IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 283/18P

In the matter between:

BRIGHT IDEA PROJECTS 66 (PTY) LTD

t/a ALL FUELS **APPLICANT**

and

FORMER WAY TRADE AND INVEST (PTY) LTD

t/a PREMIER SERVICE STATION **RESPONDENT**

ORDER

The following order is granted:

(a) The main application succeeds and the counter-application is dismissed.

(b) The respondent is directed to forthwith vacate the applicant's premises described as Sub 27 of Lot 2725, Pietermaritzburg, KwaZulu-Natal, physically situate at 238 Albert Luthuli Street, Pietermaritzburg.

(c) The respondent shall pay the applicant's costs, including the costs of two counsel.

JUDGMENT

D. Pillay J:

[1] This application for ejectment is resisted with a counter-application to enforce an alleged renewal agreement, alternatively, for a stay of these proceedings pending arbitration. The applicant is the owner of the property described as sub 27 of Lot 2725, Pietermaritzburg, KwaZulu-Natal bearing the physical address 238 Albert Luthuli Street, Pietermaritzburg ('the premises'). On 28 February 2016, the respondent signed an agreement that resulted in a cession and assignment of the rights ('the cession') held by Tomdia Service Station CC ('Tomdia'), the former franchisee in terms of a franchise agreement ('the franchise'). The respondent occupied the premises under the cession and the franchise. The franchise expired on 31 December 2017 simultaneously terminating the cession. In terms of a 'whole agreement clause' in the cession, the parties agreed that the applicant had no legal obligation to acknowledge any rights of occupation beyond the cession. Despite notices to vacate, the respondent remains in occupation of the premises against the will of the applicant.

[2] Having established its ownership of the premises and the respondent's occupation of it, the applicant is entitled to an order for eviction,[1] unless the court finds that:

(a) the parties concluded an agreement renewing the respondent's right to occupy the premises; or

(b) arbitration under the Petroleum Products Act 120 of 1977 ('the PPA') or arbitration clause 20 of the franchise suspends this litigation.

[3] The respondent contended that the parties had agreed to conclude a renewal franchise agreement terminating on 28 February 2025. Allegedly, the applicant undertook to give the respondent a standard franchise agreement, upon receipt of which, the respondent would pay the brand fee in exchange for the extended tenure. But the applicant failed to do so. For its part, the applicant acknowledged that the parties had engaged in negotiations for a renewal but that no renewal agreement materialised because the respondent refused to pay what was variously referred to as the brand fee, key money or royalty.

---

[1] *Rhoode v De Kock & another* 2013 (3) SA 123 (SCA) para 23.

[4] The respondent bears the onus of proving the existence and terms of its renewal agreement. It has to allege and prove whether such agreement is written or oral, when, where and by whom it was concluded and produce a copy if one exists.[2] A comprehensive chronology is the starting point of my search for a renewal agreement. Manifestly from the ensuing correspondence, negotiations for a renewal of the franchise were conducted concurrently with the respondent's purchase of the cession of the franchise.

[5] On 22 July 2014, the respondent concluded an agreement to purchase the service station from Tomdia. On 22 December 2014, the respondent signed the applicant's letter approving it to be the new operator, subject to the conclusion of the cession.

[6] By way of email on 30 June 2015, the applicant forwarded to the respondent, a draft cession and surety agreement for the renewal of the franchise. Paragraph 12 of the draft provided for the upfront payment of the royalty of R3 250 000, in exchange for the renewal of the franchise on standard terms, for the balance of the tenure of five years from 1 March 2015, with an option to extend for an additional five years.

[7] Apologising for its delayed response, on 23 November 2015 the respondent, on advice, indicated its resolve not to sign the draft cession on account of the stipulation of the upfront royalty. It alleged that there had been no discussion about the upfront payment and insisted on concluding a franchise agreement for five years with an option of renewal for a further five years, without such payment.

[8] The applicant responded on 1 December 2015 reiterating the terms of its draft cession above. Additionally, the applicant advised the respondent that its agreement to pay the purchase price of R8m was excessive as the franchise had approximately three years to expire. As a result of this advice, the respondent had the purchase price reduced to approximately R6m.

