IN THE HIGH COURT OF SOUTH AFRICA /ES

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: ~~YES / NO.~~
(3) REVISED. ✓

DATE 5/5/14 SIGNATURE

CASE NO: 7282/2013

DATE: 9/5/2014

IN THE MATTER BETWEEN

THE BUSINESS ZONE 1010 CC t/a EMMARENTIA CONVENIENCE CENTRE	APPLICANT
AND	
THE CONTROLLER OF PETROLEUM PRODUCTS	1ST RESPONDENT
THE MINISTER OF MINERALS AND ENERGY	2ND RESPONDENT
ENGEN PETROLEUM LIMITED	3RD RESPONDENT

JUDGMENT

PRINSLOO, J

[1] This is an application to review and set aside a decision of the first respondent ("the Controller") on 27 February 2012 in terms of which he refused a request by

the applicant to refer an alleged unfair or unreasonable contractual practice by the third respondent ("Engen") to arbitration in terms of the provisions of section 12B of the Petroleum Products Act, Act no 120 of 1977 ("the Act").

[2] The applicant also applies to review and set aside a subsequent decision by the second respondent ("the Minister"), on 6 November 2012, in which she confirmed the Controller's decision.

[3] The applicant also applies, if successful with the review applications, for this court to refer the matter to arbitration in terms of the aforesaid legislation alternatively for the matter to be referred back to the Controller for reconsideration.

[4] Before me, Mr Suttner SC, with Mr Redman, appeared for the applicant.

Mr Marcus SC, with Mr Thompson SC appeared for Engen.

There was no appearance for the Controller and the Minister, who appeared to abide the decision of the court.

Background

[5] It is common cause that the applicant is a licensed retailer and Engen a licensed wholesaler of petroleum products as defined in the Act.

[6] It is also common cause that the applicant and Engen had concluded various agreements in terms whereof the applicant operated an Engen filling station, Quick-shop and Woolworths store from the Engen premises situated at the corner of Tana Road and Barry Hertzog Avenue, Emmarentia, Johannesburg. The property is also known as Erf 1117, Emmarentia Extension 1 Township and Engen is the registered owner thereof ("the premises").

[7] In 2005 the applicant and Engen entered into a lease agreement in respect of the premises ("the first lease") and in 2008, the parties concluded a further agreement entitled "Agreement Of Lease And Operation Of Service Station" ("the agreement") which commenced on 1 April 2008 and was due to expire on 31 March 2015.

[8] Over a period of time various disputes arose between the parties.

[9] On 22 October 2010 Engen's attorneys addressed a letter to the applicant purporting to cancel the agreement.

[10] The applicant disputed Engen's right to cancel the agreement and remained in occupation of the premises. Engen continued to supply the applicant with petroleum products up to 24 March 2011.

[11] During March 2011 Engen terminated the supply of petroleum products to the applicant and threatened to terminate the supply of Woolworths products as well.

[12] On 1 April 2011, the applicant brought, and was granted, on an urgent basis, certain interdictory and interim relief against Engen ("the urgent application").

The order granted reads as follows:

> "1. Pending the determination of part B of this application
>
> 1.1 the respondent (Engen) be directed to continue to supply the applicant with petroleum products in accordance with its standard terms and conditions of sale and in accordance with the previous practice between the parties;
>
> 1.2 that the respondent be interdicted and restrained from preventing delivery of product by Woolworths (Pty) Ltd to the applicant's business."

This interim relief, granted pending the outcome of the part B relief, is still in force because the outcome of the part B relief has not yet been decided.

The part B relief was formulated as follows in the notice of motion in the urgent application:

> "1. The respondent be directed to continue to supply the applicant with pretroleum products in accordance with its standard terms and

conditions of sale and in accordance with the previous practice between the parties:

1.1 pending the consideration by the Controller of Petroleum Products of the applicant's request in terms of section 12B of the Petroleum Products Act, 120 of 1977 ('the Act'), and

1.2 pending finalisation of any arbitration proceedings in terms of section 12B of the Act in the event of the Controller of Petroleum Products referring the matter to arbitration."

[13] This relief is still in place, the applicant is still in occupation of the premises and Engen is still supplying the applicant with petroleum products.

[14] This state of affairs has now been prevailing for more than three years.

The pending proceedings in the South Gauteng High Court were also extended in the sense that Engen filed a counter-application for the eviction of the applicant from the premises on the ground of the alleged cancellation of the agreement. All this is pending.

[15] What is also pending, and worth mentioning, is that the applicant, as long ago as on 17 June 2009, also made a request to the Controller in terms of section 12B, to refer certain other unfair and unreasonable contractual practices to an arbitrator.

This request was granted, and the arbitration is still pending before eminent Johannesburg senior counsel.

For present purposes, the progress and destiny of this first request for arbitration, and the arbitration itself, are not of direct relevance. What forms the subject of this case, is the second request for arbitration ("the 12B request" or "the 12B application") which was lodged with the Controller on 4 April 2011, a few days after the urgent relief was granted.

[16] Some six months after the applicant submitted the 12B request to the Controller, Engen delivered an objection thereto running into some 1 644 pages. The record of this application comprises some 4 000 pages, some 1 400 of which are duplications.

The 12B request, the decisions of the Controller and the Minister, now under review, and some remarks about the Act

[17] The Act, *inter alia*, governs the relationship between petroleum wholesalers (like Engen) and retailers (like the applicant). The terms "retail" and "wholesale" are also defined in the Act.

Part of the long title of the Act reads as follows:

> "... to provide for the licensing of persons involved in the manufacturing and sale of certain petroleum products; to promote the transformation of

the South African petroleum and liquid fuels industry; to provide for the promulgation of regulations relating to such licences; and to provide for matters incidental thereto." (Emphasis added.)

[18] In section 3 of the Act, provision is made for the Minister to appoint a Controller of Petroleum Products ("the Controller") which may be any person in the public service and there is also provision for the appointment of regional controllers and/or inspectors.

[19] Section 12B of the Act ("12B") reads as follows:

"**Arbitration**. –

(1) The Controller of Petroleum Products may on request by a licenced retailer alleging an unfair or unreasonable contractual practice by a licenced wholesaler, or *vice versa*, require, by notice in writing to the parties concerned, that the parties submit the matter to arbitration.

