the interpretation given to this clause by Engen.

70. However, where Jai Hind's interpretation does differ is in its contention that clause 8 must be read disjunctively from clause 9. On this interpretation, clause 9 is concerned only with the question of the vacation of the premises. It has no application to that aspect of the settlement order dealing with Jai Hind's right to sell.

71. What is more, says Jai Hind, clause 9 only applies to circumstances in which it managed to reach agreement to sell the business by 31 December, and the purchaser had applied for a licence by that date. As it is common cause that this did not occur, Jai Hind says that clause 9 has no application here. Counsel for Jai Hind submitted that it might as well "*be crossed out*" for purposes of this case.

72. Jai Hind contends further that clause 8 serves a different purpose to clause 9. While clause 9 applies to situations where the sale was agreed and the licence applied for by 31 December, clause 8 applies exclusively to circumstances in which the sale and licence application occurred after 31 December. As this was the case here, Jai Hind says that it is clause 8, and not clause 9 that applies.

73. One might wonder where this interpretation is headed, as both clause 8 and clause 9 stipulate that Jai Hind must vacate the premises by 31 March 2020. Indeed, in argument, counsel for Jai Hind accepted that in the ordinary course, if Jai Hind had managed to sell the business post-December 2019, it would be obliged to vacate on 31 March.

74. However, counsel contended that this case did not follow the ordinary course of events. This is because Engen breached its obligations under clause 6.1 of Schedule 3 in that it failed to "*offer to conclude with such approved purchaser … an operating lease of the Premises for a period of at least five years*". Jai Hind says that all Engen offered to Orca was a provisional appointment as dealer. Furthermore, in making this provisional appointment, Engen imposed a term that was not contemplated in the settlement order. The offending term was the suspensive condition that Orca obtain a licence on or before 31 March 2020.

75. On Jai Hind's interpretation of the settlement offer, and because clause 9 did not apply, there was no time limit on when an approved purchaser (who had entered

into an agreement of sale with Orca after 31 December 2019) was required to apply for a licence. The only limitation imposed under the settlement order for a post-31 December agreement of sale was that it should be finalised and approved 31 March 2020.

76. On this interpretation, Jai Hind says that Engen remained bound by its obligation to offer to enter into an operating lease agreement with a purchaser right up until the final day of that stipulated period. By breaching this obligation, Engen could not enforce Jai Hind's obligation to vacate by 31 March 2020. Engen had repudiated the settlement agreement. The repudiation was accepted by Jai Hind, and it had notified Engen of the cancellation of the settlement agreement.

77. On Jai Hind's interpretation, the cancellation of the settlement agreement restored the contractual relationship existing between the parties prior to that agreement being reached. Flowing from this, Jai Hind's case is that it is in lawful occupation of the premises under the terms of its agreement of lease with Engen, and that it is only lawfully required to vacate the premises on 31 July 2022.

Applicable principles

78. Whether one is dealing with a statute or an agreement or any other legal document, such as a court order, the principles of interpretation in our modern constitutional era are well established.

79. The provisions must be read in light of the document as a whole, and of the circumstances attendant on its creation. Consideration must be given to the language used in light of the ordinary rules of grammar and syntax. The context in which the provision appears, the apparent purpose to which it is directed and the material known to those responsible for its production must also be considered.

80. If more than one meaning is possible, each meaning should be weighed in light of all of these factors. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. The interpretive process is an objective, and not a subjective one. Judges should be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used.[3]

81. In the context of court orders specifically, the Constitutional Court[4] has endorsed the following well-established approach to their interpretation:

> "*The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court's intention is to be ascertained primarily from the language of the judgment or order in accordance with the well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention.*"[5]

82. The same applies to orders that are based on settlement agreements. The basic principles of the interpretation of contracts must be applied to ascertain the meaning. This is determined from the language used read in its contextual setting and in light of the admissible evidence.[6]

83. As is so often the case in matters like this, each party asserts that on the application of these principles, their interpretation is to be preferred.