---

[2] Rule 18(6) of the Uniform Rules of the High Court.

[9] On 22 February 2016, the applicant's attorneys wrote to the respondent reminding it that the franchise was conditional upon the respondent signing the cession existing between the applicant and Tomdia. Regarding a renewal of the franchise the applicant's attorneys advised as follows:

'Our client has been unable to reach an agreement with you on the aforesaid basis and we are instructed to inform you that our client hereby revokes, with immediate effect, any acceptance, agreement and/or offer of whatsoever nature, contained in any correspondence, document or communication to and from you, our client or any third party in regard to the cession or the franchise agreement and extension of the franchise agreement.'

[10] It continued in the letter to remind the respondent once again of the expiry of the franchise and demanded that the respondent comply with the conditions of the acceptance of its application for the Caltex franchise by returning the completed and signed deeds of suretyship and the cession. Eventually, on 28 February 2016, after a delay of more than a year and a half, the applicant, Tomdia and the respondent, concluded the cession with retrospective effect to 1 March 2015. The cession incorporated the franchise which was to expire on 31 December 2017.

[11] By letter of 29 February 2016, the respondent's attorneys undertook to deliver the signed cession and franchise by close of business that day. However, their letter also recorded that the respondent had advised that the applicant had agreed to grant the respondent tenure for five years with an option to renew. Significantly that letter made no mention of the key money of R3 250 000.

[12] On 30 June 2017, the applicant again reminded the respondent that the franchise would terminate on 31 December 2017. The respondent's attorneys responded on 26 July 2017, dismissing that letter as 'nonsensical', because, they alleged, the applicant had concluded an agreement granting a franchise for five years renewable for a further five years. As for the upfront payment, the respondent's attorneys indicated that the respondent was willing to pay that on signature of a franchise agreement on its '5+5 year' terms. The respondent's attorneys proceeded to demand that the applicant provide such a franchise agreement for the respondent's signature.

[13] In its letter of 5 October 2017, the applicant's attorneys 'strongly denied' the contents of the respondent's attorneys' letter of 26 July 2017 and referred the respondent's attorneys to their letter of 22 February 2016. They reminded the respondent's attorneys that the parties were unable to reach agreement and had requested an unequivocal undertaking by 12 October 2017 that the respondent would vacate the premises before 1 January 2018, failing which, the applicant intended to institute eviction proceedings.

[14] On 22 December 2017, the respondent referred the matter for arbitration to the controller of petroleum products ('the controller'). On 29 December 2017, the applicant's attorneys advised the respondent's attorneys of the termination of the franchise and requested the respondent to vacate the property by 31 December 2017 when the cession and franchise expired.

[15] On 12 January 2018, the respondent's attorneys acknowledged the applicant's attorneys' letter of 8 January 2018 advising them that the respondent was unlawfully occupying the premises and seeking an undertaking that it would desist from operating there and using the applicant's equipment and trademark pending this litigation. The respondent's attorneys merely noted the contents of the letter. Maintaining its position that the franchise expired on 31 December 2017, the applicant launched this application on 15 January 2018.

[16] The principal relief sought by the respondent in its counter-application was an order directing the applicant to provide to the respondent for its signature, a franchise agreement substantially the same as Chevron's Standard Franchise Agreement in use in 2015 and 2016, as well as the following declarators: that the respondent enjoyed the right to continue conducting business on the premises for five years from 1 March 2015, with the right to renew until 1 March 2025; that the respondent should pay the applicant rent and other fees due by a franchisee calculated on the basis of the standard Chevron Agreement; that in terms of s 51 of the Consumer Protection Act 68 of 2008, the applicant was prohibited or not entitled to charge a brand fee, royalty or key money in consideration for a franchise agreement with the respondent; that such stipulation was void and severable from the remaining terms of the

franchise agreement between the parties; alternatively, that upon production of the written franchise agreement the respondent should pay the applicant the brand fee in the sum of R3 250 000. The respondent also sought an order dismissing or staying the application as it had referred the matter to arbitration in terms of s 12B of the PPA and arbitration clause 20 of the franchise.