(2) An arbitration contemplated in subsection (1) shall be heard -

(a) by an arbitrator chosen by the parties concerned; and

(b) in accordance with the rules agreed between the parties.

(3) If the parties fail to reach an agreement regarding the arbitrator, or the applicable rules, within 14 days of receipt of the notice contemplated in subsection (1) -

(a) the Controller of Petroleum Products must upon notification of such failure, appoint a suitable person to act as arbitrator; and

(b) the arbitrator must determine the applicable rules.

(4) An arbitrator contemplated in subsection (2) or (3) –

(a) shall determine whether the alleged contractual practices concerned are unfair or unreasonable and, if so, shall make such award as he or she deems necessary to correct such practice; and

(b) shall determine whether the allegations giving rise to the arbitration were frivolous or capricious and, if so, shall make such award as he or she deems necessary to compensate any party affected by such allegations.

(5) Any award made by an arbitrator contemplated in this section shall be final and binding upon the parties concerned and may, at the arbitrator's discretion, include an order as to costs to be borne by one or more of the parties concerned."

[20] Section 12A ("12A") reads as follows:

"**Appeal.** –

(1) Any person directly affected by a decision of the Controller of Petroleum Products may, notwithstanding any other rights that

such a person may have, appeal to the Minister against such decision.

(2) An appeal in terms of paragraph (a) shall be lodged within 60 days after such decision has been made known to the affected person and shall be accompanied by –

(a) a written explanation setting out the nature of the appeal;

(b) any documentary evidence upon which the appeal is based.

(3) The Minister shall consider the appeal, and shall give his or her decision thereon, together with written reasons therefore, within the period specified in the regulations."

[21] Section 12C ("12C") provides for appropriate regulations to be published by the Minister.

[22] 12A, 12B and 12C were inserted into the Act in terms of section 13 of the Petroleum Products Amendment Act no 58 of 2003 ("the Amendment Act") which came into effect on 17 March 2006.

[23] The long title of the Amendment Act reads as follows:

"To amend the Petroleum Products Act so as to define certain expressions and to substitute or delete certain definitions; to provide for the licensing of persons involved in the manufacturing or sale of petroleum products; to promote the transformation of the South African petroleum and liquid

fuels industry; to prohibit certain actions relating to petroleum products; to amend, substitute or repeal obsolete provisions; to provide for appeals and arbitrations; to authorise the Minister of Minerals and Energy to make specific regulations; to substitute the long title; and to provide for matters connected therewith." (Emphasis added.)

[24] The Amendment Act also introduced, as schedule 1 to the Act, the Charter for the South African Petroleum and Liquid Fuels Industry on Empowering Historically Disadvantaged South Africans in the Petroleum and Liquid Fuels Industry ("the Charter").

[25] Part of the preamble of the Charter reads as follows:

"Mindful of –

- the imperatives of redressing historical, social and economic inequalities as stated by the Constitution of the Republic of South Africa, *inter alia* section 9 on Equality (and unfair discrimination) in the Bill of Rights, and section 217.2 on procurement where the 'organs of state' may implement a 'procurement policy providing for categories of preference in the allocation of contracts and the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination';
- the policy objective stated in the Energy Policy White Paper to achieve 'sustainable presence, ownership or control by historically

disadvantaged' South Africans of a quarter of all facets of the liquid fuels industry, or plans to achieve this;

- the Black Economic Empowerment Commission's definition of empowerment as 'an integrated strategy aimed at substantially increasing black participation at all levels of the population'; and noting
- the enactment of the Preferential Procurement Framework Act (no 5 of 2000) (my note: and some other Acts as well) ...

The signatories have developed this Charter to provide a framework for progressing the empowerment of historically disadvantaged South Africans in the liquid fuels industry."

[26] The Charter is a lengthy affair under various headings including "support of culture", "capacity building", "employment equity", "private sector procurement" and so on. Under the heading "retailing/wholesaling" the following is said: "the parties agree to create fair opportunity for entry to the retail network and commercial sectors by HDSA companies", meaning companies owned or controlled by historically disadvantaged South Africans.

[27] Engen is also listed in the Charter as one of the companies that have participated in the BEE process.

[28] Section 2C of the Act (also inserted by the Amendment Act) reads as follows:

> "**Transformation of South African petroleum and liquid fuels industry**. –
>
> (1) In considering licence applications in terms of this Act the Controller of Petroleum Products shall-
>
> (a) promote the advancement of historically disadvantaged South Africans; and
>
> (b) give effect to the Charter.
>
> (2) The Controller of Petroleum Products may require any category of licence holder to furnish information, as prescribed, in respect of the implementation of the Charter."

[29] "Charter" is defined as the "Charter in schedule 1".

[30] Where counsel for the applicant refer, in their heads of argument, to the Charter and related provisions, *supra*, in support of their submissions as to how 12B should be interpreted, I assume that the applicant is a so-called "HDSA company". It is represented by business man Avishkar Harillal Dukhi and describes itself as "a licensed activity, as defined in section 2D of the Act which has been allocated a retail licence ..."

Section 2D follows on section 2C, which I have quoted, and precedes section 2E which foreshadows a system for the allocation of licences which must be based, *inter alia*, on the objective referred to in section 2C.

[31] In the 12B request, the applicant alleged unfair or unreasonable contractual practices, in the spirit of 12B, in addition to those alleged for purposes of the first request for arbitration which, as I have said was granted and which arbitration is presently pending.

Broadly speaking, these alleged unfair or unreasonable contractual practices can be summarised as follows:

- Claim A

  Engen's persistent failure to provide the site with additional access points despite a written agreement to do so.

- Claim B

  Engen's failure to provide the applicant with consent to effect the necessary improvements to the property, Engen's purported termination of the agreement based on spurious and trivial grounds and Engen's practice of serving notices of termination and cancelling agreements with retailers as a means of dissuading retailers from raising disputes with Engen. It is the applicant's case that the improvements were required to legalise the premises which would otherwise have been unlawful.