Which interpretation is correct?

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[3] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 18
[4] *Eke v Parsons* 2016 (3) SA 37 (CC) at para 29
[5] *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Others* 2013 (2) SA 204 (SCA) at para 13
[6] *Engelbrecht and Another NNO v Senwes Ltd* 2007 (3) SA 29 (SCA) at para 13, cited in *Eke v Parsons* at para 30

84. What is common cause between the parties is that in terms of the settlement order, Jai Hind had until 31 March 2020 to dispose of its interests in the business. It is also common cause that under clause 8, regardless of whether or not Jai Hind had managed to do so, it was required to vacate the premises by that date. The parties agree that under clause 9 the vacation date could be extended beyond 31 March, if the requirements in that clause were met.

85. There is further consensus that on the facts an agreement of sale was not concluded, nor was an application for a fuel licence made by Orca, by 31 December 2019. However, an agreement of sale was concluded, and was approved by Engen in February 2020. Orca applied for its fuel licence on 28 February 2020. The sale and application were before the 31 March cut-off for the disposal of Jai Hind's business interests, but well after the date specified in clause 9. The question is, in these circumstances, did the settlement order require Jai Hind's vacation of the premises on 31 March 2020?

86. One of the core elements of Jai Hind's interpretation is that clauses 8 and 9 bear no relation to each other: clause 9 only deals with situations in which Jai Hind sold its business and the purchaser applied for a licence by 31 December 2020; clause 8 only deals with situations in which Jai Hind sold its business after that date. The argument is that clause 9 had no relevance to the Orca sale. Only clause 8 governed that sale.

87. Further, on Jai Hind's interpretation, clause 8 does not specify a cut-off date for an agreement of sale or a licence application date. Consequently, on this interpretation, Engen was obliged (under clause 6.1 of Schedule 3) to make an offer to enter into an Agreement of Lease and Operation (ALO) with Orca regardless of

the fact that there was no prospect of the licence being approved by the 31 March disposal and vacation date.

88. The broad context of the settlement order is that it was agreed to by the parties against the background of ongoing litigation between them. It was aimed at bringing the litigation to a close. In the nature of most settlement agreements, this one embodied *quid pro quos* that served the interests of each party. The overall scheme for how the parties envisaged that this would be achieved is evident from the terms of the settlement order viewed holistically.

89. One of the purposes of the settlement order is that it permitted Jai Hind to sell its interests in the business for a price it felt reflected its investment without interference in that regard from Engen. In other words, the usual entrenched value provisions would not apply to any sale entered into by Jai Hind. Nor would Engen advise the purchaser on what it believed to be a fair and reasonable price, and it would not disclose financial information to a prospective purchaser as normally provided for in Schedule 3. In other words, Jai Hind was given free rein to settle on a purchase price with a purchaser.

90. However, Engen did not entirely hand over the reins to Jai Hind in terms of the sale of the business. The parties agreed that Engen's written approval of the purchaser was still required, as was the written approval of the terms and conditions of the sale. Engen was content to agree that it would not unreasonably withhold such consent. This is reflected in clause 4.1 of the settlement order, read with clause 2.1 of Schedule 3.

91. Engen's *quid pro quo* for giving Jai Hind the opportunity to realise what it felt was a good return on its investment was to insist that Jai Hind would vacate the premises on 31 March 2020, unless the conditions under clause 9 were met.

92. The fixed date for Jai Hind's vacation of the premises is repeated over and over in the settlement order. It is the obvious subject matter of clause 8, where the obligation to vacate is stated, regardless of whether the business is sold or not. It is repeated in clause 9 which, although it provides a limited exception, nonetheless reinforces the vacation date of 31 March 2020 in clause 9.1. Clause 11 reiterates that if the business is not sold by that date, Jai Hind will be obliged to vacate the premises "*with immediate effect*". Lastly, the importance of the obligation to vacate by 31 March (unless extended under clause 9) is underpinned by the agreed obligation to pay a holding over fee if Jai Hind continues to occupy beyond that date.

