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 WRITTEN SUBMISSIONS

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OVERVIEW

1. The central issue in this application for leave to appeal 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*").

2. Section 12B contemplates the referral of allegations of unfair or unreasonable contractual practices in the licensed petroleum industry to arbitration. Subsection (4)(*a*) empowers the arbitrator to determine whether alleged contractual practices referred to them "*are unfair or unreasonable*" and, if so, obliges him or her to "*make such award as he or she deems necessary to correct such practice*."

3. Section 12B was introduced into the PPA by the Petroleum Products Amendment Act, 58 of 2003, which included amongst its objects the promotion of "*transformation of the South African petroleum and liquid fuels industry*". The transformational purposes of the PPA have been endorsed by this Court, *inter alia*, in *Business Zone CC*.[1]

4. The applicant ("*Mfoza*") is a retailer of petroleum products and leased and operated a service station in Thokoza, Gauteng from the respondent ("*Engen*"), a wholesaler of petroleum products. The parties are engaged in arbitration proceedings under section 12B. Mfoza claims compensation for financial loss

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[1] *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. See also *Crompton Street Motors CC v Bright Idea Projects 66 (Pty) Ltd* 2022 (1) SA 317 (CC) at paras 60 and 61.

arising from Engen's unfair and unreasonable breach of the agreement governing its lease and operation of the petrol station.

5. Engen unsuccessfully contended before the arbitrator (Vincent Maleka SC) that a claimant cannot be awarded patrimonial damages under section 12B(4)(*a*). Maleka SC found that nothing in the provision excludes compensation being awarded to correct an unfair and unreasonable practice.

6. Maleka SC's award was taken on review by Engen. The High Court set aside the award, holding that the award of compensatory damages is not competent under an arbitrator's corrective remedial jurisdiction conferred by section 12B(4)(*a*).

7. The High Court relied[2] on the remarks of the Supreme Court of Appeal (the "*SCA*") in paragraph 23 of *Business Zone SCA*,[3] that there is a sharp distinction between an arbitrator's corrective remedial jurisdiction 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 (erroneously it is submitted) that an arbitrator's powers under section 12B(4)(*a*) and 12B(4)(*b*) are mutually exclusive and that damages are available only under a compensatory (and not corrective) remedial jurisdiction.[4]

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2 High Court judgment at para 24, record vol 4 pp 266-267.

3 *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*).

4 At para 23.

8. This restrictive interpretation of section 12B is not correct:

8.1 As discussed below, the award of damages or compensation falls within the settled core of corrective justice and a corrective jurisdiction. The arbitrator's corrective jurisdiction includes but is not limited to the competence to award damages or compensation.

8.2 Interpreting section 12B(4)(*a*) as empowering an arbitrator to award patrimonial damages or compensation to correct an unfair or unreasonable practice accords with the transformational purpose of the PPA, which includes addressing unequal bargaining power in the industry.[5]

8.3 The distinction drawn by the SCA is not supported by the text of section 12B or any authority, and is not consonant with the purposes of the PPA and the equitable remedial regime introduced by section 12B.

8.4 The general competence to make any award so as to correct an unfair or unreasonable practice is framed in broad and open-ended terms. Section 12B(4)(*a*) confers upon an arbitrator "*wide remedial powers*",[6] which do 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

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5 *Business Zone* at para 47. *Crompton Street Motors* at paras 60 and 61.

6 *Crompton Street Motors* at para 45.

detract from or limit the general corrective relief contemplated by section 12B(4)(*a*), which includes compensation.

9. For these reasons, the High Court erred in setting aside the aside Maleka SC's award. Mfoza also challenges the High Court's order substituting the arbitrator's award. We submit that the High Court's order is incompetent under the Arbitration Act 42 of 1965 (the "*Arbitration Act*").

10. These written submissions are structured as follows:

10.1 First, we address the requirements for leave to appeal;

10.2 Second, a brief background to the dispute is set out;

10.3 Third, we advance submissions concerning the proper interpretation of section 12B(4)(*a*), namely that damages and compensation may be awarded by an arbitrator to correct and unfair or unreasonable practice, and explain the implications of the correct interpretation of the provision for this case;

10.4 Fourth, we address the other way in which the High Court erred, namely by substituting Maleka SC's award.

REQUIREMENTS FOR LEAVE TO APPEAL

Constitutional matters and arguable points of law

11. This application raises constitutional matters:

11.1 It concerns the proper extent of an arbitrator's statutory power to grant any award necessary to correct an unfair or unreasonable practice under

section 12B. The correct interpretation and ambit of such a public power[7] is a constitutional matter.[8]

11.2 The role of the High Court in confirming or setting aside an arbitration award, implicates the administration of justice and is a constitutional matter.[9]

11.3 The transformational aspects of the PPA – and the nature of the corrective powers of an arbitrator appointed to promote that purpose – give effect the right to equality in section 9 of the Constitution, which is also a constitutional matter.[10]

12. The application also concerns arguable points of law of public importance which ought to be considered by the Court.

12.1 The proper interpretation of section 12B(4)(*a*) is a legal point.

12.2 It is evidently arguable whether the provision empowers an arbitrator to award financial compensation (as Maleka SC and other arbitrators have found[11]) and / or damages, or not (as the High Court held[12]).

