



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 09/16

In the matter between:

**THE BUSINESS ZONE 1010 CC t/a
EMMARENTIA CONVENIENCE CENTRE**

Applicant

and

ENGEN PETROLEUM LIMITED

First Respondent

**CONTROLLER OF PETROLEUM
PRODUCTS**

Second Respondent

MINISTER OF MINERALS AND ENERGY

Third Respondent

Neutral citation: *The Business Zone 1010 CC t/a Emmarentia Convenience Centre v Engen Petroleum Limited and Others* [2017] ZACC 2

Coram: Mogoeng CJ, Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mbha AJ, Mhlantla J, Musi AJ and Zondo J

Judgments: Mhlantla J (unanimous)

Heard on: 24 August 2016

Decided on: 9 February 2017

Summary: Petroleum Products Act 120 of 1977 — interpretation of section 12B — single act constitutes a contractual practice under section 12B — decision of Controller of Petroleum Products and Minister of Minerals and Energy reviewable in terms of section 6 (2) (d) of Promotion of Administrative Justice Act 3 of 2000 — referral by the High Court confirmed.

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Gauteng Division, Pretoria):

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Supreme Court of Appeal is set aside and replaced with the following:
“The appeal is dismissed with costs including the costs of two counsel.”
4. Engen Petroleum Limited is to pay costs in this Court, including costs of two counsel, where applicable.

JUDGMENT

MHLANTLA J (Mogoeng CJ, Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mbha AJ, Musi AJ and Zondo J concurring):

Introduction

[1] This is an application for leave to appeal against a judgment and order of the Supreme Court of Appeal.¹ The application concerns the review of decisions by the Controller of Petroleum Products (Controller) and the Minister of Minerals and Energy (Minister) not to refer an alleged unfair or unreasonable contractual practice by Engen Petroleum Limited (Engen) to arbitration in terms of section 12B(1)² of the

¹ *Engen Petroleum Limited v The Business Zone 1010 CC t/a Emmarentia Convenience Centre*) [2015] ZASCA 176 (SCA judgment).

² Section 12B(1) empowers the Controller to refer an alleged unfair or unreasonable contractual practice performed by a licensed retailer or wholesaler of petroleum products to arbitration. Section 12B is quoted in full at [45].

Petroleum Products Act³ (Act). This application in the main is about the proper interpretation of section 12B.

[2] The applicant is The Business Zone 1010 CC t/a Emmarentia Convenience Centre (Business Zone) and the first respondent is Engen. Business Zone is a licensed retailer and Engen is a licensed wholesaler of petroleum products, each as contemplated by the Act. The second respondent is the Controller, and the Minister is the third respondent. They abide the decision of this Court.

Background

[3] During 2005, Business Zone purchased a fuel and service station business situated at the corner of Tana Road and Barry Hertzog Avenue, Emmarentia, Johannesburg. Business Zone then concluded an agreement with Engen for the lease and operation of a service station. This agreement was for a period of three years. In terms of this agreement, Business Zone agreed to conduct the business of selling and distributing petroleum products supplied exclusively by Engen under its brand name. Pursuant to the conclusion of the agreement, Business Zone took occupation of the premises and began conducting its business.

[4] During April 2008, the parties concluded a second lease and operation of service station agreement (lease agreement). Then, on 16 February 2010, the parties concluded an addendum to the lease agreement (addendum). In terms of the addendum, Engen made certain undertakings. In particular, Engen would provide Business Zone with premises in accordance with the site development plan annexed to the addendum and two additional access points to the site in accordance with the provisions of the site development plan.

[5] On 20 September 2010, Business Zone wrote to Engen advising that the two additional access and entry points on Barry Hertzog Avenue and Crocodile Road were

³ 120 of 1977.

not provided in accordance with the addendum. Business Zone called upon Engen to remedy this breach.

[6] Engen did not respond to Business Zone's demand but, in a letter dated 12 October 2010, claimed that Business Zone had breached the addendum. It averred that Business Zone had, in contravention of the law or contrary to Engen's guidelines, effected certain alterations to the leased premises without its prior written consent. Engen accordingly called upon Business Zone to remedy the breach within seven days. Paragraph 4 of the letter stated that failure to comply with the demand within the stipulated time would entitle Engen to cancel the lease agreement.

[7] On 15 October 2010, Business Zone responded to Engen's letter and conceded that installations had been implemented without Engen's prior written consent. However, Business Zone averred that Engen had been aware of the installations and that reasons for the installations had been furnished. Indeed, Business Zone provided a detailed explanation in respect of the installations and in the process sought Engen's written consent for the installations.

[8] Engen ignored Business Zone's letter. Instead, on 22 October 2010, Engen addressed another letter to Business Zone. It referred to its earlier letter and stated that Business Zone had failed to comply timeously with the requirements therein. Engen stated that Business Zone's conduct constituted a repudiation of the lease agreement, and noted that Engen had accepted the repudiation. Engen accordingly advised Business Zone that, as a result, the lease agreement had been cancelled.

[9] Business Zone immediately responded to Engen's second letter. It recorded that it was of the view that Engen's conduct amounted to an unfair or unreasonable contractual practice. Business Zone accordingly notified Engen that it would make a formal referral for adjudication to the Department of Mineral Resources and Energy under section 12B(1) of the Act.

[10] Notwithstanding the purported cancellation of the lease agreement, Engen continued to supply Business Zone with petroleum products under an interim arrangement until 24 March 2011. On that date, Engen gave Business Zone 48 hours' notice of its intention to terminate the supply of petroleum products. It also terminated Business Zone's rights under the lease agreement to sell Woolworths products from the leased premises.

[11] On 30 March 2011, Engen again wrote to Business Zone stating that it had become apparent that Business Zone had started storing and selling petroleum products purchased from a source other than Engen. The letter noted that this sale of foreign products constituted passing-off and an infringement of Engen's marks. Engen then purported to cancel the lease agreement for a second time, on the basis of Business Zone's sale of foreign products.

[12] On 1 April 2011, Business Zone sought relief from the High Court of South Africa, Gauteng Local Division,, Johannesburg (Johannesburg High Court). It obtained an interdict pending its referral under section 12B (1) of the Act. The interdict directed Engen to continue supplying Business Zone with petroleum products on standard terms and conditions in accordance with the previous practice between the parties. Engen was further ordered to cease interfering with the arrangement between Business Zone and Woolworths.