93. It is plain from these provisions that one of the purposes of the settlement order was that there would be certainty as to when Jai Hind would vacate the premises, and that this would occur by 31 March 2020 or as close thereto as practically possible.

94. A further obviously important condition imposed under the settlement order on Jai Hind's right to dispose of its interests was the need for the purchaser to apply for and to be granted a fuel retail licence. This is a statutory requirement, as the correspondence bears out, and so it is not surprising that this condition also features prominently in the settlement order.

95. Clause 4.2 expressly provides that any agreement of sale for the business would be subject to the purchaser obtaining a licence. Under clause 7, once a purchaser was granted its licence, Jai Hind was obliged to surrender its own licence. Importantly, clause 2.2(b) of Schedule 3 reinforces the importance of the obligation for the purchaser to obtain a fuel retail licence. This clause says that any approval of a purchaser and an agreement of sale "*shall be conditional on the grant to the prospective acquirer of a Retail licence (even if only a temporary licence) in terms of the provisions of the Petroleum Products Act, 1977*".

96. Then there is the obvious feature of the settlement order that the fixed vacation date coincided with the date by which Jai Hind′s right to dispose of its interests in the business terminated: both are 31 March 2020. This is not co-incidental. Nor is it co-incidental that the 31 December 2019, which is the only date expressed in the settlement order as a deadline for the purchaser's licence application, falls three months, or 90 days, before the 31 March 2020.

97. The parties were aware that by statute the DOE had 90 days within which to make a decision on a licence. The exchanges of correspondence between the parties in the first part of December 2019 demonstrate that Jai Hind was well aware of the need for Orca to apply for a fuel licence by the end of that month.

98. The obvious purpose informing of all of these timelines was to ensure that any application for a licence by a purchaser would be made in good time so that if Jai Hind sold its interests in the business, it's exit, both commercially and physically, would be possible of practical achievement by the all-important date of 31 March 2020. On these timelines the new dealer would be in a position to take over from 1 April 2020, subject to the extension built into clause 9. In the overall scheme of the settlement order there is a clear and necessary link between these set dates.

99. This is demonstrated too in the plain language of the relevant provisions. Clause 2 gives Jai Hind the right to dispose of its business interests. However, the opening phrase of this clause, which I have underlined, is: "*Subject to clause 9 below, the Claimant is afforded until 31 March 2020 to dispose of its interest …. .*" There is an express connection between the right to sell and the provisions of clause 9.

100. The timelines set in clause 9 qualify the right to sell. In exercising the right to sell, Jai Hind was required to conclude an agreement of sale by 31 December, and the

purchaser had to apply for its licence by that date. For the reasons explained above, this served a practical purpose. It made it possible for Jai Hind's exit from the business and the premises to occur by 31 March 2020, or as soon thereafter as the DOE approved the licence. It also made it possible for the new dealer to take over from, or as near as possible to, Jai Hind's exit.

101. There was no magic in clause 8. It simply recorded what was a central part of the *quid pro quo*: while Jai Hind had the right to pursue the sale of its interests, whether or not it succeeded in doing so, it would be required to vacate the premises by 31 March 2020. This is stated in clear and simple terms. There is no indication from the language of clause 8 to suggest that its purpose, as Jai Hind contends, was to create an alternative avenue, unbounded by any timelines save for 31 March 2020, for it to pursue the sale of its interests in the business from January 2020 onwards. Jai Hind's interpretation would introduce a level of uncertainty that is incompatible with the overall scheme, which was to put in place timelines so that any sale of the business, and hand-over to the new dealer, would be practically possible of achievement by 31 March 2020.