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7 See High Court judgment at paras 24, 33 and 37, vol 4 pp 266-267; 266-267 & 271, where the public law principles governing the doctrine of legality were applied to the arbitrator's powers by the High Court.

8 *Business Zone CC* at para 35; *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) at para 33.

9 *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* 2009 (4) SA 529 (CC) at para 24.

10 Mfoza CC founding affidavit para 83.

11 In addition to Maleka SC, Kuper SC and Jamie SC have reached the same conclusion. Their awards are attached to these submissions.

12 In addition to the present matter, see *Marndre Beleggings CC v Minister of Energy and Others* (51067/15) [2018] ZAGPPHC 93 (22 March 2018) at para 24.

12.3 The determination of this issue is within the general public importance. Whether retailers and wholesalers may claim compensation or damages in a section 12B arbitration is an issue which transcends the interests of the parties and has implications for the petroleum industry as a whole.[13]

Interests of justice

13. Based on our submissions, Mfoza's prospects of success are good.[14]

14. Additionally, there is a strong public interest in the determination of whether arbitrators may make an award of compensation or damages under their corrective jurisdiction in section 12B. Without this Court considering the issue, the High Court's interpretation of the provision and its application of *obiter* remarks in *Business Zone SCA* will become entrenched.

BACKGROUND

15. Mfoza concluded the lease agreement with Engen in May 2015. The lease was cancelled, either by Mfoza in August 2016 or by Engen in February 2017.[15] (The issues concerning who cancelled the lease and when it was cancelled are not pertinent to the present dispute).

16. Mfoza contends that during the currency of the lease (i.e. before its cancellation) Engen failed to hand over a properly equipped petrol station site – which lacked necessary equipment and required maintenance – and on many

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13 *Paulsen and Another v Slip Knot Investments 777 (Pty) Limited* 2015 (3) SA 479 (CC) at para 26.

14 *Paulsen* at paras 29-30.

15 As recorded by the High Court in para 30 of its judgment, record vol 4 pp 268-269.

occasions did not deliver fuel timeously. It claims that Engen breached the terms of the lease, which conduct was unlawful and wrongful. This conduct was also unfair and unreasonable.

17. The dispute between the parties was referred to arbitration by the Controller of Petroleum Products (the "*Controller*") in November 2017 in terms of section 12B. Mfoza claims approximately R 8 million plus interest for financial loss it suffered as a result of Engen's failures, including loss of profit.

18. In addition to disputing the merits of Mfoza's allegations, Engen raised two preliminary points, one of which concerned the competence of an arbitrator to award damages.[16]

19. Maleka SC rejected Engen's objection.

    19.1 While acknowledging paragraph 23 of *Business Zone SCA*, Maleka SC reasoned that the SCA's remarks must be understood in the context of the case, where the issue was whether unfair or unreasonable practices might arise from the cancellation of a contract. In Mfoza's case, the practices concerned were committed during the currency of the agreement.[17]

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16 The other concerned whether some of Mfoza's complaints fell outside the scope of the referral and are not relevant to the matter before this Court.

17 Maleka SC award at para 26.1, record vol 1 p 49.

19.2 He also emphasised that the competence to make awards is open-ended and section 12B(4)(*a*) contains no prohibition against awarding compensation.[18]

19.3 Maleka SC also pointed out that, even if *Business Zone SCA* precludes damages being awarded by an arbitrator, our law recognises a difference between damages arising from delict or contract, on the one hand, and equitable compensation (such as that under the labour relations regime), on the other. He held that awarding equitable compensation of that nature is competent under section 12B(4)(*a*).[19]

20. As mentioned, the High Court disagreed with Maleka SC and set aside his award. With reference to paragraph 23 of *Business Zone SCA*, the High Court held that section 12B(4)(*a*) "*does not permit the arbitrator to grant an order for damages*" but rather "*authorises corrective remedial action prospectively*".[20] According to the High Court, it did not matter whether the agreement had been cancelled.[21]

21. Thus, the High Court held that Mfoza's claims as pleaded amounted to claims for damages and that it was not competent for an arbitrator to award damages.

22. Mfoza's application for leave to appeal was refused by the High Court.[22] The High Court criticised Mfoza for not itself seeking to review Maleka SC's ruling,

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18 Maleka SC award at para 26.4 and 26.8, record vol 1 pp 50 & 52-3.

19 Maleka SC award at para 26.11, record vol 1 p 54.

20 High Court judgment at para 32, record vol 4 p 269.

21 *Ibid*.

