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

Case No. 16138/2021

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED.

17 November 2022

In the matter between:

LEHANA’S PASS INVESTMENT CC

Applicant

and

AFRICA CAMPUS TRADING 300 (PTY) LTD

First Respondent

BP SOUTHERN AFRICA (PTY) LTD

Second Respondent

CONTROLLER OF PETROLEUM PRODUCTS

Third Respondent

JUDGMENT

WILSON AJ:

1 The applicant, “Lehana’s Pass”, is the owner of a property in Orange Farm on which the first respondent, “Africa Campus”, runs a petrol station. Africa Campus does so as a franchisee of the second respondent, BP. BP leased the property from

Lehana's Pass in 1993. Since then, a series of franchisees has operated a petrol station on the property in BP's name. Africa Campus is the latest in the series. It sublet the property on 1 January 2015, and has operated a BP petrol station on it ever since.

2 By all accounts, Africa Campus has been a very successful franchisee. It has increased the turnover of BP fuels at the property ten-fold in the eight years since it took over the franchise. Africa Campus' success drew Lehana's Pass' attention. Instead of renting the property to BP, Lehana's Pass decided to take possession of the lucrative business Africa Campus had built up.

3 Lehana's Pass did so by telling BP that it would not renew BP's head lease unless BP agreed to allow it to operate a petrol station on the property as BP's franchisee. BP acquiesced. In order to exclude Africa Campus from the property, BP and Lehana's Pass agreed that Lehana's Pass would terminate BP's head lease. In terms of clause 42 of the sublease, this would have the effect of automatically terminating Africa Campus' right of occupation. Once that had been done, BP and Lehana's Pass could enter into a new franchise agreement, with the effect that Lehana's Pass would effectively take over Africa's Campus' business.

4 Africa Campus calls this arrangement collusion. BP and Lehana's Pass call it business. Whatever its moral content, there is no real dispute between the parties that this is the arrangement that was reached, and that the arrangement will effectively deprive Africa Campus of the equity it has built up in its franchise since 2015. While Africa Campus has obviously reaped the benefit of its enhanced turnover at the property, it cannot sell the franchise as a going concern, because Lehana's Pass' and BP's arrangement deprives its business of any commercial value. Ms. Lombard, who appeared for Africa Campus before me, said that what had been brought about was the "theft" of Africa Campus' business. Emotive as that description is, I appreciate why Africa Campus sees matters that way.

5 Aggrieved, Africa Campus referred BP's conduct for arbitration in terms of section 12B of the Petroleum Products Act 120 of 1977. Section 12B was inserted into the Act in 2003, and took effect in 2006. Its purpose is to level the playing field

between wholesalers and retailers in the petroleum market. Wholesalers are often multinational companies, like BP, who distribute their product through franchises. Retailers are generally much smaller businesses, like Africa Campus, who lack the bargaining power necessary to negotiate favourable franchise terms.

6 Section 12B seeks to remedy this imbalance by permitting retailers to ask the Controller of Petroleum Products to refer any unreasonable or unfair contractual practice committed by a wholesaler to arbitration. Once the Controller decides to make the referral, the parties choose an arbitrator, or have one chosen for them (section 12B (3)). The arbitrator must then determine whether the contractual practice complained of is unfair or unreasonable. Having reached the conclusion that there is an unfair or unreasonable practice, the arbitrator is empowered to make “such award as he or she deems necessary to correct such practice” (section 12B (4) (a)).

7 Section 12B does not graft easily onto the relationship between the parties in this case. Africa Campus’ problem lies not only with BP. It is, on Africa Campus’ version, BP’s collusion with Lehana’s Pass that has caused it harm. But the arbitration Africa Campus has triggered under section 12B does not engage Lehana’s Pass at all. Lehana’s Pass is not a party to it, and no relief can be granted against Lehana’s Pass, even if Africa Campus is successful in demonstrating that BP has engaged in an unreasonable or unfair contractual practice. Although Lehana’s Pass holds a site licence under the Act, section 12B provides for arbitrations only between wholesalers and retailers.

8 In line with its arrangement with BP, Lehana’s Pass has terminated BP’s head lease, and has therefore triggered the termination of BP’s sublease with Africa Campus.

9 That termination notwithstanding, Africa Campus refuses to vacate the property. Lehana’s Pass now applies for Africa Campus’ eviction. It is, though, in no-one’s interests to affect the profitability of the petrol station. Since the termination of the head lease on 15 March 2021, the parties have conducted themselves as if the agreements governing their relationship are still effective.