Section 12B(1) Referral

[13] On 4 April 2011, Business Zone lodged its request for a referral to arbitration with the Controller under section 12B (1) of the Act. In its request, Business Zone set out the background of the matter and emphasised the problems it had experienced. In particular, Business Zone noted that Engen's conduct had worsened since 2009, when Business Zone had referred a different dispute to arbitration.⁴ Business Zone

⁴ On 17 June 2009, Business Zone requested the Controller to refer certain allegedly unfair and unreasonable contractual practices to an arbitrator. Adv. Kuper SC was thereafter appointed as an arbitrator to determine the dispute between Business Zone and Engen. On 4 April 2011, that arbitration had not been finalised.

contended that Engen had since made every effort to cancel the lease agreement between the parties on spurious grounds. Business Zone accordingly submitted three claims (A, B and C) alleging that Engen's conduct amounted to unfair and/or unreasonable contractual practices.

[14] In Claim A, Business Zone averred that under the addendum, Engen was obliged to provide it with the premises in accordance with the site development plan annexed to the addendum. Notwithstanding renovations having been completed in August 2010 and the site development plan obliging Engen to provide two additional access points to the site, Engen had failed to provide the access points. Thus, Engen breached its obligations under the addendum. Business Zone also averred that Engen had failed to take any steps to remedy the situation and persisted in its failure to provide the necessary access points. This, Business Zone argued, fell within the bounds of section 12B(1) of the Act.

[15] Claim B concerned Engen's failure to give consent to the improvements effected by Business Zone as requested on 15 October 2010. Under the addendum, all improvements made to the site were subject to Business Zone obtaining Engen's prior written consent. Although Business Zone sought Engen's consent for improvements only after Business Zone had in fact effected the improvements, Business Zone argued that an implied term of the addendum was that Engen's consent would not be unreasonably withheld. It alleged that Engen's failure to consent to its alterations, which were necessary for Business Zone to comply with its obligations under the addendum, was unfair and unreasonable.

[16] Claim C concerned Engen's conclusion of a lease agreement with a Kentucky Fried Chicken (KFC) franchisee. Business Zone alleged that the negotiation or, alternatively, the conclusion of this lease agreement with the franchisee and the collection of rent from the franchisee during the subsistence of the agreement between Business Zone and Engen (without the prior consent of Business Zone) was unfair and unreasonable.

[17] Engen, in its response, disputed the existence of the contract relied upon by Business Zone. It contended that an arbitrator could not determine a dispute between the parties when one of the parties alleged that the contract had been cancelled. Furthermore, an arbitrator could not adjudicate a dispute where the validity of the cancellation of the contract was contested. Engen argued that the arbitrator had no jurisdiction to determine the validity of the cancellation of the contract, because doing so would amount to determining his or her own jurisdiction, which would be impermissible. In any event, the cancellation of a contract did not amount to an unfair or an unreasonable contractual practice.

[18] Engen went on to argue that a referral to arbitration would result in a conflict of jurisdiction between the arbitrator, on the one hand, and the courts, on the other. In this case, Engen had launched an application in the Johannesburg High Court where it sought the cancellation of the lease agreement on the grounds that Business Zone was dealing in foreign products. That issue, including the validity of the cancellation of the lease agreement, was pending before the Johannesburg High Court. Engen contended that a pronouncement by that Court, that the cancellation of the lease agreement was valid, would render any arbitration academic.

Response of the Controller and the Minister

[19] The Controller refused Business Zone's section 12B request to refer the dispute to arbitration. He noted that the agreement, which formed the basis of Business Zone's allegations of an unfair or an unreasonable contractual practice, had been cancelled. He then took the view that "in the absence of an existing valid Agreement of Lease and Operation of Service Station, [Business Zone's] request for arbitration does not satisfy the minimum requirements in terms of section 12B of the Act". He also stated that Business Zone's "allegations of unfair or unreasonable contractual practice are centred around the agreements which are currently under consideration by the [Johannesburg] High Court and as such, the matter is therefore *sub-judice* and can no longer be considered for arbitration". The Controller thus

concluded that Business Zone’s request failed to meet the “minimum requirements” in section 12B(1) for a referral to be made.

[20] Aggrieved by the decision, Business Zone appealed to the Minister in terms of section 12A of the Act.⁵ The Minister dismissed Business Zone’s appeal on the same grounds as the Controller. The Minister found that “section 12B of the Act may only be applied in cases where there is an existing or continuing contract between the parties”. The Minister added that because Engen had cancelled the contract and the validity of its cancellation was pending before the Johannesburg High Court, a referral to arbitration would not be proper. Further, a single juristic act intended to terminate an agreement could not in law constitute or be characterised as an unfair or unreasonable contractual practice for purposes of section 12B.

Pretoria High Court

[21] As a result of the Minister’s dismissal of the appeal, Business Zone brought an application in the High Court of South Africa, Gauteng Division, Pretoria (Pretoria High Court) for the review of the Controller’s and the Minister’s decisions. The application, which was opposed by Engen, came before Prinsloo J.

[22] The Pretoria High Court⁶ dismissed an argument by Engen that the decisions of the Controller and Minister were preliminary in nature and thus did not amount to

⁵ Section 12A of the Act provides:

- “(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.”

⁶ *Business Zone 1010 CC t/a Emmarentia Convenience Centre v Controller of Petroleum Products* [2014] ZAGPPHC 257; [2014] 3 All SA 94 [Pretoria High Court Judgment].

“administrative action” capable of review in terms of Promotion of Administrative Justice Act⁷ (PAJA).⁸ The Court relied on this Court’s decision in *Viking Pony*⁹ that demanded that regard be had to the facts of each case in determining the existence of “administrative action”. It continued to hold that the statutory context of section 12B made it apparent that the Controller’s decision amounted to a final pronouncement.

[23] Regarding the interpretation of section 12B, the Pretoria High Court held that section 12B contained an “extremely low” referral threshold. It was not the place of the Controller to decide “that there is no longer a valid agreement between Business Zone and Engen” and that “the agreement . . . [had] been cancelled”. The Court concluded that it was procedurally more appropriate that an arbitrator be appointed to adjudicate a section 12B issue and make a decision so that the pending Johannesburg High Court proceedings could proceed.

[24] The Pretoria High Court rejected Engen’s reliance on *Tlhamo*¹⁰ on the basis that, in that case, the lease terminated by effluxion of time. There was no dispute as to the lease’s cancellation. The Judge relied on this Court’s decision in *Maphango*¹¹ and analogous principles of labour law to conclude that a single act may amount to a “practice”. He concluded that *Tlhamo*, on this point, had been wrongly decided. Accordingly, the Pretoria High Court upheld Business Zone’s application with the result that the decision of the Controller was reviewed and set aside. The Court ordered the substitution of the decision of the Controller with a referral to arbitration in terms of section 12B.

⁷ 3 of 2000.

⁸ Engen relied on *City of Cape Town v Hendricks* [2012] ZASCA 90; 2012 (6) SA 492 (SCA) at 495C-D in support of its proposition.

⁹ *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd* [2010] ZACC 21; 2011 (1) SA 327 (CC); 2011 (2) BCLR 207 (CC) (*Viking Pony*).