22 Record vol 4 p 305.

on the basis that Maleka SC apparently found that he could not award damages under section 12B(4)(*a*).[23] However, that is not what Maleka SC held – he found that damages are available, but that – even if they were not available – then other forms of compensation may in any event be competent.[24]

23. The SCA dismissed an application for leave to appeal lodged by Mfoza.[25]

THE CORRECT INTERPRETATION OF SECTION 12B(4)(*a*)

24. Against this background, the crisp legal question for determination is whether damages and/or compensation are competent awards under section 12B(4)(*a*).

25. As a starting point (and this Court has found), section 12B must be interpreted within its transformational legislative purpose and context. In *Crompton Street Motors* (dealing with the application and interpretation of section 12B and section 6(2) of the Arbitration Act), this Court held as follows:

> "*It is, therefore, necessary in these matters, where section 12B and section 6(2) of the Arbitration Act are at play, for a court to seriously consider whether there are ample reasons not to refer the dispute for statutory arbitration in terms of section 12B of the Petroleum Products Act in light of the broader legislative scheme. This requires engagement with the legislative purpose of the section 12B arbitration*";[26]
>
> and:
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> "*In addition to considering the larger context of the petroleum industry and the purpose of the Act when considering a stay application, courts ought to guard*

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23 High Court leave to appeal judgment at para 5, record vol 4 p 305.

24 See Mfoza CC founding affidavit paras 49-50.

25 Record vol 4 p 372.

26 *Crompton Street Motors* at para 60, emphasis added.

against treating these disputes as purely contractual. They must bear in mind that the Legislature intended that a fairness standard be imposed on contractual relationships between retailers and wholesalers in the petroleum industry. The equitable standard of fairness and reasonableness prevails in all petroleum contracts. This fairness standard does not exist in all commercial contracts and, therefore, a High Court cannot treat those disputes as regular contractual disputes when they are considering whether to stay the proceedings. To do so would be to ignore the Legislature's transformative goals in the petroleum industry in light of the unequal bargaining power between retailers and wholesalers".[27]

26. We submit, for the reasons set out below, that against the context and purpose of the PPA, damages and compensation fall within an arbitrator's corrective jurisdiction under section 12B(4)(*a*) of the PPA.

Damages and compensation as corrective remedies

27. Section 12B(1) empowers the Controller to submit to arbitration an allegation made by a retailer or wholesaler of an unfair or unreasonable contractual practice committed by the other. Subsections (2) and (3) make provision for the appointment of the arbitrator as well as the adoption of procedural rules for the arbitration.

28. The provision in issue in these proceedings, section 12B(4), states in full:

"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

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27 *Crompton Street Motors* at para 62.

she deems necessary to compensate any party affected by such allegations."

29. Writing unanimously for this Court, Mhlantla J held the following about the nature of this provision in *Business Zone CC* and *Crompton Street Motors*:[28]

29.1 First, as noted, section 12B grants the arbitrator "*wide remedial powers*".[29] This is patent in light of the open-ended phrasing of the provision. The arbitrator can make *any* award that he or she "*deems necessary*" to "*correct*" an unfair or unreasonable practice.

29.2 Second, the arbitrator's wide powers are granted in circumstances where his or her jurisdiction is also not limited strictly to the bulk supply of petroleum products, but to the contractual relationship between licensed retailers and wholesalers.[30]

29.3 Third, 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"* which "*overrides the terms of their contract to ensure that fairness and reasonableness prevail.*"[31] Mhlantla J emphasised that this equitable standard prevails in all contracts whether they are subject to arbitration under section 12B or ordinary court litigation.[32]

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28 *Crompton Street Motors supra*.

29 *Crompton Street Motors* at para 45.

30 *Business Zone CC* at para 89.

31 *Business Zone CC* at para 48.

32 *Business Zone CC* at para 52.

29.4 Fourth, a central purpose of the PPA (after the amendments which introduced section 12B) is to promote the transformation of the petroleum industry, which includes addressing the issue of unequal bargaining power between participants in the industry.[33]

30. In light of these rulings, which are unanimously supported by this Court, it is our submission that the remedial competence granted to arbitrators in section 12B(4)(*a*) must be interpreted broadly as to permit the making of any award that corrects unfair or unreasonable practices, including compensation and damages.

31. A restrictive reading – that cut downs what types of awards can be granted – is at odds both with the text of the provision, as well as the jurisprudence of this Court concerning its purpose. To serve transformational goals, the equitable regime requires robust remedies where they are appropriate. A restrictive meaning would undermine those goals.

32. The provision should accordingly be read so that the award of damages or compensation is an option available to arbitrators to address unfair or unreasonable practices.

33. The use of the word "*correct*" should not be understood or interpreted narrowly to qualify or cut down the provision, and we submit cannot be interpreted as precluding the awarding of damages or compensation for unfair or unreasonable practices.

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33 *Business Zone CC* at para 47.