10 Mr. van As, who appeared for Lehana's Pass, argued the matter as a straightforward *rei vindicatio*. Whatever the dispute between BP and Africa Campus, Lehana's Pass has terminated Africa Campus' rights to occupy its property, and is entitled to an eviction order. The arbitration between BP and Africa Campus does not, he submitted, affect this legal reality. Mr. van As was not so insouciant as to suggest that Lehana's Pass had not been party to a degree of sharp dealing. He restricted himself to the argument that, as a matter of law, Africa Campus' complaint against BP at arbitration has no effect on Lehana's Pass' right to retake its property.

11 Ms. Lombard was constrained to accept that this is the legal position. She also accepted that there is no basis on which Africa Campus can remain in occupation of the property indefinitely. She asked only that the eviction application be stayed until the arbitration had run its course.

12 There is no formal application for a stay pending the arbitration before me, but there is a postponement application which seeks essentially the same relief. Paragraph 1 of the notice of motion in that application seeks a postponement *sine die*. Paragraph 2 seeks an order preventing the application from being re-enrolled "until such time as the arbitration proceedings pending between [Africa Campus] and [BP] have concluded".

13 I cannot grant that relief. There is no basis on which the arbitrator is empowered to extend Africa Campus' right to occupy Lehana's Pass' property. Even if the arbitrator could revive Africa Campus' sublease with BP (an outcome which is itself no more than a remote possibility), he could not revive the head lease, for the simple reasons that Lehana's Pass is not a party to the arbitration, and that section 12B was never meant to regulate situations like this – in which the holder of a site licence and the holder of a wholesale licence under the Act are not the same person. There is accordingly no basis on which the determination of Lehana's Pass' substantive right to retake its property can be deferred pending the arbitration. The outcome of the arbitration will have no impact on that right.

14 In any event, Ms. Lombard submitted in argument that Africa Campus does not wish to remain on the property indefinitely. What it hopes for is compensation

from BP to make good on the loss of equity in its business that it says it has suffered. What Africa Campus really wants is the eviction suspended or delayed pending the outcome of the arbitration. It does not seek to resist the eviction *per se*.

15 Whether or not Africa Campus can claim compensation against BP is also a matter of some controversy. The Supreme Court of Appeal has held, *obiter*, that section 12B (4) (a) of the Act does not stretch to that relief (*Engen Petroleum Limited v Business Zone 1010 CC 2015 JDR 2606 (SCA)*, paragraph 23). In *Business Zone*, the Supreme Court of Appeal held that section 12B distinguishes between a “corrective remedial jurisdiction” and a “compensatory remedial jurisdiction”. “Corrective” relief is necessarily forward looking, and is meant to address unreasonable and unfair contractual practices. It does not extend to ordering the payment of compensation. This is because “compensatory” relief is backward looking. It can only be awarded to penalise a frivolous complaint under section 12B (4) (b), not to correct an unreasonable or unfair contractual practice under section 12B (4) (a).

16 The Supreme Court of Appeal’s decision in *Business Zone* was later overturned in appeal (*Business Zone 1010 CC t/a Emmarentia Convenience Centre v Engen Petroleum Limited 2017 (6) BCLR 773 (CC)*), but not on that point. This court has as a result twice held itself bound by the Supreme Court of Appeal’s *obiter* remarks about the remedial powers conferred on an arbitrator in terms of section 12B (see *Engen Petroleum Limited v Mfoza Service Station (Pty) Limited [2020] ZAGPJHC 242 (5 October 2020)*, paragraph 20 and *Marndre Beleggings CC v Minister of Energy [2018] ZAGPPHC 93 (22 March 2018)*, paragraph 24).

17 I think these decisions have taken a wrong turn, for three reasons. The first is that the analysis of section 12B of the Act provided in the Supreme Court of Appeal’s decision in *Business Zone* was clearly *obiter*, and therefore not binding on the High Court.

18 The second is that, although the Constitutional Court did not specifically conclude that the Supreme Court of Appeal’s analysis of section 12B was wrong insofar as it excluded the possibility of an award of damages to correct an

unreasonable or unfair contractual practice, the Constitutional Court's decision comprehensively rejected the Supreme Court of Appeal's general approach to interpreting the Act. I do not think that the Constitutional Court's decision in *Business Zone* is consistent with an endorsement of the Supreme Court of Appeal's characterisation of an arbitrator's compensatory powers.