[17] I will investigate the existence of the alleged renewal agreement before considering the referral to arbitration under s 12B of the PPA and the request for arbitration under clause 20 of the franchise.

[18] From the outset, engaging with the respondent was 'a problem' which the respondent itself acknowledged. The respondent failed to comply with the conditions of the cession. After protracted discussions and negotiations, on 28 February 2016, the respondent, on advice from its attorneys, eventually signed the cession without prejudice to its right to rely on a '5 + 5 year' renewal, simply to enable it to continue in business until the expiry of the franchise.

[19] No renewal agreement could have come into force. On the respondent's own version it could not make payment of the brand fee because the franchise agreement that the respondent had hoped to conclude with the applicant

'could have included clauses which might have deprived the respondent of disposing of its goodwill or the business with the consequence that it might end up losing its entire investment, in circumstances where it, in effect, had nothing to cede'.

Despite its 'nagging', no renewal franchise agreement on the respondent's terms ever materialised from the applicant. Following its demand of 26 July 2017, the respondent took no steps to enforce its alleged rights until its referral to arbitration.

[20] Contrary to the submission by counsel that it was common cause that 'the respondent would pay to the applicant the upfront brand fee' this was not borne out by the evidence. In fact, the submission was contradicted by the respondent's prayer in its conditional counter-application for an order declaring that the applicant was prohibited from or not entitled to, charge a brand fee in consideration for a franchise agreement and that such stipulation was void or severable from the remaining terms

of the franchise. The alternative remedy directing the respondent to pay the brand fee amounts to a belated tender to fulfil its obligation under the purported renewal agreement. This too fortifies the applicant's case that no renewal agreement extending the franchise was concluded because the respondent failed to fulfil its obligation to pay the brand fee that the applicant insisted upon.

[21] In the circumstances I find that the parties did not conclude any agreement to renew the franchise beyond 31 December 2017.

[22] With regard to arbitration under s 12B of the PPA, the issue is the impact of the referral on this litigation and whether, on a sensible interpretation[3] of the PPA applied to the facts of this case, a stay of the litigation would be justified. As for the proper interpretation of the PPA, in *The Business Zone 1010 CC t/a Emmarentia Convenience Centre v Engen Petroleum Ltd & others,*[4] the Constitutional Court ('CC') endorsed the jurisprudence that the words in a statute must be construed in accordance with their ordinary grammatical meaning, avoid an absurdity, and 'must be interpreted purposively and be properly contextualised'.

[23] Arbitration under s 12B of the PPA strikes a balance between processes that are compulsory and others that allow for flexible self-regulation. Making this distinction helps with analysing the powers of the arbitrator and therefore, with distinguishing issues for arbitration from litigation.

[24] Arbitration is triggered once the controller receives a request from a licenced retailer alleging an unfair or unreasonable contractual practice by a licensed wholesaler or *vice versa.* The controller has little discretion but to notify the parties to submit the matter to arbitration.[5] The threshold to invoke arbitration is pitched as low

---

[3] LM Du Plessis 'Statute Law and Interpretation' in Joubert and Farris (eds) *Lawsa* (2ed) vol 25(1) (31 March 2011) para 342; *FirstRand Bank Ltd v KJ Foods CC* 2017 (5) SA 40 (SCA) para 75.
[4] *The Business Zone 1010 CC t/a Emmarentia Convenience Centre v Engen Petroleum Ltd & others* 2017 (6) BCLR 773 (CC) para 46.
[5] See s 12B where it states: 'The Controller of Petroleum Products may on request by a licensed retailer alleging an unfair or unreasonable contractual practice by a licensed wholesaler, or *vice versa*, require, by notice in writing to the parties concerned, that the parties submit the matter to arbitration.'

as a mere allegation of unfairness or unreasonableness.[6] The decision to refer a matter to arbitration is voluntary but the obligation to attend and participate in it is compulsory if a party wishes to avoid adverse consequences.

[25] The parties may choose their arbitrator and agree on the rules of the arbitration.[7] If they fail to agree on either of these issues, the controller must appoint a suitable arbitrator who will then determine the rules of arbitration.[8] Such rules are merely procedural to lay the groundwork for how the arbitration will be conducted.