33.1 That is because the award of damages in our law – for wrongs committed in delict and contract – is "*designed to serve corrective justice*" as this Court recently held in *Thubakgale*.[34] Our law of delict – which is invoked primarily to claim damages for harm arising from wrongful conduct – is grounded in corrective justice.[35]

33.2 Corrective justice is about "*righting the scales*".[36] It contemplates financial compensation for a claimant whose losses can be measured in pecuniary terms (and for a defendant to surrender gains derived from its wrongful conduct):

> "*Corrective justice is the theory of the mean; more specifically, 'the just, or the equal, is the mean between the more and the less'. Once it is established that the defendant has, as a result of their wrongful act, taken and acquired more than they ought to have — that is, more than the mean — then they must surrender their surplus to the claimant, who has less than the mean, or who has less than what they would have had, had the defendant never acted wrongfully towards them. As a result of the wrong there is an excess (gain) for the defendant, while the claimant endures deficit (loss) as a result of an injustice at the defendant's hands.*"[37]

33.3 The payment of compensation is amongst the awards that may be necessary to correct a defendant's wrongful (or, in the context of section 12B, unfair or unreasonable) practice.

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34 *Thubakgale and Others v Ekurhuleni Metropolitan Municipality and Others* (CCT 157/20) [2021] ZACC 45 (7 December 2021) at para 162, per Jafta J for the majority

35 *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC) at footnote 86.

36 Bridgeman 'Corrective Justice in Contract Law: Is There a Case for Punitive Damages?' *Vanderbilt Law Review* Vol 56, 237 at 243.

37 Al-Tawil 'Damages for Breach of Contract: Compensation, Cost of Cure and Vindication' (2014) 34 *Adelaide Law Review* 352 at 358.

33.4 A party to a contract has an interest in ensuring that the other party performs its obligations. Where a defendant has wronged the claimant by failing to perform its obligations, that wrong may be corrected by enforcing performance. Where however, performance can no longer be enforced, or where future performance does not adequately correct the wrong, compensation is necessary. That would be the case, for example, where a party has breached a contractual obligation of confidentiality. Enforcing that obligation may prevent the future disclosure of confidential information, but it cannot correct the past disclosure of such information (as it will already have been released into the public domain).[38] The correction of the contractual practice – under a theory of corrective justice – requires the claimant's interests to be vindicated by way of an award of compensation.

33.5 Compensation may thus, depending on the circumstances, be the only remedy available to correct the unfair or unreasonable contractual practice. That is the case in the present matter where the lease has been cancelled. The contractual practice cannot be remedied by an award regulating the parties' future contractual performance or relationship.

33.6 In the present case, Mfoza claims that it is sustained financial losses as a result of Engen's wrongful and unfair breach of the lease. The consequence of Engen's conduct is that Mfoza sustained financial losses. Engen also benefitted financially from its conduct (as it did not

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38 See the example in Al-Tawil *supra* at pp 359-360.

have to incur costs it would otherwise have incurred, for example, to equip and maintain the site as Mfoza contends it ought to have done under the lease). The correction of the unfair conduct requires the financial imbalance arising from Engen's conduct to be corrected by the payment of damages or compensation. Indeed, that is the only way in which Engen's unfair contractual practice may be corrected.

33.7 Section 12B obliges an arbitrator to make the award necessary to correct the unfair or unreasonable contractual practice. The provision is couched in peremptory language. Where the arbitrator makes a determination that there has been an unfair or unreasonable contractual practice, a corrective award is mandated. That requires the nature and scope of the awards that are available under the section to be broadly construed to include damages or compensation. In cases such as this one where an arbitrator is not able to make an award regulating the parties' future conduct (as the contract has been terminated), if an award of damages or compensation were not available (as Engen contends), it would leave a claimant without any remedy, despite a finding that the defendant had engaged in unfair or unreasonable contractual practices. That is inconsistent with the text of the provision.

33.8 That would also be inconsistent with the purpose of section 12B. The transformational objects of the Act are furthered by an award of damages or compensation. Where a retailer – prejudiced by past discriminatory laws and inequitable economic policies – suffers financial losses as a result of a wholesaler's unfair or unreasonable contractual practices,

those losses must be compensated in order to ensure that the retailer can sustain a financially viable operation. Precluding compensation or damages may leave the retailer without a remedy, facing a precarious financial future. If the retailer were compelled to close its business, the transformational objects of the Act would be frustrated.

33.9 Significantly, the retailer may not be able to recover its losses in any other forum. If, for example, the retailer were to claim damages for breach of contract under common law in the courts, it would need establish all the elements of a contractual cause of action, including a breach and causation. Under section 12B, however, a claimant must establish an unfair or unreasonable contractual practice. An unreasonable or unfair contractual practice need not necessarily amount to a breach of a contractual undertaking (and consequently may not establish a basis for damages for breach of contract under common law), but it remains an unfair or unreasonable contractual practice, which under section 12B must be corrected. A breach of a contract, however, may itself amount to an unfair or unreasonable practice to be corrected under section 12B.