19 One of the Constitutional Court's principal points of departure from the Supreme Court of Appeal's decision was the Constitutional Court's emphasis on the broad equitable standard an arbitrator under section 12B must apply. The Constitutional Court made clear that the Supreme Court of Appeal had missed this feature of the Act. The conferral of a supple equitable jurisdiction on an arbitrator under section 12B seems to me to be inconsistent with the Supreme Court of Appeal's election to carve compensatory corrective powers out from section 12B (4) (a) of the Act, merely on the basis that compensatory powers are specifically provided for in section 12B (4) (b). There is no reason why, in exercising an equitable jurisdiction to make "such award as he or she deems necessary to correct" an unfair or unreasonable contractual practice, an arbitrator cannot award compensation in an appropriate case. An appropriate case would be one in which the award of damages would have the effect of correcting the unfair or unreasonable practice.

20 "Correcting" the practice can have at least two meanings that are consistent with the overall purpose of the Act. The first is restoring the parties to the position that they would have been in but for the unreasonable or unfair practice. The second is discouraging an unreasonable or unfair contractual practice in the market more generally. Compensation, in an appropriate case, can clearly "correct" an unfair or unreasonable contractual practice in either of these senses.

21 The third reason why *Mfoza* and *Marndre Beleggings* were too quick to adopt the Supreme Court of Appeal's reasoning on the compensatory powers of arbitrators under section 12B is that the Constitutional Court has itself declined to do so when the opportunity has presented itself, and appears to consider that section 12B permits an arbitrator to make compensatory orders under section 12B 4 (a). In *Crompton Street Motors CC t/a Wallers Garage Service Station v Bright Idea*

Projects 66 (Pty) Limited t/a All Fuels (2021 (11) BCLR 1203 (CC) the Constitutional Court had to deal with the meaning of section 12B once again. In doing so, the Court referred freely to an arbitrator's "wide remedial powers to remedy the unfair or unreasonable contractual practice and make compensatory awards" (paragraph 45). If there had been any real sense that the Constitutional Court viewed compensatory awards as being appropriate only under section 12B (4) (b) of the Act, the Court surely would have said so.

22 For all these reasons, I think that Africa Campus is in principle able to claim compensation from BP in the arbitration. Whether such an award should be made depends on the facts, and is obviously a matter for the arbitrator.

23 The question that remains is what effect, if any, the compensatory claim in the arbitration has on Lehana's Pass' rights to vindicate its property. As I have already held, it can have no impact on the merits of the claim. But I think it does have some impact on the manner of its enforcement.

24 I enjoy a broad discretion to suspend the execution of an order if to do so would be in the interests of justice (see section 173 of the Constitution, 1996, and Rule 45A of the Uniform Rules of Court).

25 In the circumstances of this case, where the parties are co-operating as if the contract had never been terminated; where Africa Campus accepts that it must inevitably leave the property but seeks only the resolution of its arbitral claim before it does so; and where, on Africa Campus' version, Lehana's Pass and BP are implicated in a scheme that has triggered the need for the relief claimed at arbitration, it would plainly be in the interests of justice to suspend the execution of the eviction order on appropriate terms.

26 Those terms will allow Africa Campus to remain in occupation pending the outcome of the arbitration it has initiated, and will give it a reasonable period in which to vacate once the arbitral award has been made.

27 I do not think that any costs order would be appropriate on the facts of this case. While Lehana's Pass has been successful in obtaining an eviction order, it has not obtained that order on the terms it asked for. Nor would it be appropriate to award Lehana's Pass costs where Africa Campus' resistance to the application was, in my view, a reasonable response to the arrangement made between BP and Lehana's Pass which will ultimately result in Africa Campus' exclusion from the property.

28 For all these reasons, I make the following order –

28.1 The first respondent is evicted from ERF [....] Orange Farm Extension [....], Registration Division IQ, Transvaal.

28.2 The eviction may be executed on or after the sixtieth calendar day from the date of the award in the arbitration pending between the first and second respondent. To the extent necessary, any of the parties may apply to Wilson AJ, on five days' notice to the other parties, for a determination of the date of eviction.

28.3 Each party will pay its own costs.

S D J WILSON

Acting Judge of the High Court

HEARD ON: 8 November 2022

DECIDED ON: 17 November 2022

For the Applicant: E van As
Instructed by Koor Attorneys

For the First Respondent: N Lombard
(Heads of Argument drawn by D Aldworth)

Instructed by Garlicke and Bousfield Inc

For the Third Respondent

Lawtons Africa Inc