102. The unbusinesslike consequences of Jai Hind's interpretation are manifest. On its interpretation, there was no deadline for a licence application if Jai Hind concluded an agreement of sale relatively late in the day, as it indeed did in this case. The inevitable practical consequence of this, as Engen pointed out, and as proved to be the case here, is that there would be very little prospect of a licence being granted by 31 March 2020 so as to allow the overall purpose of the settlement to be achieved. That purpose plainly was to permit Jai Hind to seek to secure value for its investment, while at the same time to impose fixed timelines for its exit, both commercially and physically, from the business so that the new dealer could take over.

103. Jai Hind's interpretation begs the question: in those circumstances, what was to happen to the business and the premises in the interim? Engen could not enter into an ALO with an entity that was not licensed to deal in fuel. This would be contrary to the statutory framework. It would also be contrary to clause 2.2(b) of Schedule 3.

104. In fact, the entire situation, both legal and practical, would be in limbo, with no fixed agreement between Engen and the prospective dealer possible for potentially months until the DOE approved the licence. There is no provision in the settlement agreement to indicate what the legal and practical consequences of this would be for the parties.

105. Clause 9 sets out what those consequences would be for agreements entered into by 31 December. But, if Jai Hind is correct in saying that clause 8 established a separate avenue with no timeline for a licence application, why did the parties not similarly agree on, and record, what these practical and legal consequences would be in circumstances where an application for a licence was made only late in the day? Was Engen expected to be content with its brand lying commercially dormant on the premises in the intervening period? Was Engen to be content to earn no fees in the interim in the absence of a competent dealer? Was Jai Hind expected to pay the penalty fee? These are obviously issues that had to be agreed upon if, as Jai Hind suggests, Engen was obliged to offer an ALO to an eleventh-hour purchaser who would not know for months whether its licence would be approved. The absence of provisions providing any answers to those questions demonstrates the inherent flaws in Jai Hind's suggested interpretation.

106. For these reasons, I conclude that Jai Hind's interpretation of the settlement order is not correct. In terms of that order, Jai Hind and a prospective purchaser were

required to conclude an agreement of sale by 31 December 2020, and the purchaser had to apply for a fuel licence agreement by that date. While Jai Hind indeed had until 31 December to dispose of its interests in the business to a purchaser, this right was limited to compliance with the timelines set in clause 9. This interpretation serves the practical, and businesslike purpose of ensuring that Jai Hind would have "*disposed of*" its business interests by the 31 March 2020.

107. Jai Hind made much of the fact that Engen never stated after 31 December 2019 that Jai Hind's efforts to conclude an agreement with Orca were contrary to the settlement order. It said Engen continued to engage with both Jai Hind and Orca between January and March 2020. Engen even approved the amended February version of the agreement, it assisted in providing documentation to support Orca's application for a licence, and it offered a provisional appointment as dealer to Orca.

108. Jai Hind pointed out that Engen repeatedly stated in correspondence from January 2020 onwards that the agreement of sale must be aligned and comply with the settlement order. The point made by Jai Hind was that this conduct was diametrically opposed to the interpretation of the agreement favoured by Engen, and demonstrated that that interpretation was incorrect. In other words, Engen had, through these utterances, understood the settlement order to mean that it was obliged to vet both Orca as a potential purchaser as well as the agreement of sale and, if they were approved by Engen, to offer to enter into an ALO with Orca.

109. This line of argument misunderstands the legal situation. On Engen's interpretation, which I have accepted as being correct, the agreement of sale and the licence application were time-bound to 31 December 2019. But this did not mean that the settlement order simply fell away and became moot when these events did not occur by that date. Engen and Jai Hind continued to be bound by whatever terms

remained relevant and applicable to them under the settlement order. So, for example, Jai Hind was still required to vacate by 31 March 2020. If it did not do so, it would have to pay the holding over fee. These were points repeatedly stressed by Engen in the correspondence referred to in detail earlier.