¹⁰ *Engen Petroleum Ltd v Tlhamo Retail (Pty) Ltd* 2010 JDR 0958 (GSJ) (*Tlhamo*).

¹¹ *Maphango v Aengus Lifestyle Properties (Pty) Ltd* [2012] ZACC 2; 2012 (3) SA 531 (CC); 2012 (5) BCLR 449 (CC) (*Maphango*).

Supreme Court of Appeal

[25] Engen appealed to the Supreme Court of Appeal. In a judgment penned by Ponnann JA, the Supreme Court of Appeal rejected the Pretoria High Court's interpretation of section 12B. The Supreme Court of Appeal held that section 12B could not confer jurisdiction on an arbitrator to decide disputes where a contract between the parties had been terminated. The Supreme Court of Appeal further held that the interpretation proffered by Business Zone would result in a concurrency of jurisdiction and with the potential to cause anomalous consequences.

[26] The Supreme Court of Appeal disagreed with the finding of the Pretoria High Court that the Controller should decline a request "only in the rarest and most exceptional of circumstances" and held that this amounted to an unnecessary fettering of the Controller's discretion. As for the arbitrator, the Supreme Court of Appeal confirmed the interpretation of section 12B adopted in *Tlhamo*. It held that the only jurisdiction conferred on an arbitrator was "to determine whether an ongoing practice in the performance of an existing agreement or contract is unfair or unreasonable".

[27] In support of its finding that the Controller could validly consider the existence of an underlying contractual relationship, the Supreme Court of Appeal contrasted the nature of the arbitrator's remedial powers under subsections 12B(4)(a) and 12B(4)(b). The remedial powers under the former being corrective, the latter compensatory. It held that a corrective jurisdiction implied that any relief granted by an arbitrator had to be against the backdrop of an ongoing contractual relationship. It was impermissible for an arbitration to occur after the severing of this relationship.

[28] The Supreme Court of Appeal held that the phrase "unfair or unreasonable contractual practice" should also derive meaning from its context, namely the Act's regulation of the bulk supply of petroleum products. Only those aspects of the contractual relationship relating to the supply of bulk petroleum products can be subjected to arbitration under section 12B. The Court noted that Business Zone's complaints related to matters beyond the supply of petroleum products, extending into

the terrain of approval of the Johannesburg Roads Agency, and the Woolworths and KFC franchises. Accordingly, the Controller could not properly exercise jurisdiction over a dispute between Engen and Business Zone in relation to the contractual provisions that involve and affect those interests, let alone refer these disputes to arbitration.

[29] In the result, the Supreme Court of Appeal concluded that as *Tlhamo* was correctly decided, there was no error of law on the part of the Minister and the Controller when they exercised their discretions. The Court therefore upheld Engen's appeal, set aside the decision of the Pretoria High Court and dismissed the review.

Submissions in this Court

[30] Business Zone argues that the real significance of section 12B is the standard of equity it imposes on the parties. When a dispute is referred to arbitration, the arbitrator determines the contractual practices by what is fair and reasonable and not merely by the terms of the contract. It further argues that the ordinary meaning of a "contractual practice" includes cancellation by one of the parties acting in accordance with the contract and the common law. Business Zone further relies on this Court's finding in *Maphango* that a single act, including the termination of a contract, may constitute a "practice".¹² In this regard, Business Zone seeks a reinstatement of the Pretoria High Court's order, including its decision to substitute the decision of the Controller with a referral to arbitration in terms of section 12B.

[31] On the other hand, Engen submits that a single act of cancellation of a contract between a licensed wholesaler and a licensed retailer cannot constitute a contractual practice for the purposes of section 12B. Engen points out that the statutory framework applicable in *Maphango* is distinguishable from this matter. It maintains

¹² *Maphango* above n 11 at para 57.

that that decision specifically related to the provisions of the Rental Housing Act¹³ (RHA) and no similar provisions under the Act suggest a similar position.

[32] Furthermore and in the alternative, Engen submits that, if a separate dispute over the termination of a contract between a licensed wholesaler and a licensed dealer is pending before a High Court, it would be inappropriate to refer any alleged unfair and unreasonable contractual practice for determination under section 12B.

[33] Engen highlights that the request for arbitration did not take issue with Engen's second cancellation on 30 March 2011, which was based on Business Zone's storage and sale from the premises of foreign products. Accordingly, the request concerned alleged disputes in terms of a contract that Engen had cancelled in circumstances which would be beyond the jurisdiction of any arbitrator to arbitrate. Primarily, these disputes related to the Woolworths and KFC outlets, and road access to the site and not the supply of petroleum products. Lastly, Engen submits that substitution of the Controller's decision could not have been justified in light of the pending Johannesburg High Court proceedings, the patently spurious nature of Claims A and C, and that the claims concerned a wide range of issues that only tenuously related to the supply of petroleum products.

Jurisdiction and Leave to Appeal

[34] This Court is empowered to decide matters of a constitutional nature, and any other matter that raises an arguable point of law of general public importance that ought to be considered by it.¹⁴ In addition, it must be in the interests of justice to grant leave.

[35] This matter raises a constitutional issue as it concerns the exercise of public power pursuant to empowering legislation. This power ultimately stems from the

¹³ 50 of 1999.

¹⁴ See section 167(3)(b) of the Constitution.

Constitution and a determination of its ambit falls within this Court's jurisdiction. Section 33(1) of the Constitution guarantees that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. This Court has held that the exercise of all public power must comply with the Constitution¹⁵ and, therefore, any dispute in relation to the exercise of such power falls within this Court's jurisdiction.

[36] It is in the interests of justice that this Court makes a final determination on this matter in order to establish legal certainty in a large and regulated sector of the economy that is currently uncertain as a result of conflicting lower-court decisions on the interpretation of section 12B. There are also reasonable prospects of success. Therefore, leave to appeal should be granted.

Issues

[37] This Court has to determine the following issues:

- (a) Do the decisions of the Controller and the Minister amount to administrative action for purposes of PAJA?
- (b) If so, are these subject to review under PAJA?
- (c) What is the proper interpretation of section 12B of the Act?
- (d) Can a singular act of cancellation of a contract amount to a "contractual practice" in the context of section 12B of the Act?
- (e) What is the effect, if any, of Engen's purported "second cancellation" on the Controller's ability to refer Business Zone's complaint under section 12B of the Act?
- (f) What is an appropriate remedy?

¹⁵ *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC).

Nature of the decisions of the Controller and the Minister

[38] It is common cause that Business Zone requested the Controller to refer allegations of unfair or unreasonable contractual practices to arbitration. Aligned to this question is the issue whether the decisions of the Controller and Minister not to refer this allegation constituted administrative action for purposes of a PAJA review.