[26] Under s 12B(4) of the PPA, the substantive powers of the arbitrator are limited as follows:

'(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.'

Subsection (4)*(a)* defines the scope of the arbitrator's powers within which the referring party must frame the terms of reference. Considering that any party can refer a matter to arbitration, it should be permissible for the parties to also agree to the terms of reference. The power of the arbitrator is to determine whether contractual practices are unfair or unreasonable and to correct them.[9] It is limited by 'contractual practices' and broadened by an expansive, purposive interpretation of 'unfair or unreasonable'.[10]

---

[6] *Business Zone* fn4 para 62.

[7] Section 12B(2) states: '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.'

[8] Section 12B(3) states: '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.'

[9] *Business Zone* fn4 para 63.

[10] *Business Zone* fn4 paras 46, 59-60, and 93.

[27] Although the range of corrective measures seems open-ended, it will be bounded by all the principles that constrain adjudicators' decisions generally, not least the presumption of legality of legislation (*omnia praesumuntur rite esse acta*)[11] and rationality as an incidence of the rule of law.[12] Additionally, overarching notions of justice, reasonableness, limitations imposed by other rights, such as freedom and individual autonomy to contract, decisional efficacy, effectiveness and enforceability, and so on, must inform the arbitrator's award. So too must the prohibition against forum-shopping.

[28] Implicit in the scope of the arbitrator's powers must be the presumption that the legislature, acting rationally and reasonably in designing a bespoke dispute resolution system for the petroleum industry, had no intention to encourage forum-shopping by duplicating or bestowing powers of other institutions like the courts and chapter nine institutions upon arbitration under s 12B, and *vice versa*. Recently the Supreme Court of Appeal reminded '[f]orum-shopping is to be discouraged'.[13] The CC expressed its disapproval thus:

'Forum-shopping between these two different systems of law applied in different institutions will disappear.' [14]

[29] Demarcating the jurisdiction and powers of s 12B arbitration will depend, case by case, on how parties, in particular a referring party, frame the terms of reference. The voluntary, self-regulatory aspects of arbitration allow the parties to include or exclude any matter in the terms of reference for the arbitrator's determination. If the parties cannot agree, then the jurisdiction and powers of the arbitrator would be governed by s 12B(4) of the PPA. Consequently, the CC observes:

'Section 12B arbitration presents an additional route for licensed retailers and wholesalers alike to have their disputes adjudicated quicker within rules and processes of their own design.'[15] (Footnote omitted)

---

[11] DT Zeffertt and AP Paizes (formally Hoffmann and Zeffert) *The South African Law of Evidence* 3ed (2017) at 225-226; Lawsa fn6 para 342; *Boddington v British Transport Police* [1998] 2 All ER 203 at 210; see also *Merafong Demarcation Forum & others v President of the Republic of South Africa & others* 2008 (10) BCLR 969 (CC) paras 260 and 284.

[12] *AB & another v Minister of Social Development* 2017 (3) SA 570 (CC) para 283.

[13] *Motor Industry Staff Association v Macun NO & others* 2016 (5) SA 76 (SCA) para 20.

[14] *Business Zone* fn4 para 56.

[15] *Business Zone* fn 7 para 58.

[30] *Business Zone* was the CC's first judgment on the interpretation of s 12B 'in order to establish legal certainty in a large and regulated sector of the economy'.[16] Given the unequal bargaining power in the petroleum industry and the standard for referral to arbitration being pitched as a mere allegation of 'unfair or unreasonable contractual practice', the CC found a ready substratum in the jurisprudence of the Labour Relations Act 66 of 1995 ('the LRA') and its 1956 predecessor. Labour jurisprudence garnered meaning for the words unfair, unreasonable and practice as it evolved from about 1981.[17] This comparison led the CC to conclude that 'the fairness required in our labour law jurisprudence is the same as the fairness in section 12B'.[18] And further, to observe that the unfair labour practice remedy included reinstatement of a contract of employment either by a court or tribunal.[19] Similarly the Rental Housing Act 50 of 1999 ('the RHA') imported an unfair practice jurisprudence to rebalance the relationship between powerful landlords and their vulnerable tenants.[20]

[31] The LRA and the PPA regulate arbitration conducted under those statutes respectively. Arbitrators have no more power than what the statutes or the parties' agreements bestow upon them. Thus, whereas the LRA allows arbitrators to award reinstatement for unfair breaches of employment contracts under strictly prescribed conditions, no power of reinstatement is expressly prescribed in the PPA. It remains to be seen whether such a power can be interpolated.