110. Engen was not precluded under the settlement order from engaging with and approving a purchaser presented by Jai Hind after the cut-off date. Critically, however, it was not obliged under the settlement order to do so, and it was not obliged to offer to enter into an ALO with a post-31 December 2019 purchaser. Because the settlement agreement did not fall away, Engen was entitled to insist that any agreement of sale with Orca was in line with the settlement agreement, as it did repeatedly in the correspondence. For example, Engen insisted on the removal of the take-over assistance clause from the agreement of sale. This was because it would be in breach of Jai Hind's obligation under clause 13 of the settlement order in terms of which it warranted that it would play no role in the management of the business after a purchaser took transfer.

111. Therefore, there was nothing contradictory between Engen's interpretation of the settlement order and its support for the agreement of sale with Orca, subject to its compliance with Engen's and Orca's obligations under that order. The commercial sense of Engen's conduct was that it did not have anything to lose commercially or legally by approving the agreement of sale. If the late conclusion of the agreement meant that Orca's licence would not be approved by 31 March 2020, it was within Engen's remit under the settlement order to agree to extend J's occupation of the premises subject to payment of the holding over fee. Indeed, it offered to do so in its letter of 10 February 2020. As subsequent correspondence demonstrates, Jai Hind was not enthusiastic at this prospect, and instead pleaded for a waiver of the hold over fee obligation. One can understand why Engen did not concede to this

request. It was entitled to refuse a waiver under the settlement order that remained in force between the parties.

112. Contrary to the submissions made by Jai Hind, the correspondence between the parties and the stance adopted by Engen in its dealings with Jai Hind and Orca from January 2020 to March 2020, do not support Jai Hind's interpretation of the settlement order.

113. On a proper reading of the settlement agreement, Jai Hind was obliged to vacate the premises on 31 March 2020, regardless of whether or not it had by that date disposed of its interests in the business. The post-31 December conclusion of the agreement of sale, and Orca's 28 February 2020 application for a fuel retail licence did not alter Jai Hind's legal obligation to vacate. By remaining in occupation of the premises, Jai Hind triggered the application of clause 12 of the settlement order, rendering it liable for the payment of the holding over fee. On this basis, Engen is entitled to its remedies under the settlement order.

On the alternative interpretation

114. But what if I am wrong in my interpretation of the settlement order? Assuming (contrary to what I have found) that Jai Hind's interpretation is correct, did Engen act in breach of its obligations under clause 6.1 in Schedule 3?

115. Jai Hind's case here is that under the settlement order read with clause 6.1 of Schedule 3, having approved both Orca as a purchaser and the agreement of sale, Engen was obliged to offer to enter into an ALO with Orca. It says that Engen failed to comply with this obligation in that it only offered to appoint Orca as a provisional dealer.

116. Clause 6.1 of the schedule says that: "*… if a purchaser… and the sale of the Business is approved by the Company* <u>*in terms of this Schedule 3*</u>*, the Company will offer to enter into (an ALO) of the Premises for a period of at least five years*" (my underlining). The portion of the clause that I have underlined means that any approval is regulated by whatever other provisions of the Schedule are applicable. Clause 2.2, which I set out in full earlier, makes it clear that "*any approval*" by Engen of the purchaser and the agreement of sale will be conditional on two things: the first is the conclusion of an ALO, and the second is the grant to the purchaser of a fuel retail licence. Clause 2.3 says that no approval will have any force or effect unless each such condition has been fulfilled or waived in writing.

117. The effect of these provisions is that at least until a fuel retail licence had been granted to Orca, Engen had no obligation to make an offer to enter into an ALO with it. That obligation, under clause 6.1, would only arise once a licence was obtained. Read together, clauses 6.1, 2.2 and 2.3 mean that the grant of the licence is the event that triggers both the requisite approval and the obligation to offer to enter into a ALO. Once this is done, Engen must make the ALO offer to the purchaser, and the entire approval process then takes "*force and effect*", as it is stated in clause 2.3.