[39] Counsel for Engen disputed the contention that the Controller’s decision amounts to “administrative action” under PAJA. He argued that a decision by the Controller to refuse to refer a matter to arbitration is not one that “adversely affects the rights of any person” nor is it a decision that has a “direct, external legal effect”. In addition, that referral to arbitration is a purely procedural step of a preliminary nature that has no adverse effect on the rights of Business Zone.

[40] It must be borne in mind that in order for conduct to amount to administrative action, PAJA requires that there be a decision. The decision must be made by an organ of state (or natural or juristic person) exercising a public power or performing a public function, in terms of legislation or an empowering provision that adversely affects rights; and has a direct, external legal effect.¹⁶

[41] In *Viking Pony*, Mogoeng J invoked this Court’s decision in *SARFU*¹⁷ and held that:

¹⁶ Section 1 of PAJA defines “administrative action” as—

“any decision taken, or any failure to take a decision, by—

- (a) an organ of state, when—
 - (i) exercising a power in terms of the Constitution or a provincial constitution;
 - (ii) exercising a public power or performing a public function in terms of any legislation; or
- (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect”

¹⁷ *President of the Republic of South Africa v South African Rugby Football Union* [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) (*SARFU*).

“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.”¹⁸

[42] When Business Zone approached the Controller and later the Minister, it sought to rely on its statutory rights under section 12B of the Act. More specifically, Business Zone sought its statutory right to have the subject of its allegations adjudicated before an arbitral forum rather than a court. The decisions that these entities made were determinative of whether Business Zone could access such a right and that right falls squarely within the scope of the “legal rights” Mogoeng J contemplated in *Viking Pony*.

[43] In this vein, Engen’s contention that the decisions of the Controller and Minister were purely preliminary in nature cannot be sustained. These decisions prevented Business Zone from exercising its statutory right of access to arbitration. I am satisfied that the decisions of both the Controller and Minister amount to administrative action capable of a PAJA review. The decisions they were called upon to make, in terms of the powers conferred on them by the Act, clearly affected the rights of the parties to the dispute and had a direct, external legal effect on the legal relationship between the parties.

[44] It is apposite at this stage to point out why I do not think that the existence of a contract between the parties and the absence of an ongoing dispute that could affect the validity of that contract are prerequisites to establishing section 12B referral power. I will do so by analysing section 12B and other related aspects.

¹⁸ *Viking Pony* above n 9 at para 37.

Proper interpretation of section 12B

[45] The Petroleum Products Amendment Act¹⁹ (Amendment Act) amended the Act during 2004. Arbitral dispute resolution mechanisms were introduced by the insertion of sections 12A, 12B and 12C of the Amendment Act respectively. Licensed retailers and wholesalers were, in terms of section 12B(1), now entitled to request that the Controller refer a dispute to arbitration rather than resolving the dispute through court litigation. Section 12B provides:

- “(1) 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.
- (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 any order as to costs to be borne by one or more of the parties concerned.”

¹⁹ 58 of 2003.

[46] When interpreting a statutory provision the point of departure is that the words employed must be construed in accordance with their ordinary grammatical meaning provided an absurdity does not result. The jurisprudence is clear that this is subject to the requirement that statutory provisions must be interpreted purposively and be properly contextualised.²⁰

Equitable standard

[47] One of the purposes of the Amendment Act is set out in its preamble and is, amongst others, “to promote transformation of the South African petroleum and liquid fuels industry”. Schedule 1 to the Amendment Act goes on to introduce an industry charter “on empowering historically disadvantaged South Africans in the petroleum and liquid fuels industry”. Unequal bargaining power in the petroleum industry is pervasive even in more developed countries such as our common law comparator, England, whose history of inequality pales in comparison with our own.²¹

[48] Both in written and oral argument counsel for Business Zone submitted that the real significance of section 12B does not lie in the Controller’s power to compel the parties to refer their dispute to arbitration, but in the equitable standard it imposes. A standard that overrides the terms of their contract to ensure that fairness and reasonableness prevail. Counsel for Engen agreed with this proposition when questioned during oral argument.

[49] It would seem that the standard of fairness provided for in section 12B was inspired by the standard of fairness upon which our pre-democracy unfair labour practice jurisprudence under the Labour Relations Act, 1956, as amended, (1956 LRA) was based and upon which our unfair dismissal law under the current

²⁰ *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) (*Cool Ideas*) at para 28 and *Natal Joint Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) (*Endumeni Municipality*) at para 18.

²¹ In the context of English law, see the cases of *Alec Lobb (Garages) Ltd v Total Oil GB Ltd* [1985] 1 All ER 303 (CA) and *Esso Petroleum Co Ltd v Harper’s Garage (Stourport) Ltd* [1967] 1 All ER 699 (H.L.).

Labour Relations Act²² (LRA) is based. Support for this view is as follows: Prior to the LRA, the unfair labour practice jurisprudence was based on the concept of an “unfair labour practice” which was defined in the 1956 LRA. Section 12B refers to the concept of an “unfair or unreasonable contractual practice”. Both the words “unfair” and “practice” which we had in the concept of an unfair labour practice under the 1956 LRA are to be found in the concept of an “unfair or unreasonable contractual practice” provided for in section 12B. Under section 46(9) of the 1956 LRA a party referring an unfair labour practice dispute to the Industrial Court for adjudication had to *allege* an unfair labour practice by the other party to the dispute. Under section 12B as well, a licensed retailer seeking the referral of “an unfair or unreasonable contractual practice” by a licensed wholesaler is required to *allege* an unfair or unreasonable contractual practice by the licenced wholesaler. Under the 1956 LRA an alleged unfair labour practice would be subjected to adjudication or sometimes arbitration. Under section 12B an alleged unfair or unreasonable contractual practice is subjected to arbitration. Therefore, the fairness required in our labour law jurisprudence is the same as the fairness in section 12B.

[50] Understanding that the nature of the standard of fairness provided for in section 12B is the same as that found in the concept of an unfair labour practice and in our law of unfair dismissal is important, because the unfair labour practice jurisprudence and the unfair dismissal jurisprudence may throw light on what is and what is not possible under the standard of fairness created in section 12B. A good example of this is that both in terms of the unfair labour practice jurisdiction under the 1956 LRA and in terms of the unfair dismissal jurisprudence under the LRA, a court or tribunal given power to decide unfair labour practice disputes or unfair dismissal disputes has the power to order the reinstatement of a contract of employment that had been lawfully and validly terminated by the employer if that court or tribunal concluded that the employer committed an unfair labour practice or under the LRA concludes that the dismissal was unfair for lack of a fair reason to dismiss. In other words, the tribunal or court has power to compel the employer to continue with an

²² 66 of 1995.

employment contract which had been validly terminated. In this regard reference can be made to *National Union of Mineworkers v Marievale Consolidated Mines Ltd (Marievale)*.²³ In that case, although the High Court had found that the termination of the employees' contracts of employment had been valid in law,²⁴ the Industrial Court ordered the employer to reinstate the employees after it had found that the termination of their contracts of employment had been unfair or constituted an unfair labour practice.²⁵ Subsequently, the High Court dismissed a review application that sought to have the reinstatement order of the Industrial Court reviewed and set aside on, *inter alia*, the basis that the termination of the contracts of employment of the employees had been valid in law.