- Claim C

Engen's conduct in negotiating, alternatively concluding, a lease agreement with a tenant in respect of the selfsame property occupied by the applicant and contrary to the provisions of the agreement between the applicant and Engen.

[32] Of course, as I mentioned, Engen, six months later, opposed the request in no uncertain terms, and over some 1 644 pages. It is not practical, or necessary, to deal fully with the opposition to the 12B request, but, in essence, the main thrust of Engen's argument is that it had purported to cancel the agreement (the cancellation is challenged in the pending case before the South Gauteng court) so that an arbitrator appointed under 12B would not have the necessary jurisdiction to arbitrate an alleged unfair and unreasonable contractual practice. Engen contended that it was a jurisdictional requirement for a matter to be referred to arbitration under 12B that an "undisputed" contract existed between the parties. 12B does not expressly require the existence of such a contract.

Engen also argued that because it had brought a counter-application for the eviction of the applicant (some 3½ months after the 12B request was filed) the matter was "sub judice" and should accordingly not be referred to arbitration under 12B.

[33] In turning down the 12B request, and clearly preferring the arguments presented by Engen, the controller wrote the following letter, dated 27 February 2012, to the applicant's attorney:

> "Dear Mr Naidoo
>
> **re Request for arbitration in terms of section 12B of the Petroleum Products Act, 1977 (Act no 120 of 1977) as amended: The Business Zone 1010 CC t/a Emmarentia Convenience Centre versus Engen Petroleum Limited**
>
> I refer to your request for arbitration in terms of section 12B of the Petroleum Products Act ...
>
> I have been advised of the matter between the above parties and after careful consideration of the request for arbitration, our position on the matter is as follows: section 12B of the Act states thus –
> 'The Controller of Petroleum Products may on request by a licensed retailer alleging unfair or unreasonable contractual practise (*sic*) by a licensed wholesaler, or *vice versa*, require, by notice in writing to the parties concerned, that the parties submit the matter to arbitration.'
>
> Before a matter can be referred to arbitration, the Controller of Petroleum Products (hereinafter referred to as 'the Controller') must be satisfied that the reason(s) for the request is as a result of the alleged unfair or unreasonable contractual practice by a licensed retailer or wholesaler in the performance of an existing valid contractual agreement in an ongoing business relationship.

The information we have before us is that there is no longer a valid agreement between Emmarentia and Engen. The agreement forming the basis of Emmarentia's allegations of unfair or unreasonable contractual practice have been cancelled. Further, Emmarentia's allegations of unfair or unreasonable contractual practice are centered around the agreements which are currently under consideration by the South Gauteng High Court and as such, the matter is therefore sub-judice and can no longer be considered for arbitration.

In light of the aforegoing, it is our considered view that in the absence of an existing valid Agreement of Lease and Operation of Service Station, Emmarentia's request for arbitration does not satisfy the minimum requirements in terms of section 12B of the Act. As such, the Controller has no basis for referring this matter to arbitration because of the requirements in the regulatory framework.

In the spirit of facilitating a speedy resolution to the dispute we urge parties to allow the South Gauteng High Court to give a determination on the validity of the agreements before the matter can be taken further.

We also encourage parties to use other dispute resolution forums which dispose of disputes promptly as opposed to protracted court proceedings.

It will be in the best interest of all parties concerned if the matter is resolved promptly and amicably.

Yours sincerely

Mr T Maqubela
Controller of Petroleum Products"

[34] In terms of 12A, the applicant took the Controller's decision on appeal to the Minister. The appeal was also opposed. In a letter dated 6 November 2012 the Minister wrote the following letter to the applicant's attorney, Mr Naidoo:

"Dear Sir

Appeal to the Minister in terms of section 12A(1) of the Petroleum Products Act, 1977 (Act no 120 of 1977) as amended and hereinafter referred to as the 'Act') by Business Zone 1010 CC
Licensed wholesaler: Engen Petroleum Limited

1. I have, in terms of the provisions of section 12A of the Petroleum Products Act, 1977 (hereinafter referred to as the 'Act'), considered the appeal lodged on behalf of your client, The Business Zone 1010 CC t/a Emmarentia Convenience Centre, against the decision of the Controller of Petroleum Products to refuse your request for the referral of the matter to arbitration in terms of section 12B of the Act.

2. After careful consideration of all the facts and arguments presented before me, I hereby confirm the decision made by the Controller of Petroleum Products refusing the submission of the matter to arbitration in terms of section 12B of the Act.

3. The reason for my aforementioned decision is that, in my opinion, section 12B of the Act may only be applied in cases where there is an existing or continuing contract between the parties. Since the validity of the termination of the contract by Engen Petroleum Limited is disputed by your client, and the matter is currently before a competent court, we believe that the arbitration under section 12B of the Act would not be proper. I am advised further that a single juristic act (the exercise of a legal right to cancel a contract) intended to terminate an agreement cannot, in law, constitute or be characterised as 'an unfair or unreasonable contractual practice' for purposes of section 12B of the Act. Therefore, an arbitrator would not have jurisdiction to determine the validity or otherwise of the cancellation of the agreement.

4. I am also mindful of the fact that the Controller's powers to refer a matter to arbitration in terms of section 12B of the Act is a discretionary power and I believe that, having considered the circumstances and arguments submitted by both parties, the decision of the Controller of Petroleum Products to refuse to submit the matter to arbitration was justified in the circumstances.

Yours faithfully

Ms Dipuo Peters, MP
Minister: Energy"

Overview of Engen's argument

[35] Before the commencement of the proceedings, I was informed that counsel for Engen would be presenting three arguments, described by counsel as "insuperable obstacles" to the relief sought by the applicant, and that all counsel were agreed that it would be appropriate for counsel for Engen to start with their submissions. Although the arguments (with the exception of the first one) were not in the nature of points *in limine*, I agreed that this procedure could be followed.