118. Once this is understood, the obvious consequence is that Jai Hind's contention has no merit. Engen did not act contrary to its obligations under the settlement order (assuming, contrary to what I have found, that it bore such obligations to Orca) by providing Orca with the letter of provisional appointment rather than an ALO. The appointment was provisional on Orca obtaining a licence. This was consistent with Schedule 3 and was a precursor to what would follow. As Engen explained in its replying affidavit, when Orca refused to sign the letter of appointment, it in effect rejected the basis on which the ALO would have been offered and entered into.

119. It follows that even if I am wrong in my interpretation of the settlement order, Engen did not breach its obligation under 6.1 of Schedule 3 by not offering to enter into an ALO with Orca. Jai Hind's defence, even if it's interpretation of the settlement order is correct, is without merit.

120. It should follow from the above that Engen is entitled to an order enforcing the terms of the settlement order. However, as I indicated earlier, Jai Hind has a final defence up its sleeve, this being the submission that the court should decline to enforce the settlement agreement on the basis that Engen's conduct was unfair and unreasonable. I refer to this as the *Business Zone* defence.

THE *BUSINESS ZONE* DEFENCE

121. Relying on the dicta of the Constitutional Court in *Business Zone*, Jai Hind submits that: "*the equitable standard imposed by section 12 B of the Petroleum Products Act is applicable*" and that consequently I have "*the necessary jurisdiction to determine the matter on an equitable basis*". While this submission seems to suggest that "*the equitable standard*" permits me to simply decide this matter on an equitable basis, as opposed to on an interpretation of the settlement order, I will proceed on the basis that Jai Hind's Business Zone defence is more nuanced that this. I know of no authority that would permit me to approach the matter on an equitable basis rather than one of law, for that is not what *Business Zone* laid down.

122. In *Business Zone*, this is what the Court said:

> "*The contention that two different adjudicative standards, one equitable and one not, apply based on the forum that the parties find themselves before is unsustainable. There is sufficient context and justification to accept that the equitable standard of fairness and reasonableness prevails in all petroleum contracts regardless of whether they are subject to statutory arbitration or ordinary court litigation.*"[7]

[7] At para 52

And:

> "*the establishment of separate adjudicative institutions under the LRA (Labour Relations Act) and RHA (Rental Housing Act) does not mean that the equitable standard under those Acts does not also apply to contractual employment and residential lease disputes. It is difficult to imagine any employment dispute under the common law still being determined as if the fairness standard developed under the LRA is irrelevant.*
> …
> *There is no reason why the specifics of the general standard of fairness and good faith in the common law of contract should not be given shape in the context of petroleum contracts, as is done in the context of labour or rental housing contracts.*"[8]

123. The statement that the equitable standard of fairness and reasonableness prevails in all petroleum contracts is a high-level statement of principle. What the Court goes on to say, in a more directed fashion in the last extract above, is that the statutory specific standard of fairness and reasonableness, introduced in the PPA, has a role to play in shaping the principle of good faith that applies to common law contracts when these are litigated in the courts.

124. The jurisprudence of the Constitutional Court is ripe with judgments dealing with the principle of good faith in common law contracts. The issue has been canvassed in the broad context of public policy and its implications for the law of contract under our constitutional democracy. Neither time, nor necessity demand that I traverse the jurisprudence here. In *Beadica*,[9] Theron J for the majority of the Court clarified the position as follows:

> "*Our law has always, to a greater or lesser extent, recognised the role of equity (encompassing the notions of good faith, fairness and reasonableness) as a factor in assessing the terms and the enforcement of contracts. Indeed, it is clear that these values play a profound role in our law of contract under our new constitutional dispensation. However, a court may not refuse to enforce contractual terms on the basis that the enforcement would, in its subjective view, be unfair, unreasonably or unduly harsh. These abstract values have not*

[8] At paras 54-5
[9] *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 (5) SA 247 (CC)

