

**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA**

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

A handwritten signature in black ink, appearing to be "P. J. J.", is written over a rectangular box.

2 August 2021

Case No:61429/19

In the application for leave to appeal between:

**CHAMDOR SERVICE STATION CC**

Applicant

and

**THE CONTROLLER OF PETROLEUM PRODUCTS  
OF THE DEPARTMENT OF MINERAL RESOURCES  
ENERGY**

First Respondent

**ARBITRATION FOUNDATION OF SOUTHERN AFRICA**

Second Respondent

**ARBITRATOR HENKLOUW N. O**

Third Respondent

**FUTURE PHAMBILI PETROLEUM (PTY) LTD**

Fourth Respondent

*In re:*

**CHAMDOR SERVICE STATION CC**

Applicant

and

**THE CONTROLLER OF PETROLEUM PRODUCTS  
OF THE DEPARTMENT OF MINERAL RESOURCES  
ENERGY**

First Respondent

**ARBITRATION FOUNDATION OF SOUTHERN AFRICA**

Second Respondent

**ARBITRATOR HENKLOUW N. O**

Third Respondent

**FUTURE PHAMBILI PETROLEUM (PTY) LTD**

Fourth Respondent

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## JUDGMENT

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**SK Hassim AJ**

### Introduction

[1] The applicant, Chamdor Service Station CC (“*Chamdor*”) seeks leave to appeal (i) the dismissal of its application to stay all proceedings<sup>1</sup> instituted against it by the fourth respondent, Future Phambili Petroleum (Pty) Ltd (“*Phambili*”); and (ii) upholding Phambili’s counter application for Chamdor’s eviction from the property.

[2] Leave to appeal is sought on the following broad grounds:

2.1.

2.1.1. The order staying the 2015 eviction application in effect precluded Phambili from instituting any arbitral or legal proceedings against Chamdor and the order must be interpreted as such.

2.1.2. The failure to do so (i) frustrates and undermines the statutory purpose of the Petroleum Products Amendment Act, 2003 (“*the Act*”); (ii) “*disregards the notion and jurisprudence of the Constitutional Court*”<sup>2</sup>; (iii) disregards the context in which the section 12B referral occurred and the “*overall undesirable, and the unreasonable business consequences and prejudice suffered by [Chamdor][if] the matter is*

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<sup>1</sup> The relief sought by Chamdor the application was “...*staying any proceeding instituted against the applicant until finalization of the section 12B arbitration proceedings with the first respondent in terms of the judgment and order of Teffo J on 11 November 2017.*”

<sup>2</sup> Paragraph 8.1.2 of the application for leave to appeal.

*not arbitrated ahead of and over any contractual rights and obligations arising from the contract or operation of law.*<sup>3</sup>”

2.2. The existence of a pending section 12B arbitration entitled the applicant to a stay of proceedings.

2.3.

2.3.1. The finding that the issues in the AFSA arbitration and the 2015 eviction (and seemingly the counterapplication for eviction) are not related to the issues in the section 12B arbitration is erroneous.

2.3.2. The two *lis alibi pendens* pleas raised by Chamdor should have been upheld because (i) the section 12B arbitration has not been finalised and (ii) because the 2015 eviction application by Phambili is pending.

2.3.3. For this reason, the counter application and the AFSA arbitration must be stayed pending the finalisation of these prior proceedings; and

2.4. The judgment overlooks firstly, the nature and purpose of a section 12B arbitration; and secondly that courts have no power “*to determine the fairness or reasonableness of a contractual term or the fairness, reasonableness and good faith in the implementation of a contractual practice*” nor do courts have remedial powers which section 12B confers to correct an unfair and unreasonable contractual practice. For this reason, as I understand the argument, the section 12B arbitration must be disposed of before an application for Chamdor’s eviction can be entertained.

[3] There are three categories of grounds on which leave to appeal is being sought:

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<sup>3</sup> Paragraph 8.1.3 of the application for leave to appeal.

- 3.1. The order by Teffo J barred all proceedings (pending and future) by Phambili against Chamdor.
- 3.2. The section 12B process entitles the applicant to a stay of the AFSA arbitration.
- 3.3. In view of the unfinalised section 12B arbitration and 2015 eviction application, the AFSA arbitration and the counter application for eviction are *lis alibi pendens* and should have been stayed.