[36] The three arguments are the following:

1. The decision by the Controller/Minister not to refer the request to arbitration does not constitute "administrative action" and is therefore not reviewable in terms of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA").
2. The Controller/Minister is vested with a discretion whether or not to refer a particular matter to arbitration. In the present case, both declined to refer the matter on the basis that there was and is pending before the High Court (South Gauteng) an application which will determine the validity of the contract on which the applicant's request for referral is based. This was a proper exercise of discretion and cannot be set aside on review.
3. The decision in *Engen Petroleum Ltd v Tlhamo Retail (Pty) Ltd* (unreported, South Gauteng case no 43846/09, dated 6 May 2010) was binding on the Controller and the Minister. That decision is correct in law and is dispositive of the present review.

[37] I will deal with the arguments in the same order.

The argument that the decision not to refer to arbitration does not constitute "administrative action"

[38] It was argued that only decisions which fall within the definition of "administrative action" are reviewable in terms of PAJA. In order to constitute "administrative action" the decision must be one, *inter alia*, "which adversely affects the rights of any person and which has a direct external legal effect".

[39] It was argued that, on the facts, the decision by the Controller (and the Minister) to refuse to refer the matter to arbitration was purely preliminary in nature.

The argument appears to be based on the following utterance by the Controller (the full text was already quoted):

> "In the spirit of facilitating a speedy resolution to the dispute we urge parties to allow the South Gauteng High Court to give a determination on the validity of the agreements before the matter can be taken further."

The argument, if I understood it correctly, was that the Controller "left the door open" for the possibility of entertaining an application to refer the matter to arbitration at a later stage. It was argued that decisions of a preliminary nature do not adversely affect the rights of any person and do not have any direct external legal effect.

[40] Authorities quoted in supplementary heads of argument on behalf of Engen, on this point, were not helpful, in my view, but during the hearing, Mr Marcus referred me to the judgment in *City of Cape Town v Hendricks* 2012 6 SA 492 (SCA). Two informal traders conducted their businesses from large, sturdy, temporary structures erected on pavements at road corners, with a portion of each structure encroaching onto a neighbouring property where a mall was situated.

A warning/compliance notice issued by the City and notifying the traders of their contravention of a bylaw and calling upon them to comply with the bylaw in order to avoid legal action was found not to be "administrative action" for the purposes of PAJA.

At 495C-D the following is said:

> "It is clear that the City did not take a decision that the respondents are obliged to remove and rebuild their business structures daily on their trading sites, and that the notices cannot reasonably be construed to mean that. The notices simply informed the respondents that they must comply with the law (ie remove the structures which contravene the bylaws and the Ordinance) and informed them of the consequences should they fail to do so. This was not administrative action as defined in PAJA."

[41] The relevant portions of the definition in PAJA read as follows:

"'Administrative action' means any decision taken, or any failure to take a decision, by –

(a) an organ of state ...

(b) ...

which adversely affects the rights of any person and which has a direct, external legal effect, ..."

[42] In my view, the remarks referred to in *City of Cape Town* are distinguishable, and deal with a different situation altogether. In *Viking Pony Africa Pumps v Hidro-tech Systems* 2011 1 SA 327 (CC) the following is said at 341B:

"PAJA defines administrative action as a decision or failure to take a decision that adversely affects the rights of any person, which has a direct, external legal effect. This includes 'action that has the capacity to affect legal rights'. Whether or not administrative action, which would make PAJA applicable, has been taken cannot be determined in the abstract. Regard must always be had to the facts of each case."

- See the authorities quoted in the relevant footnotes.

[43] Mr Suttner argued, correctly in my view, that when considering the nature of the decision taken by either the Controller or the Minister, it is essential to consider the statutory context in which the decision was required to be made.

The text of 12A and 12B has already been quoted.

12A provides in subsection (1) that

> "Any person directly affected by a decision of the Controller of Petroleum Products may, notwithstanding any other rights that such a person may have, appeal to the Minister against such decision."

And in subsection (2) it is stated:

> "An appeal in terms of paragraph (a) shall be lodged within 60 days after such decision has been made known to the affected person and shall be accompanied by ..." (Emphasis added.)

[44] As far as the Controller is concerned, it is clear that the Act enjoins him to either refer a matter to arbitration or to decline to do so. The decision either way is required to be a final decision. The Minister is required to consider an appeal against the decision. The appeal is against a final decision. In the absence thereof, there would be no scope for an appeal.

The Minister is required to decide the appeal. The decision of an appeal cannot be described as a purely preliminary decision. It is final in nature.

[45] The Act allows only one way to get a dispute before an arbitrator. That is via 12B.

[46] With reference to the passage from the Controller's letter, *supra*, on which the counsel for Engen relies, it was submitted on behalf of the applicant that it is not within the Controller's jurisdiction to defer his decision in this way or to subordinate it to a later decision which may be made by a court.

[47] It is important to consider the remarks of the Controller, in his letter, in totality. He, for example, made a clear finding that there is no longer a valid agreement between the applicant and Engen. He found that the agreement forming the basis of the applicant's allegations of unfair or unreasonable contractual practice "have (*sic*) been cancelled". He also finds, as a matter of fact, that the applicant's allegations of unfair or unreasonable contractual practice "are centered around the agreements which are currently under consideration by the South Gauteng High Court and as such the matter is therefore *sub judice* and can no longer be considered for arbitration" (emphasis added).

He then goes on to say

> "In light of the foregoing, it is our considered view that in the absence of an existing valid Agreement of Lease and Operation of Service Station, Emmarentia's request for arbitration does not satisfy the minimum requirements in terms of section 12B of the Act. As such, the Controller has no basis for referring this matter to arbitration because of the requirements in the regulatory framework."

In my view, this is clearly a final pronouncement. He also says all this before concluding with the remarks relied upon by Engen, namely that "in the spirit of facilitating a speedy resolution to the dispute" the parties are urged to allow the South Gauteng High Court to "give a determination on the validity of the agreements" before the matter can be taken further. He follows it up by encouraging the parties to use other dispute resolution forums which dispose of disputes promptly as opposed to protracted court proceedings. In the light of the final pronouncements made by the Controller, these last remarks can be seen as nothing more than gratuitous advice which takes the matter no further.

[48] Turning to the Minister's decision, already quoted in full, it is clear, that she regarded the Controller's decision as a final one and then she goes on to "confirm the decision made by the Controller of Petroleum Products refusing the submission of the matter to arbitration in terms of section 12B of the Act". After making some remarks purporting to deal with legal issues, the Minister then concludes that the Controller's decision "to refuse to submit the matter to arbitration was justified in the circumstances".