34. We consequently submit that Parliament's choice of the word "*correct*" to describe the purpose of the awards that may be made by an arbitrator indicates that an award of damages or compensation is competent where it is appropriate to correct an unfair or unreasonable practice.

35. We also note that in *Business Zone CC*, this Court held that standard of fairness in section 12B of the PPA is inspired by and based on the concept and

jurisprudence of an unfair labour practice or unfair dismissal under the former Labour Relations Act, 1956.[39] The upshot is that 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*."[40]

36. Section 46(9)(c) of the 1956 LRA empowered the Industrial Court to determine unfair labour practice disputes "*on such terms as it may deem reasonable, including but not limited to the ordering of reinstatement or compensation*…"

36.1 This was interpreted as providing for compensation for "*financial loss*" caused by an unfair dismissal or unfair labour practice.[41] Nugent AJ held in *Camdons Realty (Pty) Ltd* that:[42]

> *"Compensation is not synonymous with a gratuity. In its ordinary meaning the term envisages an amount to make amends for a wrong which has been inflicted. In the context within which it is used… it means a payment to offset or counter-balance financial loss which has resulted from the wrongful act."*

36.2 The claim for compensation was also held to be "*more akin to a delictual claim than to a claim based on breach of contract*."[43]

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39 *Business Zone CC* at para 50.

40 *Business Zone CC* at para 51.

41 *Ferodo (Pty) Ltd v De Ruiter* (1993) 14 *ILJ* 974 (LAC) at 981 (where guidelines to determine compensation are set out); *Chevron Engineering (Pty) Ltd v Nkambule and Others* 2004 (3) SA 495 (SCA) at para 31.

42 *Camdons Realty (Pty) Ltd & another v Hart* (1993) 14 *ILJ* 1008 (LAC) at 1018.

43 *Alert Employment Personnel (Pty) Ltd v Leech* (1993) 14 *ILJ* 655 (LAC) at 661.

37. This jurisprudence supports Mfoza's contention that the competent awards that may be made under section 12B(4)(*a*) of the PPA, include compensation for financial loss (or patrimonial damages).

38. This Court in *Business Zone CC* further found that section 12B and the common law do not impose different "*adjudicative standards, one equitable and one not*" depending on the forum in which the parties find themselves.[44] Section 12B does not establish "*an exclusive parallel institution [i.e. arbitration] to deal with the equitable standard*".[45] A finding that damages or compensation is not available under section 12B would fundamentally undermine this Court's *dicta* in this regard. If, for example, as in the present case, a retailer were to claim that a breach of contract amounted to an unfair or unreasonable contractual practice giving rise to contractual damages, it would be able to claim damages before the ordinary courts, but would not be able to do so in an arbitration under section 12B. Similarly, in the context of an ongoing contractual relationship, a retailer would be able to approach an arbitrator for a remedy to regulate the future contractual relationship (an award compelling the wholesaler to rectify its conduct), but would need to approach a separate forum – the court – to obtain compensation. A bifurcated adjudication regime of this nature is not envisaged under section 12B of the PPA, as this Court has already found.

39. Even though the word "*compensation*" is not explicitly referred to in section 12B(4)(*a*), that is "*of no moment*" – as Maleka SC held[46] – because the

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44 *Business Zone CC* at 52.

45 *Business Zone CC* at 53.

46 Maleka SC award at para 26.11, record vol 1 p 54.

competence to award damages or compensation is also not explicitly precluded by the provision. This power is implied by the wide nature of the competence to make any award to "*correct*" an unfair or unreasonable practice.[47]

Paragraph 23 of *Business Zone SCA*

40. As stated, the High Court relied directly on the SCA's remarks in paragraph 23 of *Business Zone SCA*.[48]

41. In that paragraph, the SCA articulated four propositions:

41.1 One: that section 12B(4) "*distinguishes between a corrective remedial jurisdiction … and a compensatory remedial jurisdiction*":

> *"Section 12B(4)(a) operates in relation to allegations of an 'unfair or unreasonable' contractual practice and enjoins an arbitrator appointed under its provisions to make whatever award is necessary 'to correct such practice'. Subsection 12B(4)(b), which operates in relation to allegations found to be 'frivolous or capricious', authorises the arbitrator to make such award as he or she deems necessary to compensate any party affected by such allegations."*

41.2 Two: that a "*corrective remedial jurisdiction can operate only prospectively.*" Flowing from this proposition, the SCA held that in "*relation to contractual practices, a corrective remedial jurisdiction accordingly presupposes an ongoing contractual relationship*". Accordingly, if "*a contract has been terminated, a practice under it can*

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47 *Ibid*.

48 These remarks were *obiter*, as the SCA was not called on to determine the issue of whether an award of damages or compensation is competent, but rather whether the cancellation of an agreement amounts to a practice that may be referred to arbitration – see Mfoza CC founding affidavit para 50 and subparas.

no longer be corrected and a corrective remedial jurisdiction is accordingly rendered nugatory."