[51] It is not the first time that the standard of fairness in the labour and employment field inspires the imposition of the standard of fairness in other areas as well. The Legislature also included the same standard in regard to disputes between landlords and tenants under the Rental Housing Act (RHA). The RHA uses the concept of an "unfair practice" where the 1956 LRA used the concept of an "unfair labour practice" and section 12B uses the concept of "unfair or unreasonable contractual practice".

[52] In its judgment, the Supreme Court of Appeal stated that the failure to define the jurisdiction of the arbitrator, on the one hand, and the courts, on the other, would result in anomalous consequences.²⁶ I disagree. The contention that two different adjudicative standards, one equitable and one not, apply based on the forum that the parties find themselves before is unsustainable. There is sufficient context and justification to accept that the equitable standard of fairness and reasonableness

²³ (1986) 7 ILJ 123 (IC).

²⁴ *Marievale Consolidated Mines Ltd v National Union of Mineworkers* 1986 (2) SA 472 (W); (1986) 7 ILJ 108 (W).

²⁵ *Marievale Consolidated Mines Ltd v President of the Industrial Court and Others* 1986 (2) SA 485 (T); (1986) 7 ILJ 152 (T).

²⁶ SCA judgment above n 1 at para 27.

prevails in all petroleum contracts regardless of whether they are subject to statutory arbitration or ordinary court litigation.

[53] As I have already stated, the imposition of the equitable standard on contractual relationships already happens in employment matters and in residential leases. The LRA imposes a fairness standard on the contractual relationship between employers and employees,²⁷ and the RHA does the same for landlords and their tenants through its unfair practice standard.²⁸ It is true that the LRA and RHA also established separate adjudication structures to deal with disputes under the equitable standard,²⁹ but this does not assist the argument that section 12B establishes an exclusive parallel institution to deal with the equitable standard.

[54] First, the establishment of separate adjudicative institutions under the LRA and RHA does not mean that the equitable standard under those Acts does not also apply to common law contractual employment and residential lease disputes. It is difficult to imagine any employment dispute under the common law still being determined as if the fairness standard developed under the LRA is irrelevant, and I am not aware of

²⁷ See, for example, Chapter 8 of the LRA, which prohibits unfair dismissals and classifies certain labour practises as unfair.

²⁸ In *Maphango* above n 11 at para 51 it was characterised thus:

“In this way, the [RHA] 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 [RHA] 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.”

²⁹ The Commission for Conciliation, Mediation and Arbitration, the Labour Court and the Labour Appeal Court under the LRA and the Gauteng Rental Housing Tribunal under the RHA.

that being the case.³⁰ The application of the unfair practice standard under the RHA to common law residential lease disputes was left open by this Court in *Maphango*.³¹

[55] Second, the institutions set up under those two statutes form part of an elaborate construction of a separate and parallel institutional hierarchy to deal with and give effect to the respective constitutional rights to fair labour practices and access to housing. Section 12B of the Act holds no pretence to giving effect to a particular constitutional right nor can it, by any stretch of the imagination, be seen as establishing a separate adjudicative hierarchy. Furthermore, the normative commitments underlying the legal framework of arbitration are increasingly incorporated and reflected in the common law of contract. There is no reason why the specifics of the general standard of fairness and good faith in the common law of contract should not be given shape in the context of petroleum contracts, as is done in the context of labour or rental housing contracts.

[56] In my view, the absence of two adjudicative regimes, one transformatively equitable and the other not, will address the Supreme Court of Appeal's concern that failing to precisely define the jurisdiction of the arbitrator, on the one hand, and the courts, on the other, would result in anomalous consequences. Forum-shopping between these two different systems of law applied in different institutions will disappear. Instead, what remains is only the choice of arbitration rather than adjudication in the courts, a procedure well known to our law. And the law will be the same in arbitration as in court adjudication: equitable and giving effect to the demand of constitutional transformation of this part of our industry. Interpreted in this way, the purpose of introducing a fairness standard in petroleum contracts is better given effect to, without shielding the common law from statutory development.

³⁰ Compare *Old Mutual Life Assurance Co SA Ltd v Gumbi* [2007] ZASCA 52; 2007 (5) SA 552 (SCA) at para 5:

“It is clear however that co-ordinate [labour] rights are now protected by the common law: to the extent necessary, as developed under the constitutional imperative (section 39(2)) to harmonise the common law into the Bill of Rights (which itself includes the right to fair labour practices (section 23(1))).”

³¹ *Maphango* above n 11 at para 55.

Referral to arbitration

[57] The purpose of the Act is not only to transform the petroleum industry but “to provide for appeals and arbitrations”. Section 12B introduces an equitable standard in the framework of the statutory arbitration mechanism under section 12B. If the same adjudicative standard can be relied on in section 12B arbitration proceedings and court litigation alike, would that detract from the purpose of the Act to provide for arbitrations? I think not.

[58] 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.³² Section 12B offers a statutory guarantee of a mechanism that has become ubiquitous in contract, which may otherwise not exist possibly due to the unequal bargaining position retailers *vis a vis* wholesalers find themselves in. Reliance on the section 12B arbitration procedure can more accurately be understood as arbitration is ordinarily in contract: it suspends the institution of court litigation.³³ In turn the section 12B arbitral mechanism is insulated from becoming a mere preliminary, strategic step to court litigation in that section 12B (5) speaks to the finality of such an award.³⁴

³² Section 12B(2) of the Act allows the parties to a section 12B arbitration to determine the rules in accordance with which the arbitration will be conducted as well as the arbitrator before whom the arbitration will proceed.

³³ This will of course depend on the specific contractual provisions agreed upon between contracting parties. However, the general position is stated in section 6 of the Arbitration Act 42 of 1965, which provides that:

“Stay of legal proceedings where there is an arbitration agreement

- (1) If any party to an arbitration agreement commences any legal proceedings in any court (including any inferior court) against any other party to the agreement in respect of any matter agreed to be referred to arbitration, any party to such legal proceedings may at any time after entering appearance but before delivering any pleadings or taking any other steps in the proceedings, apply to that court for a stay of such proceedings.
- (2) If on any such application the court is satisfied that there is no sufficient reason why the dispute should not be referred to arbitration in accordance with the agreement, the court may make an order staying such proceedings subject to such terms and conditions as it may consider just.”