[32] That an arbitrator has powers of determining the fairness and reasonableness of contracts is commendable insofar as the context-specific considerations of the petroleum industry would inform the meaning to be given to unfair and unreasonable contractual practices. Whether an arbitrator's powers goes beyond declaring a practice to be unfair or unreasonable to creating new contracts for the parties, is doubtful in view of the constitutional right to individual freedom to contract; after all,

---

[16] *Business Zone* fn4 para 36.
[17] *Business Zone* fn4 paras 47-51.
[18] *Business Zone* fn4 para 49.
[19] *Business Zone* fn4 para 50.
[20] *Business Zone* fn4 paras 51 and 53.

the courts have no powers to create contracts for parties; nor can they refuse to give effect to agreements if, in the opinion of the court, they are unfair or unreasonable.[21]

[33] A push-pull tension between freedom and constraint similar to subsection (4)*(a)* is also built into subsection (4)*(b)*. The arbitrator's apparently wide power 'to compensate any party' is restricted to 'frivolous or capricious' allegations and only against those who make them to give rise to the arbitration. An arbitrator is expressly allowed to impose a compensation award against a party for frivolous or capricious referrals. In the absence of any similar power to award compensation as a substantive remedy for unfair or unreasonable contractual practices,[22] it would be a matter of interpretation of the PPA and the facts of a particular case, whether an award of compensation would be an effective remedy to correct a practice. This is confirmed in the CC's holding that 'the arbitrator's remedial powers can go no further than correcting the contractual practice in question.'[23]

[34] Whether arbitration becomes the process of choice instead of adjudication as the CC seems to anticipate,[24] will depend very much on co-operation and efficiencies within the industry. Ultimately the degree of consensus about the choice of arbitrator, the rules of arbitration and the terms of reference for arbitration will determine the usefulness and integrity of the s 12B dispute system design.

[35] An arbitrator's award is final and binding on the parties and may include any order as to costs.[25] Whatever the powers of the arbitrator are, be they agreed or determined by interpretation, they have to be carefully crafted given the finality and enforceability of valid arbitration awards.

[36] *Business Zone* is distinguishable from this case on several fronts. The CC interpreted s 12B in the context of an application to review the decisions of the

---

[21] *Barkhuizen v Napier* 2007 7 BCLR 691 (CC); 2007 5 SA 323 (CC) par 82); Brisley v Drotsky supra pars 22 93; *Afrox Healthcare Bpk v Strydom* 2002 4 All SA 125 (SCA).
[22] *Business Zone* fn paras 62-63.
[23] *Business Zone* fn para 92.
[24] *Business Zone* fn4 para 56.
[25] Section 12B(5) states: '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 any order as to costs to be borne by one or more of the parties concerned.'

controller and the Minister of Minerals and Energy not to refer an alleged unfair or unreasonable contractual practice to arbitration. *Business Zone* also identified three distinct claims for unfair or unreasonable contractual practices. The first related to access points to the site, the second to Engen's failure to consent to certain alterations and the third to Engen's conclusion of the lease agreement with a chicken franchisee during the subsistence of its agreement with Business Zone without the latter's consent. None of these claims involved ejectment or declarators to establish a renewal agreement. Nor did the CC order a stay of the litigation pending in the high court.