41.3 Three: that the "*only remedy available to an injured party after a contract has been terminated is perhaps a damages remedy*."

41.4 Four: nonetheless that "*an award of damages is not competent under a corrective remedial jurisdiction – it requires the existence of a compensatory remedial jurisdiction*."

42. Neither of these propositions is, however, supported by the text or purpose of the provision. They were also substantively overturned by this Court in *Business Zone CC*.

43. In relation to the first proposition, paragraphs (*a*) and (*b*) of section 12B(4) do not distinguish between two types of jurisdiction, but rather empower the arbitrator to make necessary awards depending on the nature of the dispute within the arbitrator's single jurisdiction.

43.1 Paragraph (*a*) empowers the arbitrator to issue an award to correct any unfair or unreasonable contractual practice. As explained above, it does not limit the awards that can be made, and is framed widely. The power is general and broad in nature, and can be invoked to make any award in any number of circumstances where it is determined that there have been unfair of unreasonable practices.

43.2 Paragraph (*b*) caters for the specific situations where frivolous or capricious allegations have been made. In those limited circumstances, the arbitrator is empowered to make a compensatory award.

> Compensation is a subset of the broad range of awards available to an arbitrator that is applicable in the specific context of frivolous or capricious allegations. In *Business Zone CC*, this Court held that paragraph (*b*) is a "*legislative safeguard*". This is because a compensatory award "*imposes remedial and punitive costs beyond that of an ordinary costs award*" and acts as "*a strong deterrent for parties seeking to exploit the section 12B(1) arbitration mechanism*."[49] The "*compensation*" contemplated by paragraph (*b*) is therefore very specific.

44. Instead of establishing separate remedial jurisdictions, the provisions provide for remedies, the one general the other specific, to address different scenarios within the arbitrator's single jurisdiction to determine disputes concerning alleged unfair or unreasonable practices.

45. The SCA's reasoning which flowed from the second proposition was rejected by this Court in *Business Zone CC*. Mhlantla J held that a single act of cancelling a contract can constitute an unfair or unreasonable practice in terms of section 12B.[50] She held further that an arbitrator is empowered to direct "*that the parties reinstate their agreement*" if the act of cancellation was unfair or unreasonable.[51] This Court thus reached a materially different conclusion from the SCA.

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49 *Business Zone CC* at para 63.

50 *Business Zone CC* at paras 72-76.

51 *Business Zone CC* at para 76.

46. Importantly for the present case, Mhlantla J's *dicta* also undermines the SCA's second proposition. Corrective relief which reinstates a cancelled contract is not simply prospective in effect, as it requires the arbitrator to consider past conduct and correct it.

47. Yet, even if the SCA's second proposition – that corrective awards can only be prospective – were correct, that does not in any event preclude the awarding of damages for conduct committed during the currency of the agreement. Mfoza claims damages and compensation for practices of Engen that occurred before the agreement was cancelled.

48. *Business Zone CC* also undermines the SCA's third proposition. If a contract has been cancelled, section 12B(4)(*a*) empowers the arbitrator to direct reinstatement of the contract. Damages are therefore not the only potential remedy (as the SCA incorrectly found).

49. As the first to third propositions cannot stand, the fourth must also fall. An arbitrator exercising a wide corrective remedial jurisdiction is not precluded from awarding damages or compensation. A corrective remedial jurisdiction does not exclude compensation from being a competent remedy. Compensatory and corrective remedial competences are not mutually exclusive, as the SCA assumed.

50. The first and fourth propositions also indicate that the SCA implicitly applied the maxim *inclusio unius est exclusion alterius* – i.e. the specific inclusion of one

implies the exclusion of the other – by reasoning that the express mention of compensation in paragraph (*b*) excludes it from paragraph (*a*).[52]

50.1 This Court has cautioned that the maxim "*is not a rigid rule of statutory construction*" but rather a "*principle of common sense*" which "*must at all times be applied with great caution*."[53]

50.2 The express and specific reference of "*compensation*" in paragraph (*b*), as we have already emphasised, is to provide the arbitrator with specific power to grant remedial and punitive costs where frivolous allegations are submitted for arbitration.

50.3 The express inclusion of a power to grant a specific form of compensation in those circumstances, is not indicative of a limitation of the more general (and broader) power to make corrective awards in paragraph (*a*) of the provision.

50.4 In other words, the general and wide power in section 12B(4)(*a*) includes but is not limited to awarding compensation or patrimonial damages, so as to correct unfair or unreasonable practices. The specific mention of a power to award compensation in paragraph (*b*) does not detract from the wide powers given in paragraph (*a*).

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52 Engen embraces this in its argument, see Engen CC answering affidavit para 25.

53 *National Director of Public Prosecutions v Mohamed NO and Others* 2003 (4) SA 1 (CC) at para 40.