[49] I fail to see how these decisions by both the Controller and the Minister can be described as "purely preliminary in nature". In my view, these decisions adversely affect the rights of the applicant, and have a direct, external legal effect on the applicant, so that they amount to administrative action in the spirit of the

PAJA definition. Consequently, I see no basis for upholding the first argument offered on behalf of Engen.

The argument that the Controller/Minister exercised a proper discretion

[50] It was argued on behalf of Engen that it is clear from the terms of 12B that the Controller enjoys a discretion whether or not to refer a matter to arbitration. The Act is silent on the factors which are relevant to the exercise of the discretion. Provided that the factors taken into account were permissible and lawful, there can be no basis for impugning that discretion.

It was argued that neither the Controller nor the Minister can be faulted for taking into account the fact that the validity of the contract in issue was the subject of a pending High Court application. It was argued that if the contract has been lawfully cancelled, and it is so held by the High Court, and eviction follows, then it would be an exercise in futility for the Controller (and the Minister) to entertain the matter at all.

[51] It is necessary, and convenient, at this point, to embark upon a brief discussion of arguments offered on behalf of the applicant with regard to the significance of the introduction of 12B (and 12A for that matter) as well as the Charter and all related provisions into the Act by the Amendment Act. I have already dealt, in some detail, with the Charter, the long title of the Amendment Act and the effect it had on the present wording of the Act.

[52] It was submitted on behalf of the applicant that the purpose of the arbitration process prescribed in 12B is to provide alternative and enlarged access to dispute resolution procedures which were previously unavailable. It was submitted that the provisions of 12B cannot be interpreted in isolation but should be interpreted having regard not only to the context of the Act and the Amendment Act but also to the larger picture, including the Constitution and other relevant law. It was submitted that the court must adopt an interpretation of 12B that will render that legislation effective.

[53] It was submitted that both the Controller and the Minister overlooked the fact that all the unfair and unreasonable contractual practices complained of by the applicant had taken place prior to the alleged cancellation.

[54] What is of the utmost importance, for purposes of deciding this dispute, is the fact that the courts do not have jurisdiction to decide the issues of fairness and equity underlying the concept of unreasonable contractual practices as intended by 12B. This much was common cause between counsel before me.

[55] In *South African Forestry Co Ltd v York Timbers Ltd* 2005 3 SA 323 (SCA) the following was said at 338H-339D:

> "This implied term, as formulated by SAFCOL, was said to have imposed an obligation on York to act in accordance with the dictates of

reasonableness, fairness and good faith when SAFCOL exercised its rights in terms of clause 3.2 and 4.4 of the contracts.

York's answer to these contentions, which found favour with the Court *a quo*, was that they were in conflict with the judgments of this Court in *Brisley v Drotsky* 2002 4 SA 1 (SCA) paragraphs [21] to [25] and [93] to [95] and *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) in paragraphs [31] to [32]. In these cases it was held by this Court that, although abstract values such as good faith, reasonableness and fairness are fundamental to our law of contract, they do not constitute independent substantive rules that Courts can employ to intervene in contractual relationships. These abstract values perform creative, informative and controlling functions through established rules of the law of contract. They cannot be acted upon by the Courts directly. Acceptance of the notion that judges can refuse to enforce a contractual provision merely because it offends their personal sense of fairness and equity will give rise to legal and commercial uncertainty. After all, it has been said that fairness and justice, like beauty, often lie in the eye of the beholder. In addition, it was held in *Brisley* and *Afrox Healthcare* that – within the protected limits of public policy that the Courts have carefully developed, and consequent judicial control and contractual performance and enforcement – constitutional values such as dignity, equality and freedom require that Courts approach their task of striking down or declining to

enforce contracts that parties have freely concluded, with perceptive restraint."

It is convenient to further illustrate the point by quoting a few extracts from what is stated in the judgment at 340A-E:

"To say that terms can be implied if dictated by fairness and good faith does not mean that these abstract values themselves will be imposed as terms of the contract."

And:

"The question whether parties have complied with their contractual obligations depends on the terms of the contract as determined by proper interpretation. The Court has no power to deviate from the intention of the parties, as determined through the interpretation of the contract, because it may be regarded as unfair to one of them." (Emphasis added.)

And:

"Once it is established that a party has complied with his or her obligations as properly determined by the terms of the contract, that is the end of the inquiry."

[56] It seems that, in the case of some legislation introduced after 1994, including the Amendment Act and the Act, the ball game has changed.

[57] I find myself in respectful agreement, by and large, with detailed submissions made in this regard by counsel for the applicant in their comprehensive heads of argument, which I briefly summarise: 12B introduced the concepts ("abstract values" in the words of the learned Judge of Appeal in *York*) of fairness and reasonableness into the contractual relationship between licensed fuel retailers and wholesalers. The legislature felt compelled to intervene in the relationship between retailers and wholesalers. Prior to March 2006 (when the Amendment Act came into operation) the contractual relationship between a fuel retailer and a fuel wholesaler would have been governed by the common law and in accordance with the law of contract.

The legislature appears to have concluded that it was necessary to regulate agreements between fuel retailers and fuel wholesalers to prevent the parties from treating one another unfairly or unreasonably, and to address the historical imbalance between the various stakeholders in the fuel industry.

Generally, fuel retailers are individuals (conducting business in their personal capacity or through the vehicle of a corporate entity). The fuel wholesalers, on the other hand, are generally large multi-national corporations which are in a position to dictate the terms (often of a Draconian nature) of the agreements concluded with the fuel retailers. The agreements concluded are generally all-encompassing and far-reaching. The Lease and Operation of Service Station

Agreement in this matter prescribes to the applicant terms relating to a myriad of subjects. Engen reserves the right to terminate the supply of fuel to the applicant in the event of the latter failing to comply with any of the terms of the agreement. 12B provides the parties to such an agreement with a forum to ventilate any disagreements arising out of their relationship.

Importantly, it is submitted by counsel for the applicant, and I agree with them, that the forum provided by 12B has not been established in order to determine contractual disputes between the parties. The courts are already vested with this power.