³⁴ Section 12B(5) provides that:

[59] The purpose of the Amendment Act “to provide for appeals and arbitrations” through section 12B cannot be overlooked. The inherent value of section 12B enabling a party to resolve a dispute through arbitration rather than court proceedings must be recognised. Arbitration offers an expedient, specialised and procedurally flexible forum to resolve disputes. It is no wonder that Business Zone would want to benefit from its statutory right under section 12B to access such a forum. A purposive interpretation of section 12B must give effect to this right.

[60] The ordinary meaning of the words employed in section 12B accord with such a purposive approach. In the context of a referral to arbitration, section 12B(1) requires that there must be an “allegation” of an unfair or unreasonable contractual practice by either a licensed retailer or wholesaler. It does not require the “proving”, “demonstrating”, or “showing” of an unfair or unreasonable contractual practice. This suggests that the Controller’s discretionary threshold is a low one in line with the Act’s purposes, seeking to promote arbitration mechanisms and to transform the industry by holding the contractual dealings of retailers and wholesalers to an equitable standard.

[61] The only jurisdictional requirement for the Controller to make a referral under section 12B(1) is an allegation by a retailer that a wholesaler, or vice versa, has committed an unfair or an unreasonable contractual practice. The Controller need only satisfy himself to the existence of such an allegation and must accordingly limit his interrogation of the merits of the dispute to the extent required to establish the allegation’s existence. The Controller should then refer the matter to arbitration.

“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.”

In this vein, section 28 of the Arbitration Act analogously speaks to the finality of arbitration awards. It provides:

“Unless the arbitration agreement provides otherwise, an award shall, subject to the provisions of this Act, *be final and not subject to appeal and each party to the reference shall abide by and comply with the award* in accordance with its terms.”

[62] That the Controller's discretionary threshold is a low one is clear when consideration is had to the mandate and powers of the arbitrator under section 12B(4). Unlike section 12B(1), subsections 12(B)(4)(a) and (b) clearly demand that the arbitrator enter into the merits of a dispute. Subsection 12(B)(4)(a) provides that the arbitrator "shall determine whether the alleged contractual practices concerned are unfair or unreasonable". Subsection 12(B)(4)(b) contains a similar mandate, this time requiring that the arbitrator "shall determine whether the allegations giving rise to the arbitration were frivolous or capricious" and authorising the arbitrator to award compensatory relief if this is the case.

[63] My reading of subsection 12(B)(4)(a) is that it mandates the arbitrator to enter into and interrogate the merits of the alleged contractual practice in order to make a determination into the unfairness or unreasonableness thereof. Likewise subsection 12(B)(4)(b) provides a legislative safeguard to prevent frivolous and capricious use of the section 12B referral mechanism in view of the Controller's low discretionary threshold. Indeed, the arbitrator is not only mandated to determine frivolity and capriciousness, but is empowered to make a compensatory award, which imposes remedial and punitive costs beyond that of an ordinary costs award.³⁵ This provides a strong deterrent for parties seeking to exploit the section 12B (1) arbitration mechanism.

[64] Section 12B(1) does not require that the Controller be satisfied before approving a referral that an underlying contract still exists. Furthermore, it does not require the Controller to pre-determine that an award to correct the practice would be issued in the event of a referral being made. It is also clear that the Controller does not have the power to determine whether an allegation is frivolous or capricious – that duty vests in the arbitrator in terms of section 12B(4)(b). All that is required is that

³⁵ It must be borne in mind that compensatory relief goes further than relief for costs, the latter's purpose being simply to indemnify a successful party and to refund expenses actually incurred. See *Minister of Police v Kunjana* [2016] ZACC 21; 2016 (9) BCLR 1237 (CC) at para 43.

the request for a referral must contain an allegation of an unfair or unreasonable contractual practice, which the Controller in turn refers to arbitration.

[65] This interpretation of section 12B may create the impression that any piece of paper purporting to be an allegation would trigger a referral to arbitration. This would render the Controller's discretion superfluous. I disagree.

[66] Firstly, it goes without saying that, as with all administrative acts, the Controller's decision to refer an allegation must comply with the standards of just administrative action under PAJA. The Controller would in the ordinary course conduct his or her own assessment and determine whether his decision would almost certainly be met with a successful review, and, if it would, not make such a determination. This would preclude, for example, a referral decision that is based on irrelevant considerations;³⁶ is not rationally connected to the information before the Controller;³⁷ or is so unreasonable that no reasonable person could have so exercised the power or performed the function.³⁸

[67] Secondly, if the allegation is indeed referred, the arbitrator wields the big stick of a compensatory costs award should he or she determine that the allegation is frivolous or capricious. Parties would be hesitant to abuse the process knowing their potential liability extends beyond legal costs.

[68] Thirdly, the adjudication is premised on equitable grounds. If an allegation is referred by the Controller and is also not found to be frivolous or capricious by the arbitrator, then the standard of fairness and reasonableness still factor into the arbitrator's determination of corrective relief. This provides an additional layer of protection against abuse.

³⁶ Section 6(2)(e)(iii) of PAJA.

³⁷ Section 6(2)(f)(ii)(cc) of PAJA.

³⁸ Section 6(2)(h) of PAJA.

Singular act of cancellation

[69] Engen submits that a single act of cancellation of a contract cannot constitute a contractual practice. In support of this argument, it relies on the decision of *Tlhamo*, which was approved by the Supreme Court of Appeal. In *Tlhamo*, the Court had to determine the meaning of the words “contractual practice”. In interpreting the words the Court relied on their dictionary meaning and held that a juristic act could not be characterised as a practice, which is a habitual doing or carrying on of something. The Court concluded that the termination of an operating lease agreement and the month-to-month agreement did not constitute a contractual practice that could be referred to the arbitrator in terms of section 12B of the Act.

[70] In *Maphango*, this Court analysed the meaning of practice in the context of the RHA. It concluded that a once off termination of a lease may amount to a practice. Cameron J said:

“It has long been established in our law that a ‘practice’ may consist in a single act. This accords with one of the dictionary meanings of the word. . . . A cramped interpretation of ‘practice’ would thwart its good ends.”³⁹

[71] Engen made much of this Court’s decision in *Maphango* being distinguishable from the present matter. The provisions of the RHA differed from those in the Act; the jurisdiction of the tribunal under the RHA and the arbitrator under the Act differed; and the RHA implicated fundamental rights. In my view, none of these considerations sufficiently distinguishes Cameron J’s interpretation of the word “practice” from applying to this matter. This interpretation was reached independently of the distinguishing considerations advanced by Engen on the basis of the ordinary meaning of the word; established jurisprudence; and adopting a broader interpretive approach that accords with the Constitution.

³⁹ *Maphango* above n 11 at para 57.