One regime of lawfulness and fairness

51. The essence of Engen's argument against the interpretation proffered by Mfoza of section 12B is an impermissible attempt to bifurcate the disputes that may arise in a contract between the courts (a "*lawfulness dispensation*") and an arbitration (a "*fairness dispensation*").[54] As we have already noted, this Court has held that section 12B does not contemplate such a bifurcated adjudicative regime.

52. Engen contends that:

52.1 section 12B's focus is on the unfair or unreasonable invocation of a contractual right, rather than the unlawful breach of a contract;[55]

52.2 the enforcement of a contractual right cannot sustain a claim for damages because the enforcement of a valid contractual term cannot be unlawful or wrongful, even if an unreasonable or unfair practice is subject to correction under the Act – damages are an ordinary contractual remedy for the courts to determine;[56]

52.3 it would be "*absurd*" to interpret section 12B(4)(*a*) in a manner that would render the enforcement of valid contractual rights wrongful through the imposition of an unfairness standard, and on the back of such a finding, order the enforcing party to pay damages or compensation.[57]

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54 Engen CC answering affidavit para 35.

55 Engen CC answering affidavit paras 34 & 35.

56 Engen CC answering affidavit para 34.

57 Engen CC answering affidavit paras 18-19.

53. Those contentions are fundamentally misconceived for at least four reasons:

53.1 First, contrary to Engen's submission, section 12B is as much concerned with the unfair or unreasonable invocation of a contractual right as it is with the unlawful breach of a contract. Relief under section 12B is not confined to the enforcement of a contractual term, but extends also to the (unfair or unreasonable) failure to comply with a term. Mfoza's principal complaint in the arbitration was not that Engen was unfairly enforcing a term of the contract but that it breached the lease and, in doing so, acted unfairly and unreasonably.

53.2 Second, Engen's contention that the enforcement of a freely-agreed contractual term cannot be wrongful or unlawful is inconsistent with long-established *dicta* that contractual terms, freely agreed, may be *contra bonos mores* or contrary to public policy.[58] The enforcement of those terms would be wrongful and unlawful. While under the common law fairness is not a "*free-standing*" requirement of enforcement,[59] the Courts (before and after the advent of the Constitution) have recognised that public policy may preclude the enforcement of a contractual term, whether it is particularly unreasonable at an abstract level or in the specific circumstances of a case.[60] Where a Court declines to enforce a contractual term, on either basis, it is based on a finding that the term

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58 See, for example, *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

59 *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 (5) SA 247 (CC) at para 79.

60 *Beadica* at para 36.

is illegal, unlawful or wrongful.[61] The PPA extends those principles to unfair or unreasonable contractual practices. An arbitrator will not enforce the provisions of the contract where to do so would be unfair or unreasonable. The law does not recognise a strict separation of lawfulness, on the one hand, and reasonableness and fairness, on the other, in the context of contractual relationships, as Engen incorrectly asserts.

53.3 Third, Engen's contentions rest on the assumption that unfair or unreasonable practices are incapable of resulting in financial harm or loss. While the assumption is asserted, Engen provides no authority, reasoning or rationale to support it. But even lawful exercises of contractual rights and powers, which are unfair or unreasonable, can result in financial or other harm to the other party. Section 12B(4)(*a*) gives a broad power to the arbitrator to correct such harm: Engen offers no cogent argument for why such power does not extend to correcting financial resulting from unfair or unreasonable conduct, through damages or compensation.

53.4 Fourth, as alluded to above, at a broader level Engen's argument is in conflict with *Business Zone CC*:

53.4.1 Mhlantla J (in *Business Zone CC*) explicitly held that the equitable standard – of fairness and reasonableness –

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61 *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) at 18. See also Van Huyssteen et al *Contract General Principles* 6 ed (2020) at 211*ff*.

introduced into such contracts by section 12B, applies in both the adjudicative jurisdictions of the Court and the arbitrator:[62] "*[T]he 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.*" Section 12B has resulted in a change of the common law position.

53.4.2 It is therefore wrong to disparage (as Engen has done) Mfoza's case as being "*misconceived*" and as having "*collapsed*" the court and arbitration regimes "*into one*".[63] Mfoza's approach is mandated by this Court's jurisprudence, which holds that while there are two adjudicative *fora* (arbitration and the courts), they deal with the same issues and apply the same standard.

53.4.3 Arbitration has certain advantages over litigation in court.[64] as Mhlantla J noted "*[a]rbitration offers an expedient, specialised and procedurally flexible forum to resolve disputes*."[65]

53.4.4 Engen's contention that damages should be relegated to disputes about lawful contract behaviour in the Courts, ignores how section 12B has transformed contractual relationships in the petroleum industry by imposing an equitable standard – in both the courts and in arbitrations.

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62 *Business Zone CC* at paras 51-56.

63 Engen CC answering affidavit para 62.2, record p XXX.

64 *Crompton Street Motors* at paras 44-45.

65 *Business Zone CC* at para 59.