The forum has been established under 12B to determine "unfair or unreasonable contractual practices" which may include the unfair or unreasonable implementation of contractual terms or the inclusion of unfair or unreasonable contractual terms in the agreement.

As appears from *York*, a court generally has no power to determine the fairness or reasonableness of a contractual term or the fairness and reasonableness and good faith of the implementation of a contractual practice and the courts are not vested with any remedial power in terms of 12B. The 12B arbitrator, on the other hand, has extensive remedial powers and is vested with the discretion to make an award which he or she deems necessary to "correct such practice" – 12B(4)(a).

[58] I turn to the powers of the Controller within the ambit of 12B.

All that 12B provides, is that the Controller may on request of a retailer alleging an unfair or unreasonable contractual practice by a wholesaler (or *vice versa*) require the parties by notice in writing to submit the matter to arbitration.

I accept, because of the use of the word "may", that the controller has a discretion whether or not to grant the request but the only jurisdictional requirement for this process to be activated appears to be an allegation by the retailer (or the wholesaler for that matter) of an unfair or unreasonable contractual practice by the other one and a request by the aggrieved party for te matter to be referred to arbitration.

All that is required of the Controller is to determine whether the applicant has alleged an unfair or unreasonable contractual practice. It seems to me that a 12B request ought only to be refused by the Controller in the clearest of cases, for example, where the Controller, on good grounds, can conclude that what is alleged is clearly not, and can never be, an unfair or unreasonable contractual practice. It seems to me that the Controller can arrive at such a conclusion only in the rarest and most exceptional of circumstances because it would amount to pre-judging the issue. This is particularly so if one has regard to the provisions of 12B(4)(b) which opens the door for the arbitrator, upon considering the case, to decide whether the allegations made by the aggrieved party were frivolous or

capricious and, if so, to compensate the affected party by making an appropriate award to the latter. Presumably, there could also be formal requirements which are not met by the complainant and which will allow the Controller to turn down the request, such as the absence of a proper licence in the possession of the complainant, as foreshadowed by 12B.

In this case, there is no suggestion of a flawed licence or that the comprehensive allegations made by the applicant, as detailed above, could not amount to unfair or unreasonable contractual practices. Moreover, the Controller should have been alive to the fact, and taken it into account, that earlier complaints by the applicant had already been referred to arbitration in terms of the first 12B request and was pending as such.

From the aforegoing, it follows, in my view, that the threshold for an aggrieved applicant for arbitration to cross, in order to have the request granted, is extremely low. What is plain, is that it is not for the Controller to decide the dispute between the parties.

What the Controller certainly could not do, within the limited powers vested in him or her in terms of 12B, was to decide "that there is no longer a valid agreement between Emmarentia and Engen" and "the agreement forming the basis of Emmarentia's allegations of unfair or unreasonable contractual practice have (*sic*) been cancelled". The same applies to the Controller's finding that the dispute

can no longer be considered for arbitration, because of the pending dispute in the South Gauteng High Court: as demonstrated earlier, the arbitration forum established under 12B has the power to pronounce upon "unfair or unreasonable contractual practices", something which the courts, generally, are not empowered to do, as appears from *York* and other decisions. Indeed, on my understanding of the present legal position, as will be described hereunder, the arbitrator, in a proper case, has the power to pronounce upon the validity of the purported cancellation of the agreement based on the terms of the contract, and can even set aside such a cancellation.

It is for this reason, that it would, in my view, be procedurally more appropriate for an arbitrator, if appointed, to first come to his or her decision so that the way forward for the case in the South Gauteng High Court can be clearly mapped out. If I understood counsel correctly during my debate with them, the High Court proceedings are being kept in obeyance (and it is now three years since they were instituted) pending the outcome of this application.

[59] In all the circumstances, I have come to the conclusion that the Controller committed an error of law when basing his or her decision to refuse the request for arbitration on a number of findings which he or she was not entitled to make within the powers vested in him or her. The decision taken by the Controller was, in these circumstances, materially influenced by this error of law and falls to be reviewed in terms of the provisions of section 6(2)(d) of PAJA. In my opinion,

the decision of the Controller also falls foul of the provisions of section 6(2)(e) of PAJA in that it was taken – (i) for a reason not authorised by the empowering provision and because (iii) irrelevant considerations were taken into account and/or relevant considerations were not considered.

[60] For the same reasons, the decision of the Minister in endorsing the decision of the Controller (by more or less adopting his or her reasoning as her own) also falls to be reviewed and set aside.

[61] I add, in passing, that a 12B decision by a Controller is not the only decision by the Controller that can be taken on appeal to the Minister in terms of 12A. A Controller has different powers, duties and functions which may be determined by the Minister. This can be gleaned from a general reading of, for example, sections 2B, 2C, 2E and 3 of the Act.

[62] I turn to the case of *Maphango and others v Aengus Lifestyle Properties (Pty) Ltd* 2012 3 SA 531 (CC) ("*Maphango*"). In my view, this judgment provides the principles and the guidance in terms of which disputes such as the present one have to be considered.

[63] *Maphango* deals with the Rental Housing Act 50 of 1999 which provides, *inter alia*, for the protection of the rights of tenants, and landlords for that matter.

In the preamble, the provisions of section 26 of the Constitution, that everyone has the right to have access to adequate housing, are recognised and the last two paragraphs of the preamble read as follows:

> "And whereas there is a need to balance the rights of tenants and landlords and to create mechanisms to protect both tenants and landlords against unfair practices and exploitation;
>
> And whereas there is a need to introduce mechanisms through which conflicts between tenants and landlords can be resolved speedily at minimum cost to the parties ..."

In terms of section 4(5)(c) of the Rental Housing Act, the landlord's rights against the tenant include his or her rights to –

> "(c) terminate the lease in respect of rental housing property on grounds that do not constitute an unfair practice and are specified in the lease."

In terms of the Rental Housing Amendment Act no 43 of 2007, several new provisions were introduced into the Rental Housing Act. One of those was a definition for "unfair practice" which means –

> "(a) any act or omission by a landlord or tenant in contravention of this Act; or
>
> (b) a practice prescribed as a practice unreasonably prejudicing the rights or interests of a tenant or a landlord."

