IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No: CCT 167/21

In the matter between:

MFOZA SERVICE STATION (PTY) LIMITED	Applicant
and	
ENGEN PETROLEUM LIMITED	First Respondent
VINCENT MALEKA SC	Second Respondent

APPLICANT'S PRACTICE NOTE

A Names of parties and case number

1. As above.

B Nature of proceedings

2. Application for leave to appeal against a judgment and order of the Gauteng Division of High Court, and if leave is granted, an appeal against the judgment and order.

C Issues

3. If leave to appeal is granted, the primary issue is whether damages and/or compensation are competent awards that may be made by an arbitrator in terms of section 12B(4)(*a*) of the Petroleum Products Act 120 of 1977 (the "*PPA*").

4. A secondary issue is whether the High Court erred in substituting the arbitrator's award.

D Portions of the record that are relevant to the Applicant's argument

- Founding affidavit in the review (vol 1 pp 6-32)
- Annexure FA3 – arbitrator's award (vol 1 pp 36-57)
- Annexure FA5 – statement of case (vol 1 pp 62-68)
- Annexure FA6 – claim calculations (vol 1 pp 69-81)
- Annexure FA7 – extract from reply to statement of response (vol 1 p 82)
- Annexure FA8 – statement of response (vol 2 pp 83-132)
- Answering affidavit in the review (vol 2 pp 135 – 147)
- Replying affidavit in the review (vol 2 pp 148-158)
- High Court judgment (vol 4 pp 256-274)
- Judgment in the application for leave to appeal (vol 4 pp 309-311)
- SCA order dismissing application for leave to appeal (vol 4 p 372)

E Duration of argument

5. One court day.

F Summary of argument

6. On the primary issue, section 12B(4)(*a*) of the PPA empowers the arbitrator to determine whether alleged contractual practices referred to them "*are unfair or unreasonable*" and if so to "*make such award as he or she deems necessary to correct such practice*."

7. The High Court relied on remarks of the Supreme Court of Appeal in paragraph 23 of *Business Zone SCA*,[1] that there is a sharp distinction between an arbitrator's corrective remedial jurisdiction (under section 12B(4)(*a*)) and jurisdiction to award compensation under section 12B(4)(*b*) where the allegations giving rise to an arbitration are frivolous or capricious. The SCA expressed the view that damages are available only under compensatory (and not corrective) remedial jurisdiction.[2]

8. This restrictive interpretation of section 12B embraced by the High Court is not correct.

   8.1 The award of damages or compensation falls within the settled core of corrective justice and a corrective jurisdiction.

   8.2 A restrictive interpretation of section 12B(4)(*a*) conflicts with the transformational purpose of the PPA, which includes addressing unequal bargaining power in the industry.[3]

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1 *Engen Petroleum Limited v The Business Zone 1010 CC t/a Emmarentia Convenience Centre* (20513/2014) [2015] ZASCA 176 (27 November 2015) (*Business Zone SCA*).

2 At para 23.

3 *Business Zone 1010 CC t/a Emmarentia Convenience Centre v Engen Petroleum Limited and Others* 2017 (6) BCLR 773 (CC) (*Business Zone CC*) at para 47.

8.3 The distinction drawn by the SCA is not supported by the text or any authority.

8.4 The general competence to make any award so as to correct an unfair or unreasonable practice is widely framed, and does not exclude damages or compensation. The specific competence to award compensation under section 12B(4)(*a*) where allegations are frivolous or capricious is a specific remedy pertaining to the allegations giving rise to the arbitration. That remedy does not detract from or limit the general corrective relief contemplated by section 12B(4)(*a*), which includes compensation.

9. On the secondary issue, section 33 of the Arbitration Act 42 of 1965 empowers a Court only to set aside an award and refer the matter to a new arbitrator at the request of one of the parties. The Court is not authorised to substitute the award for its own decision.

G Authorities on which particular reliance will be placed

10. *Business Zone 1010 CC t/a Emmarentia Convenience Centre v Engen Petroleum Limited and Others* 2017 (6) BCLR 773 (CC)

11. *Camdons Realty (Pty) Ltd & another v Hart* (1993) 14 ILJ 1008 (LAC)

12. *Engen Petroleum Limited v The Business Zone 1010 CC t/a Emmarentia Convenience Centre* (20513/2014) [2015] ZASCA 176 (27 November 2015)

13. *Hos+Med Medical Aid Scheme v Thebe Ya Bophelo Healthcare Marketing & Consulting (Pty) Ltd and Others* 2008 (2) SA 608 (SCA)

14. *National Director of Public Prosecutions v Mohamed NO and Others* 2003 (4) SA 1 (CC)

15. Al-Tawil 'Damages for Breach of Contract: Compensation, Cost of Cure and Vindication' (2014) 34 *Adelaide Law Review* 352

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