**Is Phambili precluded from instituting any arbitral or legal proceedings against Chamdor?**

[4] The only proceedings that were stayed by Teffo J was the application which served before her. The order issued by Teffo J in the 2015 eviction application is unambiguous. What was stayed was “*This application<sup>4</sup> ...pending the outcome of the s12B arbitration proceedings*”.

[5] I am not persuaded that there is a reasonable prospect that another court will find that the order staying “*This application ...pending the outcome of the s12B arbitration proceedings*” means that not only was the 2015 application for eviction stayed, but all proceedings, including future proceedings were barred (or interdicted).

[6] The refusal to stay the AFSA arbitration and authorising the eviction of Chamdor does not preclude the section 12B arbitration. Firstly, the issues which arise for determination in the two arbitral processes differ. Secondly, the arbitrator (in the section 12B arbitration) is not precluded from deciding the two charges levelled by Chamdor against Phambili namely, has Phamibili treated Chamdor unfairly (i) in refusing to supply

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<sup>4</sup> This can mean nothing other than the application which the court was seized with, namely the 2015 eviction application.

fuel to it; and (ii) in failing to maintain the premises, equipment, cameras, *et cetera*? The right to remain in occupation is not before the arbitrator.<sup>5</sup>

[7] Additionally, despite the remedial powers conferred by section 12B an arbitrator cannot reinstate a lease which has expired by effluxion of time.<sup>6</sup> In the absence of such power, and even if Chamdor is successful in the section 12B arbitration, as well as the AFSA arbitration, Chamdor will not have the right to occupy the premises.

### **Does the pending section 12B arbitration entitle Phambili to a stay of proceedings?**

[8] The disputes which the parties agreed to refer to arbitration in terms of their contractual arrangements do not include or extend to the disputes (or complaints) over which an arbitrator appointed in terms of section 12B of the Act must decide. There is no risk of conflicting findings by different tribunals. The findings in the section 12B arbitration are not dispositive of the issues which arise in the AFSA arbitration or the counter application.

### **Has the applicant satisfied the requirements of the defence *lis alibi pendens*?**

[9] For a plea of *lis pendens* to succeed, a *lis* must firstly be pending and secondly, it must be in respect of the same cause of action; it is sufficient if the other proceedings (i.e., the other pending proceedings) involve the determination of a question that is necessary in the (present) proceedings before the court.

[10] Phambili withdrew the 2015 eviction application. The failure to tender costs does not render a withdrawal of proceedings ineffective. Nor the failure to seek the court's leave to do so. The process embarked upon may be irregular- but not invalid.

[11] The applicant's *lis pendens* plea fails for another reason. The requisite that the cause of action must be the same in the pending proceedings and the present proceedings is not

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<sup>5</sup> Cf. Engen Petroleum Limited v Rissik Street One Stop CC t/a Rissik Street Engen and Another (Case No 209/2020) [2021] ZASCA 63 (26 May 2021).

<sup>6</sup> *Ibid.*

satisfied. The cause of action in the 2015 eviction application and the counter application are not the same. The former rests on the right to occupation having been terminated by the positive act of the cancellation of the contract, the latter on the right to occupation having terminated because the right to do so lapsed by effluxion of time.

[12] In the circumstances I come to the conclusion that there is no reasonable prospect that another court will come to a different conclusion on the issues.

[13] That brings me to consider whether there exist some other compelling reasons why the appeal should be heard. None of the reasons<sup>7</sup> advanced by Chamdor in my view constitute a compelling reason for an appeal.

[14] In the circumstances the application for leave to appeal is dismissed with costs.



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**S K HASSIM AJ**

Acting Judge: Gauteng Division, Pretoria  
(electronic signature appended)  
2 August 2021

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties' legal representatives by e-mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 2 August 2021.

Appearances:

For the applicant: Adv T Moretlwe

For the fourth respondent: Adv L Hollander

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<sup>7</sup> Paragraph 2 of the application for leave to appeal.