[64] In *Maphango*, the landlord terminated a number of leases on the basis that the existing leases did not allow the landlord to unilaterally increase the rental to the levels needed and that the only way in which this could be achieved was to cancel the existing leases. At the same time the tenants were invited to enter into new lease agreements. The High Court endorsed the termination of the leases, also finding that the aggrieved tenants had not proved that the termination was contrary to public policy. An order of eviction of the tenants was granted against ten of the tenants. With leave of the High Court, the matter went to the Supreme Court of Appeal ("the SCA") which concluded that the tenants' security of tenure was circumscribed by the leases themselves. It could therefore not be said that termination, in accordance with the leases, constituted an infringement of their security of tenure – at 540B.

Significantly, the learned Judge, Cameron J, writing for the majority of the Constitutional Court, said the following at 540C-D:

> "The tenants' contractual argument fared no better. The Supreme Court of Appeal held that since reasonableness and fairness are not free-standing requirements for the exercise of a contractual right, a court cannot refuse implementation of a contract simply because the individual judge regards this as unreasonable or unfair ..."

This, it appears, is in line with what was stated in *York* and other cases.

[65] In terms of section 13(1) of the Rental Housing Act, any tenant or landlord or group of tenants or landlords or interest group may in the prescribed manner lodge a complaint with the Rental Housing Tribunal (created in terms of chapter 4 of the Rental Housing Act) in respect of a matter which may constitute an unfair practice (emphasis added).

The tribunal can then refer the matter to mediation or conduct a hearing itself in order to decide the complaints.

[66] In my view, there is a clear similarity between the spirit or intention behind the Act and the Amendment Act on the one side and the Rental Housing Act on the other side, and disputes flowing from referrals to arbitration in terms of the Act and referrals to the Rental Housing Tribunal in terms of the Rental Housing Act, should be governed by the same principles. The fact that the Act does not contain a specific definition for "an unfair or unreasonable contractual practice" should not, in my view, detract from this approach.

[67] In *Maphango*, the issue for decision was described as follows by the learned Judge at 542E:

> "The critical question is whether the landlord was lawfully entitled to exercise the bare power of termination in the leases solely to secure higher rents. At common law, there can be no doubt that a lessor was entitled

> with no let or hindrance to terminate a lease on notice. But even before the Constitution, rent control legislation heavily clamped lessors' common law powers ..."

And at 543D the learned Judge says:

> "Before 1994 the only clogs inhibiting a lessor's common-law power of termination were those expressly legislated. But the Constitution has fundamentally changed the setting within which the rights of both lessors and lessees stand to be evaluated. Constitutionalism has wrought significant changes to private-law relationships ..."

At 550E the learned Judge says that the question before the Constitutional Court was not whether the Act prohibited the landlord from terminating the tenants' leases in order to secure higher rents, "but whether the termination was capable of constituting an unfair practice".

Perhaps the crux of the case is summarised in these words by the learned Judge at 551E-G:

> "The Act expressly provides that a landlord's rights against the tenant include the right to 'terminate the lease ... on grounds that do not constitute an unfair practice and are specified in the lease'. 'And' is not disjunctive. It is conjunctive. It means the Act recognises the landlord's power to terminate a lease, provided the ground of termination is specified in it but,

in addition, does not constitute an unfair practice. Differently put, the Act demands that a ground of termination must always be specified in the lease, but even where it is specified, the Act requires that the ground of termination must not constitute an unfair practice."

[68] Perhaps more importantly for present purposes, the learned Judge says the following at 551F-552C:

"In this way, the Act superimposes its unfair practice regime on the contractual arrangement the individual parties negotiate. That the statute considers its unfair practice regime to be super-ordinate emerges not only from the requirement that a lease-based termination must not constitute an unfair practice, but also from what the Act enjoins the tribunal to take into consideration when issuing its rulings: these include 'the provisions of any lease', but only 'to the extent that it does not constitute an unfair practice'. The effect of these provisions is that contractually negotiated lease provisions are subordinate to the tribunal's power to deal with them as unfair practices.

It follows that where a tenant lodges a complaint about a termination based on a provision in a lease, the tribunal has the power to rule that the landlord's action constitutes an unfair practice, even though the termination may be permitted by the lease and the common law ... This makes it even clearer that the statutory scheme does not stop at

contractually agreed provisions, and conduct in reliance on them. It goes beyond them. It subjects lease contracts and the exercise of contractual rights to scrutiny for unfairness in the light of both parties' rights and interests."

[69] At 552G, Cameron J held that the SCA applied an unduly constricted approach to the question, which focused solely on the landlord's common law entitlement to cancel the leases. He held that the dispute could best be approached through the generous and powerful mechanisms of the Rental Housing Act with the result that leave to appeal was granted, the appeal was postponed and the matter was referred to the Rental Housing Tribunal, with leave to re-approach the Constitutional Court for further directions. A minority of three of the Constitutional Court judges held that the leases were validly terminated – at 582I. And in another minority judgment, Froneman J and Yacoob J concurred in the majority judgment of Cameron J, but added some further comments which I do not propose dealing with.

[70] In the result, I remain satisfied that the Controller erred in refusing the application for an arbitration referral, did so for reasons which were beyond his or her powers to adopt and, in doing so, committed an error of law which materially influenced the decision, thereby rendering it reviewable as already indicated. I also remain of the view that the decision of the Minister, in endorsing the Controller's decision falls to be reviewed and set aside.

[71] I turn to the third argument offered on behalf of Engen.

The decision in *Engen Petroleum Ltd v Tlhamo Retail (Pty) Ltd* (South Gauteng case no 43846/09) was binding on the Controller and the Minister, correctly decided and dispositive of the review application

[72] In *Tlhamo*, the operating lease had lapsed through effluxion of time at the end of March 2008 so that there was no dispute flowing from any cancellation thereof. The respondent was forced to conclude an agreement ("FA5") providing for the sale of the petrol station by the applicant to a third party. This agreement may have been entered into under duress because the applicant threatened to terminate the supply of fuel and petroleum products and to evict the respondent from the petroleum station.