[37] Arbitration under s 12B does not automatically suspend litigation. An agreement to arbitrate entitles a party to apply to the court for a stay of litigation. Section 12B arbitration is regulated under the PPA; it is not one arising from an arbitration agreement governed by the Arbitration Act 42 of 1965 which prescribes the procedure for a stay of litigation. Nevertheless, courts may stay litigation pending the outcome of a s 12B arbitration, subject to such terms and conditions as may be considered just in the general exercise of their powers to regulate their own process.[26] What s 12B arbitration is not, is a stratagem to delay litigation, or to have two bites at the cherry. The finality of arbitration awards and the risk of punitive cost awards aim to discourage abuse of arbitration.[27]

[38] *Future Phambili Petroleum (Pty) Ltd v Chamdor Service Station CC*[28] is also distinguishable. In that case eviction emanated from on-going disputes between the parties, which could not be separated from the issues referred to arbitration. Furthermore, the parties were bound by an agreement to refer to arbitration and there was 'no harm' in staying the proceedings to give effect to s 12B.[29]

[39] In this case, in its referral for arbitration in terms of s 12B, the respondent complained of the applicant being unfair and unreasonable in various respects,

---

[26] Section 173 of the Constitution.
[27] *Business Zone* fn4 para 58.
[28] *Future Phambili Petroleum (Pty) Ltd v Chamdor Service Station CC* (82577/2015) [2017] ZAGPPHC 1206 (10 November 2017).
[29] *Future Phambili* fn30 paras 37 and 41.

ranging from the stipulation of the royalties to failing to provide the respondent with ‘the balance of the franchise agreement ceded to it’. Nowhere in the referral did the respondent indicate what findings and remedies it sought from the arbitration. Nor did the respondent challenge the applicant’s ownership of the premises, request an award refusing or suspending its eviction from the premises, declaring that the parties concluded a renewal agreement, or, directing the parties to conclude one. In the absence of a request to the arbitrator in the terms of reference, to pronounce on the applicant’s rights of ownership of the premises and to evict the respondent who occupies against the applicant’s will, no findings or remedies on these aspects can be anticipated from the arbitration. Conversely, nothing in my judgment trenches on the arbitrator’s powers to determine the unfairness and unreasonableness of the royalty stipulations and other matters falling within the scope of the arbitrator’s powers.

[40] My approach to the referral is that s 12B arbitration is a discrete process, parallel to this litigation. I have not been addressed on any authority that would result in the award trumping the order in this application for restoration of a real right to its lawful owner. In the circumstances, I dismiss the application for a stay pending the outcome of the s 12B referral to arbitration.

[41] The respondent relied on clause 20 of the franchise which provided for negotiation, mediation and expedited arbitration should ‘any dispute arise between the parties concerning this agreement’ (my underlining). ‘This’ agreement referred to the franchise about which there was no dispute. The dispute turned on the respondent’s alleged renewal franchise agreement, which, as I have found above, never materialised. The application for a stay on this ground must also be dismissed.

[42] The respondent’s reliance on the Consumer Protection Act was misplaced as that act was not available for the protection of the respondent as a juristic entity with a turnover that exceeded the statutory minimum prescribed in that act. Counsel for the respondent correctly abandoned this point.

[43] As for costs, this area of law is novel; awarding costs on a punitive attorney and client scale could have a chilling effect on the development of the jurisprudence. Furthermore, the aims of the PPA and s 12B in particular, encourage inclusivity by levelling the disparities amongst participants in the petroleum industry. An award of costs that includes the costs of two counsel is sufficiently punitive.

[44] I grant the following order:

(a) The main application succeeds and the counter-application is dismissed.

(b) The respondent is directed to forthwith vacate the applicant's premises described as Sub 27 of Lot 2725, Pietermaritzburg, KwaZulu-Natal, physically situate at 238 Albert Luthuli Street, Pietermaritzburg.

(c) The respondent shall pay the applicant's costs, including the costs of two counsel.

_____

D. Pillay J

APPEARANCES

Counsel for the applicant	:	G. Harpur SC
Instructed by	:	Norton Rose Fullbright SA Inc Tel: 031 582 5642 Ref: ALL1218 c/o Venns Attorney 033 355 3100
Counsel for the respondent	:	J. Marais SC
Instructed by	:	Kobus Swart & Company Tel: (031) 303 3597 Ref: KS/AH/01/Bentz
Date of Hearing	:	15 June 2018
Date of Judgment	:	10 July 2018

(Handed down electronically with parties' consent)