> *been accorded autonomous, self-standing status as contractual requirements. Their application is mediated through the rules of contract law, including the rule that a court may not enforce contractual terms where the term or its enforcement would be contrary to public policy. It is only where a contractual term, or its enforcement, is so unfair, unreasonable or unjust that it is contrary to public policy that a court my refuse to enforce it.*"[10] (my underlining)

125. Reading *Business Zone* and *Beadica* together, then, the principles of fairness and reasonableness introduced into petroleum contracts under the PPA do not give courts a free-standing basis upon which to decide a contractual dispute on the basis of equity, as opposed to the principles of contract. Where equitable principles will apply in petroleum contracts litigation is in the context of a court determining whether it is justifiable to refuse to uphold or enforce contractual terms because the inequities involved render the terms or the enforcement of them contrary to public policy. In the context of petroleum contracts, the courts will obviously have regard, in applying this principle, to the purpose and objectives of the PPA, which expressly introduced the equitable standard.

126. A party seeking to avoid the enforcement of a contractual obligation on the basis that it is inequitable and hence contrary to public policy must demonstrate good reason for failing to comply with the term.[11] It must set out the facts that establishing the reasons for non-compliance.[12]

127. It is within these legal parameters that Jai Hind's *Business Zone* defence must be evaluated.

128. The first obvious difficulty for Jai Hind is that the above principles have been developed and applied in the context of the enforcement of contracts. However, this

[10] At para 80
[11] *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at paras 58 and 69
[12] *Barkhuizen*, at para 85

case is not about the enforcement of a contract: it is about the enforcement of a court order. Although its origins were a settlement agreement between the parties, once a settlement agreement is made an order of court, it is an order like any other; it is generally enforceable through execution and contempt proceedings, as Engen has sought to do in this case.[13]

129. A court order is final and may not be revisited, save through the mechanisms recognised in our law. These include appeal, rescission and variation. I have not been referred to any authority, and have found none through my own research efforts, which supports the principle that, in the absence of a resort to one of these procedures, a court has a general discretion, on public policy grounds, to decline to enforce a court order which is established to have been breached. I accordingly agree with the submission made by Engen that Jai Hind's reliance on the principles laid down in *Business Zone*, in the event that its interpretation defence fails, is misplaced.

130. And even if this were not so, Jai Hind does not indicate which of the terms of the settlement order is offensive to public policy. It bases its defence on the averment that Engen acted with an ulterior motive, and in a deliberate attempt to undermine the settlement order. It says that Engen dictated unreasonable terms for inclusion in the agreement of sale; it placed an impossible time limit on for Orca to obtain a fuel licence; and it refused reasonable and practical requests by Orca and by Jai Hind to relax the timelines set out in the settlement order so that the deal could go through. The effect of this alleged unfair and unreasonable conduct, says Jai Hind, is that Engen prevented Jai Hind from receiving proper value for its investment in the business, which was one of the purposes of the settlement order. In addition, it

[13] *Eke*, above at para 29

says that the payment of the holding over fee will unfairly compensate Engen, which, in the interim, has continued to receive the royalties due to it because of the continued operation of the business.

131. As the Constitutional Court has indicated, the test is not one of subjective unfairness. Even if I did feel that these consequences result in some unfairness to Jai Hind (and I express absolutely no view to this effect), this is not the test. Assuming, contrary to what I have found earlier, that principles of equity were in play here, the test is whether the inequities are so great as to constitute an offence to public policy.

132. This is not established on what I have before me. There is no evidence to support the averment that Engen acted with malicious intent to sabotage the agreement of sale and thus to undermine the settlement order. As I have already stated, Engen was entitled to ensure that the agreement of sale did not have consequences that would be contrary to the terms of the settlement order. The events leading up to this litigation show that the problems it raised with the agreement of sale in its correspondence related directly to the terms of the settlement agreement. This was not an attempt to dictate unreasonable terms in order to sabotage the agreement and the settlement order, as Jai Hind avers.