53.4.5 Engen's arguments are also artificial in the sense that conduct may both be unlawful and unfair or unreasonable. Mfoza contends that Engen's breaches of the agreement are not only unlawful, but also unfair and unreasonable.

53.4.6 In addition, even if it were so that fairness and lawfulness were to be treated differently under separate adjudicative regimes (which we submit is plainly not the case), that would not in any event support the proposition that damages or compensation are incompetent as corrective remedies in respect of unfair practices.

Engen's remaining arguments

54. In what follows we respond to specific arguments made by Engen which are not already addressed in our submissions.

55. First, Engen says that the reinstatement of a contract and damages are "*mutually destructive*" remedies because the "*entire premise of the corrective jurisdiction in Business Zone was that the arbitrator could reinstate the contract between the parties*".[66] The conclusion of Engen's argument has no logical basis. There is no reason in logic why damages and reinstatement cannot both be awarded, if that would correct an unfair or unreasonable practice. In addition, the argument proceeds from an incorrect assumption that a "*corrective*" jurisdiction excludes damages or compensation. It also reads into *Business Zone CC* an issue which this Court was not deciding.

[66] Engen CC answering affidavit para 46.4.

56. Second, Engen emphasises that section 12B does not "*vindicate*" or "*directly invoke*" a right.[67] This is correct, as this Court pointed out in *Business Zone CC*.[68] Engen, however, does not explain the relevance of this for the proper interpretation of the arbitrator's powers under section 12B. There is nothing precluding Parliament from empowering an arbitrator to award damages or compensation to correct an unfair practice in any contractual relationship where the parties have unequal bargaining power.

Implications for this case

57. For these reasons, we submit that section 12B(4)(*a*) empowers an arbitrator to award damages or compensation if doing so will correct an unfair or unreasonable practice committed by party to a contract to which it applies.

58. It follows, in our submission, that Maleka SC's award was unimpeachable. The High Court erred in reviewing and setting it aside.

THE HIGH COURT HAD NO POWER TO SUBSTITUTE THE ARBITRATOR'S AWARD

59. As set out in Mfoza's founding affidavit before this Court, the High Court erred in another fundamental manner.

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67 Engen CC answering affidavit paras 14.6 and 24.

68 *Business Zone CC* at para 55: "*Section 12B of the Act holds no pretence to giving effect to a particular constitutional right.*"

60. Even if the High Court was right in setting aside Maleka SC's award (which it was not), it erred in any event by substituting the award with an order:[69]

60.1 upholding Engen's preliminary objection;

60.2 declaring that an arbitrator does not have jurisdiction to grant patrimonial damages; and

60.3 directing Mfoza to amend its statement of case to remove its claim for patrimonial damages, and to do so within 10 days.

61. The High Court invoked section 33(1)(*b*) of the Arbitration Act 42 of 1965 to set aside Maleka SC's award.[70] That provision says:

> *"Where … an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers … the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside."* [emphasis added]

62. Unlike section 172(1)(*b*) of the Constitution and section 8 of the Promotion of Administrative Justice Act 3 of 2000, section 33(1) of the Arbitration Act does not give the Court wide discretionary powers to make any just and equitable remedy (which could include substitution relief). The section provides for only one remedy: setting aside.

63. The only other power granted to the Court by section 33 is that contained in subsection (4), which provides: "*If the award is set aside the dispute shall, at*

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69 High Court judgment at para 43, record vol 4 pp 273-274.

70 High Court judgment at paras 38-39, record vol 4 p 272.

the request of either party, be submitted to a new arbitration tribunal constituted in the manner directed by the court."

64. In *Hos+Med Medical Aid Scheme*, Lewis JA held that this provision is peremptory in nature, so that where any party requests a new arbitrator, the Court must make such referral.[71]

65. In light of the "*the peremptory wording of section 33(4)*", Lewis JA also held that "*equally*" "*a court does not have the discretion to substitute its own order for that of the appeal tribunal.*"[72] The SCA accordingly replaced the order of the High Court – which had substituted the arbitrator's award[73] – with an order simply setting aside the award and referring it to a new arbitration panel.[74]

66. Therefore, the High Court's substitution of Maleka SC's award in this matter was incompetent on its own terms and must be set aside, for that reason too.

RELIEF SOUGHT

67. Mfoza accordingly seeks an order on the following terms:

    67.1 Mfoza is granted leave to appeal;

    67.2 The appeal is upheld with costs, including the costs of two counsel;

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71 *Hos+Med Medical Aid Scheme v Thebe Ya Bophelo Healthcare Marketing & Consulting (Pty) Ltd and Others* 2008 (2) SA 608 (SCA) at para 43.

72 At para 43.

73 At para 38.

74 At para 46.

67.3 The order of the High Court is set aside and replaced with the following order:

"*The application is dismissed with costs.*"

Grant Quixley

Mitchell De Beer

Chambers
Cape Town
17 February 2022

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