[72] That a practice can amount to a single act is well founded in labour law. A single act of dismissal constitutes an “unfair labour practice”. In *Marievale*, Goldstone J held:

“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]t does not in any way relate to habitual or repetitious conduct on the part of a particular employer.”⁴⁰

[73] In the result, the interpretative approach adopted in *Tlhamo* is incorrect. The Court in *Tlhamo* interpreted the meaning of “practice” without taking cognisance of its relevant context or the purpose of the Act, which is a necessary step in any interpretive exercise.⁴¹ That Court failed to apply the established principles of statutory interpretation. It should have considered the context of the Act and the well understood legal construction of the term when embarking on its interpretive approach.

[74] The facts of this case indeed demonstrate why an interpretive approach that excludes “practice” from constituting a singular act, such as cancellation, is inconsistent with promoting the Act’s purpose, which our interpretive jurisprudence demands. Engen’s purported cancellation of 22 October 2010 – for the said non-consensual alterations – took place long after Business Zone had already referred a request for arbitration on 17 June 2009.⁴² That arbitration was pending at the time of Engen’s purported cancellation.

[75] Again, on 30 March 2011, Engen sought to effect a second cancellation – done under the pretext of unlawful foreign products being brought onto the premises. It cannot be gainsaid that the unavailability of the products had been “instigated” by Engen’s conduct: its termination of the interim agreement forced Business Zone to

⁴⁰ See n 25 at 498B .

⁴¹ *Cool Ideas* above n 20 at para 28 and *Endumeni Municipality* above n 20 at para 18.

⁴² See n 4 above.

source foreign products to protect the business. Besides, the cancellation was effected despite Business Zone having written to and notified Engen that it will refer the claims to arbitration. Engen claims this was done “*ex abundanti cautela*” (out of abundant caution). This is disingenuous: what Engen sought to do by cancelling was not to exercise caution, but to frustrate Business Zone’s statutory right of referral. Preventing these situations that retard the efficacy of the Act demands an interpretation of “practice” which encompasses a single act.

[76] I therefore conclude that a single act of cancellation may amount to a contractual practice under section 12B. Like any other contractual practice, it is susceptible to arbitral correction under section 12B(4)(a). The arbitrator’s corrective relief would extend to the terrain of setting aside the unfair or unreasonable act of cancelling the underlying agreement and directing that the parties reinstate their agreement.⁴³ It follows that Engen’s argument that the arbitrator’s corrective power under section 12B presumes the backdrop of an ongoing contractual relationship that can be subject to such correction must fail.

[77] Nevertheless, the fact that the dispute relating to the validity of the termination of the contract is pending in the Johannesburg High Court is not a ground for the Controller to refuse a referral in terms of section 12B of the Act. The interpretation advanced by Engen, that a Controller may not refer a dispute where a contract has been cancelled, would defeat the purpose of arbitration under section 12B. In that case, the retailers would be unable to access their right of referral as Engen or similar wholesalers would oust the jurisdiction of the arbitrator by cancelling the contracts. Wholesalers like Engen would hold dealers to ransom under threat of cancellation.

⁴³ In its written submissions, Business Zone summed up the position succinctly as follows:

“The flaw in the [Supreme Court of Appeal’s] reasoning lies, with respect, in the [Supreme Court of Appeal’s] assumption that, once the contract has been cancelled, the arbitrator cannot grant prospective relief. But the arbitrator is given a wide remedial power to ‘correct’ any unfair or unreasonable contractual practice. If the arbitrator finds that the cancellation of the contract was unfair or unreasonable, she may for instance set aside the cancellation and direct the party responsible for it to reinstate the contract. Such a remedy corrects the unfair or unreasonable contractual practice despite the prior cancellation of the contract.”

[78] The next question is whether the decisions of the Controller and Minister are reviewable under PAJA.

Merits of PAJA review

[79] In his response to Business Zone's request, the Controller stated:

“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 [Business Zone] and Engen. The agreement forming the basis of [Business Zone's] allegations of unfair or unreasonable contractual practice have been cancelled. Further, [Business Zone's] allegations of unfair or unreasonable contractual practice are centred around the agreements which are currently under consideration by the [Johannesburg] High Court and as such, the matter is therefore *sub-judice* and can no longer be considered for arbitration.

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, [Business Zone'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.”

[80] Likewise, the Minister refused to refer the dispute to arbitration. In her response, the Minister stated:

“[I]n 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 [Business Zone], 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.”

[81] The Minister was of the view that she was precluded from doing so since the contract had been cancelled and the dispute relating to the cancellation was pending before the Johannesburg High Court. She also stated that a single act of cancellation did not constitute a contractual practice.

[82] In light of my interpretation of section 12B, it is clear that the Controller laboured under the erroneous belief that he did not have the power to refer the dispute to arbitration because the contract between the parties had been cancelled. In addition, the validity of that cancellation was under consideration before the Johannesburg High Court, and this precluded him from referring the matter to arbitration.

[83] The Controller was clearly wrong, as the provisions of section 12B did not require him to ascertain the existence of these two requirements. The only jurisdictional requirement is an allegation by a retailer that a wholesaler has committed an unfair or unreasonable contractual practice. The issues raised by the Controller were irrelevant for purposes of the request for referral.

[84] Jafta J held in *City of Johannesburg* that—

“a mere error of law is not sufficient for an administrative act to be set aside. Section 6(2)(d) of [PAJA] permits administrative action to be reviewed and set aside only where it is ‘materially influenced by an error of law’. An error of law is not material if it does not affect the outcome of the decision. This occurs if, on the facts, the decision-maker would have reached the same decision despite the error of law.”⁴⁴

⁴⁴ *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* [2010] ZACC 11; 2010 (6) SA 182 (CC); 2010 (9) BCLR 859 (CC) (*City of Johannesburg*) at para 91. See also *Minister of Local*

[85] The Controller’s misunderstanding of his powers under section 12B was clearly material. He came to his decision on the basis that the existence of the two requirements he specified were a prerequisite to him having the power to refer under section 12B. In the result, the Controller laboured under a material error of law as he clearly misunderstood his powers under section 12B. His refusal to refer the dispute to arbitration constitutes a ground of review under section 6(2)(d) of PAJA.⁴⁵

[86] Likewise, the Minister also misunderstood the provisions of sections 12A and 12B of the Act. She too refused to refer the dispute, as she believed that she was precluded from doing so since the contract had been cancelled and the dispute relating to the cancellation was pending in the Johannesburg High Court. She also stated that a single act of cancellation did not constitute a contractual practice. These are not prerequisites to exercising referral powers under section 12B(1) and, consequently, section 12A. It follows that the refusal to refer the dispute to arbitration constitutes a ground of review under section 6(2)(d) of PAJA.