133. The same applies to the events from January 2020 onwards. Engen's conduct was not malicious or carried out with *male fide* intent. It insisted in its dealings with Jai Hind on conformity with the settlement order and it acted entirely reasonably in doing so. It offered Jai Hind an extension of time until 30 June 2020 against payment of the holding over fee, but Jai Hind refused.

134. Jai Hind itself made the point in its heads of argument that both parties were legally represented in the conclusion of the settlement agreement that led to the order, and

that they both ought to have known what was required of them thereunder. Jai Hind ought to have known that to secure an extension of three months so that the post-31 December deal with Orca could be practically achieved, it would have to pay the holding over fee. It gives no reason why it insisted, instead, on asking Engen to waive its entitlement to the fee. After all, it was Jai Hind who introduced Orca as a potential purchaser weeks before the 31 December deadline. Time was always going to be tight to comply with the deadlines set in the settlement order. This cannot be laid at Engen's door.

135. I conclude that even if Jai Hind did not face the obstacle that its *Business Zone* defence is misplaced, it has not established that the contract is unenforceable based on public policy considerations.

CONCLUSION AND ORDER

136. In summary then, I find:

136.1. There are no material disputes of fact warranting the dismissal of the application or its referral to oral evidence.

136.2. On the interpretation issue, Engen's interpretation is correct. On the plain terms of the settlement order, read in context and in light of its purpose, despite the post-31 December agreement, Jai Hind was required to vacate the premises on 31 March 2020, failing which, it would be liable to pay the penalty fee.

136.3. The post-31 December agreement of sale did not give rise to any obligation under clause 6.1 of Schedule 3 to offer to enter into an ALO with Orca.

136.4. But even if I am wrong in accepting Engen's interpretation as being correct, and even if it is found, on Jai Hind's interpretation, that Engen did assume that liability, its conduct did not constitute a breach thereof.

136.5. Finally, Jai Hind's defence based on *Business Zone* is misplaced and without merit.

137. It is common cause that Jai Hind did not vacate the premises on 31 March 2020. Accordingly, Engen is entitled to an order enforcing the obligation under the settlement order to vacate. It is also common cause that Jai Hind has not paid the holding over fee to Engen. Engen is also entitled to an order of payment of the amount due under clause 12 of the settlement order.

138. I make the following order:

1. Jai Hind CC (trading as Emmarentia Convenience Cenue, previously, The Business Zone 1010 CC) (Jai Hind), having failed to conclude a sale agreement with a purchaser on or before 31 December 2019, in terms of the Court Order dated 16 October 2019 under case number 2019/31374 (incorporating a Settlement Agreement dated 23 May 2019) (the Court Order), is declared to be in unlawful occupation of the business premises situated at Cnr of Barry Hertzog Avenue and Tana Road, Emmarentia, Randburg, 2195 (the premises).

2. As a result of Orca Investments (Pty) Ltd, having failed to lodge an application for a retail license with the Department of Energy on or before 31 December 2019, in terms of the Court Order, Jai Hind is declared to be in unlawful occupation of the premises.

3. Jai Hind is declared to be in breach of the Court Order and is directed to vacate the premises within 10 business days of this court's order.

4. Jai Hind is ordered in terms of clause 12 of the Court Order to pay a holding over penalty of an amount of R250,000.00 in respect of the month ending April 2020 and R250,000.00 (or part thereof) for each month thereafter (or part thereof) that it remains in unlawful occupation of the premises contrary to the Court Order.

5. Jai Hind is directed to pay the costs of the application, including the costs of two counsel, one being Senior Counsel.

R KEIGHTLEY

JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION

ELECTRONICALLY SUBMITTED

This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 14 October 2021.

Date Heard (Ms teams): 19 July 2021

Further written submissions received: 25 August 2021 and 3 September 2021

Date of Judgment: 14 October 2021

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