There was another agreement ("FA4") which was the so-called month-to-month operating lease replacing the lapsed original lease which was terminable on the giving by the applicant to the respondent of 24 hours notice, which had been done. It was held therefore that the respondent had no right whatever to occupy the property and for that matter to receive further fuels.

[73] The respondent argued that the conduct of the applicant in cancelling both those agreements was unfair and unreasonable and constituted a contractual practice, as intended by 12B, which was referable to the arbitrator.

[74] On pp10-11 of the unreported judgment, the learned Judge says the following:

> "The exercise of a legal right to cancel or terminate a contract although pertaining to a contract is not a 'contractual practice'. It is a single juristic act intended to terminate an agreement and cannot be characterised as a practice (that is a hibitual doing or carrying on of something).
>
> I hold therefore that the termination of the month-to-month operating lease agreement FA4 and the agreement FA5 does not constitute a contractual practice that is referable to the arbitrator in terms of section 12B of the Act."

[75] In *Marievale Consolidated Mines Ltd v President of the Industrial Court and others* 1986 2 SA 485 (TPD) the learned Judge, Goldstone J, said the following at 498A-D:

> "(b) What constitutes a 'practice'
>
> In my opinion, the reference to 'labour practice' in the definition of 'unfair labour practice' relates to a customary or recognised device, scheme or action adopted in the labour field. I am in no way attempting to give an exhaustive definition to that phrase. My purpose is solely to indicate that it does not in any way relate to hibitual or repetitious conduct on the part of a particular employer. Such an interpretation of the phrase does not appear to be a natural

> one and is certainly not necessary, having regard to the words in their context. It would lead to the unhappy, if not absurd, result that any employer can be a 'bad boy' once and may be twice but not thrice! That cannot have been the intention of the legislature. I find no basis for upholding this submission made on behalf of the applicant."

It does not appear as if the learned Judge in *Tlhamo* was referred to this decision.

[76] In *Maphango*, which, of course, was decided long after *Tlhamo*, the learned Judge says the following at 553C-554A:

> "I also respectfully differ from the Supreme Court of Appeal's conclusion that 'practice' envisages only 'incessant and systemic conduct by the landlord which is oppressive or unfair' and cannot consist in unacceptable conduct on an isolated occasion. It has long been established in our law that a 'practice' may consist in a single act. This accords with one of the ordinary meanings of the word (my note: see footnote 108, which even demonstrates support for this approach in the *Shorter Oxford Dictionary*). Thus, it was decided early under the unfair labour practice jurisdiction in employment law that a single dismissal may constitute a labour 'practice'. That authority has never been doubted. It forms the interpretive backdrop for understanding the use of the word 'practice' in the Act. More importantly, the broader interpretation accords with the Constitution. The

Act is a post-constitutional enactment adopted expressly to give effect to the right of access to adequate housing. A cramped interpretation of 'practice' would thwart its good ends."

[77] For the above reasons, I am obliged to come to the conclusion that the decision in *Tlhamo*, on this point, was wrong. Of course, the learned Judge did not have the benefit of being referred to any of the two decisions which I quoted from.

[78] It follows that the Minister, who adopted the reasoning on this point of the learned Judge in *Tlhamo*, to fortify her decision to endorse the Controller's decision, was also wrong, committed a further error of law in this respect, and that rendered her decision, also for this reason, reviewable.

Should this case be remitted to the Controller and the Minister in the spirit of the provisions of section 8(1)(c)(i) of PAJA, or is this an "exceptional" case where this court can substitute the administrative action reviewed and set aside with a decision of its own?

[79] This is a matter of some substance, and the 12B request for a review was already filed on 4 April 2011, more than three years ago.

It appears that an undue delay, under these circumstances, has been held to be justification for a court substituting the administrative action through its own decision in terms of section 8(1)(c)(ii) of PAJA – see *National Tertiary*

Retirement Fund v Registrar of Pension Funds 2009 5 SA 366 (SCA) at 375F-H; *ICS Pension Fund v Sithole* 2010 3 SA 419 (TPD) at 442B-D.

[80] With the 12B request already having been filed more than three years ago, and the Controller's decision having been handed down more than two years ago, on 27 February 2012, and where it must be realistically anticipated that there will be a further delay if the matter were to be referred back to the administrators, it seems to me that this is an exceptional case which falls inside the ambit of the provisions of section 8(1)(c)(ii).

Costs

[81] I see no reason for not applying the normal rule that the costs should follow the result and, in this case, the costs of two counsel are justified. Provision will also be made for costs relating to unnecessary duplications in the record to be disallowed in terms of a discussion I had with counsel during the hearing.

The order

[82] I make the following order:

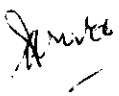
1. The decision delivered by the first respondent on 27 February 2012 in terms of which the applicant's request to refer an alleged unfair or unreasonable contractual practice to arbitration in terms of section 12B of the Petroleum Products Act, no 120 of 1977, was refused, is reviewed and set aside.

2. The decision delivered by the second respondent on 6 November 2012, in terms of which the decision of the first respondent, described in 1 above, was confirmed, is reviewed and set aside.

3. The applicant's request for referral of an alleged unfair or unreasonable contractual practice (as set out in annexure "O" to the founding affidavit) is referred to arbitration in terms of section 12B of the Petroleum Products Act, 120 of 1977. The first and second respondents are ordered to facilitate this referral, in terms of section 12B, as a matter of urgency.

4. The costs of the application, including the costs of two counsel, are to be paid by the third respondent save for the costs referred to in 5 hereunder.

5. The costs of 1 397 pages of the record (being the duplicated pages) are disallowed.



W R C PRINSLOO
JUDGE OF THE GAUTENG DIVISION, PRETORIA

7282-2013

HEARD ON: 11 MARCH 2014
FOR THE APPLICANT: J SUTTNER SC ASSISTED BY N REDMAN
INSTRUCTED BY: DES NAIDOO ATTORNEYS
FOR THE 1ST AND 2ND RESPONDENTS: NO APPEARANCE
FOR THE 3RD RESPONDENT: G J MARCUS SC WITH A THOMPSON SC
INSTRUCTED BY: A D HERTZBERG ATTORNEYS