Petroleum products argument

[87] Engen argues that some of the complaints made by Business Zone are unrelated to the supply of petroleum products and therefore fall outside the ambit of matters that can be referred in terms of section 12B. For example, Engen alleges that the disputes relating to the KFC franchise and the Woolworths shop are unrelated to the supply of petroleum and, therefore, cannot be adjudicated under the Act. Resultantly, Engen argues, these claims would never have been competent for referral to arbitration and accordingly, a decision to do so could never have been disturbed on review.

Government, Environmental Affairs and Development Planning of the Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd [2013] ZACC 39; 2014 (1) SA 521 (CC); 2014 (2) BCLR 182 (CC) at para 67.

⁴⁵ Section 6(2)(d) of PAJA provides:

“(2) A court or tribunal has the power to judicially review an administrative action if—
 . . .
 (d) the action was materially influenced by an error of law.”

[88] The Supreme Court of Appeal agreed with Engen’s approach and held that the phrase “unfair or unreasonable contractual practice” only relates to the Act’s context and disputes arising from the bulk supply of petroleum products. It went on to hold that the Act does not contemplate jurisdiction over disputes that do not relate directly to the supply of petroleum products.

[89] I disagree. The requirement that section 12B’s ambit extends only to the supply of petroleum products is not an explicit one. The reading in of this requirement is unwarranted. I have already highlighted a number of safeguards that exist to prevent unsuitable claims from becoming the subject of section 12B arbitration. Here, it is worth mentioning three further reasons in the context of the supply of petroleum products as to why I am satisfied that the Controller and arbitrator would not find themselves swamped with disputes about utilities or unrelated contractual breaches.

[90] The first is that an allegation must be made that the contractual practice is between a licensed retailer and wholesaler of petroleum products. Contractual dealings between retailers and wholesalers are bound to touch on the supply of petroleum products. Should this not be the case, the arbitrator can beat frivolous claims with the big stick of compensatory costs.

[91] Secondly, the remedy in section 12B is a layperson’s remedy – it does not expressly provide for legal representation and oral argument. It is desirable that complex and potentially intersectional issues are unpacked at the arbitral, rather than the referral stage.

[92] Lastly, the arbitrator’s remedial powers can go no further than correcting the contractual practice in question. The interests of third parties are protected in the section 12B arbitration process, the subject matter of which is limited to a “contractual practice”. This presumes that remedying the dispute lies squarely within the contractual rights and obligations of the parties to the contract. In this case, Engen

submitted that certain complaints lodged by Business Zone would affect municipal interests and resolution of this dispute through arbitral means would not cater for these and other third-party interests. What Engen's submission fails to consider is that the arbitrator's remedial powers are limited to correcting the contractual practice in question. The arbitrator is not compelling the Johannesburg Roads Agency to remedy the dispute, the arbitrator is merely compelling Engen to engage with the Johannesburg Roads Agency to the extent that it is contractually obliged to do so.

[93] For these reasons, the interrogation of the merits of a matter is clearly the mandate of the arbitrator. In adopting a purposive interpretation of section 12B, additional requirements to the exercise of section 12B rights beyond those contemplated by the Legislature cannot be read-in. Such an interpretation is a far shot from the interpretive "absurdity" that *Endumeni Municipality* and related cases contemplated. In the result, the Controller cannot, based on this argument, refuse to refer an allegation.

Effect of second cancellation

[94] Engen argued that in its correspondence of 30 March 2011, it purported to cancel the lease with Business Zone a second time. This second cancellation was based on Business Zone supplying foreign products after Engen cut-off Business Zone's supply of fuel, following termination of the interim arrangement. Engen contends that Business Zone failed to include this second cancellation in its section 12B(1) request. This failure was fatal as the second cancellation was pending before the Johannesburg High Court and its determination is a prerequisite to determining the section 12B(1) request, rendering any referral *sub-judice* (pending determination). Engen argued that if the Controller had referred Business Zone's complaint under these circumstances a finding by the Johannesburg High Court that Engen had validly cancelled the lease agreement would render the section 12B arbitration academic. This was because the arbitrator's remedial powers under section 12B(4)(a) were corrective in nature and thus presumed to remedy a contractual practice against the backdrop of an ongoing contractual relationship.

[95] Engen's contention seems to be this. The dispute that Business Zone asked the Controller to refer to arbitration relates to the first cancellation and not the second cancellation. Therefore, if arbitration does take place pursuant to that request, the arbitrator can only grant a remedy in respect of the first cancellation and not the second cancellation because no request was made for the referral of the second cancellation to arbitration. That being the case, the request for arbitration in respect of the first cancellation is irrelevant and academic when there is a later cancellation in respect of which Business Zone did not request a referral to arbitration. In other words, Engen's argument was that, even if the arbitrator were to grant Business Zone a remedy the effect of which was to reverse the first cancellation, the second cancellation would still stand. It was implied in this argument that in such a case there would be no lease between Business Zone and Engen which would enable Business Zone to operate its business.

[96] Whilst Engen's argument may have some merit, that question need not be answered now. This is so because the Controller has no duty to consider the merits of the matter as that is the domain of the arbitrator. This is so even if the arbitrator's powers are limited, should Engen be correct that the second cancellation is valid, to the period before it took effect. This does not preclude the Controller from referring the dispute concerning the first cancellation to arbitration. Regardless of the second cancellation, the arbitrator may have power to grant relief for the intervening period. In any event, should it be so advised, Business Zone may be still able to refer the second cancellation to arbitration subject to the provisions of the Act. In the result, Engen's purported second cancellation has no effect on the Controller's ability to refer Business Zone's complaint under section 12B of the Act.

Remedy

[97] Regarding remedy, I support the conclusion of the Pretoria High Court when it substituted the decision of the Controller. While substitution is an exceptional

remedy,⁴⁶ it is appropriate in this matter because of the extended period of time that has elapsed since Business Zone brought the referral. Since the Controller's threshold is low and the full contents of Business Zone's allegations and Engen's responses thereto are before this Court, nothing more can be done by the Controller. It follows that the order of the Pretoria High Court must be restored. All three claims will be considered by the arbitrator, who will make a determination in terms of sections 12B(4)(a) and (b) of the Act.

[98] Engen raised concerns that referring claim C would be inappropriate. This is because claim C concerned Engen's conclusion of the lease agreement with a KFC franchisee on an area that the addendum had specifically carved out from the scope of Business Zone and Engen's relationship. This Court steps into the shoes of the Controller by making an order of substitution, and I have already indicated that such disputes will be appropriately adjudicated at the arbitral, rather than the referral stage.

Order

[99] In the result, the following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Supreme Court of Appeal is set aside and replaced with the following:
"The appeal is dismissed with costs including the costs of two counsel."
4. Engen Petroleum Limited is to pay the costs in this Court, including costs of two counsel, where applicable.

⁴⁶ *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Limited* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) at para 42.

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