IN THE CONSTITUTIONAL COURT

REPUBLIC OF SOUTH AFRICA

CCT CASE NUMBER: 290/20

In the matter between: -

SEEBED CC t/a SIYABONGA CONVENIENCE CENTRE

(REGISTRATION NUMBER: 2004/125873/23) Applicant

and

ENGEN PETROLEUM LIMITED Respondent

(REGISTRATION NUMBER: 1989/003754/06)

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INTRODUCTION

1. On 8 September 2021, the Acting Chief Justice of this Court issued a directive inviting the parties in this matter to submit written submissions on the effect of the Court's judgment in *Crompton*.[1]

2. The Applicant contends that *Crompton* is distinguishable both in fact and in law from the current matter.

DISTINGUISHABLE ON THE FACTS

3. In *Crompton*, it was common cause between the parties that the franchise and lease agreement had expired through effluxion of time.

4. In this matter, the Respondent (*"Engen"*) purported to cancel the lease agreement based on Seebed's alleged breach in refusing to sign a franchise agreement with Retsol. Seebed disputed Engen's entitlement to cancel the lease agreement. As a result, Engen instituted eviction proceedings (*"the first eviction"*) against Seebed during 2012.

5. In *Crompton* the eviction application was granted. In Seebed, the first eviction was referred to trial on 26 May 2016.

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1 *Crompton Street Motors CC v Bright Idea Projects 66 (Pty) Ltd* (CCT 19/20) [2021] ZACC 24 (3 September 2021) ("*Crompton*").

6. One of the defences raised by Seebed is that Engen's conduct in purporting to terminate the lease agreement and failing to extend the lease up until July 2020 (despite its oral representation that it would do so) constituted an unfair or unreasonable contractual practice as envisaged by the provisions of section 12B of the Petroleum Products Act.[2]

7. The trial is yet to be enrolled for hearing.

8. The issue as to whether Engen's purported cancellation of the lease agreement constitutes an unfair or unreasonable practice is an issue that the High Court is called upon to determine. It is therefore not Seebed's case, as was *Crompton's*, that section 12B ousts the High Court's jurisdiction.

9. It must also be borne in mind that the purpose of the eviction was the Retsol Franchise agreement, however, Engen announced on 17 May 2016 that it was cancelling the Retsol Franchise as from 31 March 2017 and currently it remains cancelled. Therefore, the underlying cause for the eviction fell away.

10. Instead of enrolling the first eviction trial for hearing, Engen brought a second eviction application during October 2016. The second eviction was premised on an allegation that on Seebed's own version, it relied on a month-to-month lease. Engen placed reliance on submissions made by counsel during the course of argument in the first eviction.

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11. Seebed opposed the second eviction *inter alia* on the ground that the first eviction was pending and had been referred to trial and that a material dispute of fact on the papers justified the referral of the second eviction to trial to be heard simultaneously with the first eviction. Further, Seebed had brought a counterclaim in the first eviction wherein it asserted a right to remain in occupation of the leased premises until July 2020 and therefore the issue relating to unfair and/or unreasonable contractual practice as raised in the second eviction could only be determined by oral evidence, which necessitated a referral of the second eviction to trial.

12. As in *Crompton,* Seebed brought an application to stay the second eviction. However, *Crompton* appealed against the High Court's refusal to stay the application. Seebed addressed the fairness and reasonableness of the applicant's conduct head-on in the answering affidavit and sought that this issue be referred to trial.

DISTINGUISHABLE IN LAW

13. The argument made out by Seebed within the context of section 12B is strikingly different to the one argued by *Crompton.*

14. In the second eviction Seebed argued that that section 12B of the Act imposes the principle of fairness and reasonableness in all disputes between fuel wholesalers and fuel retailers and that there is sufficient context and justification to accept that the equitable standard of fairness and reasonableness prevails

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

15. The court of first instance erred in finding reasonableness or fairness have no place in an eviction application arising from a contractual breach, and that Engen's application involves an enquiry into lawfulness, whilst the section 12B enquiry is directed at the reasonableness or fairness of a contractual practice. The findings of this Court in the *Crompton* matter support the argument raised by the applicant. The applicant argued that the Court had the necessary jurisdiction and was required to apply a just and equitable standard.

16. In this regard, clause 41 of the lease agreement afforded Seebed an opportunity to sell the business. Engen disputes that the clause applies in light of Seebed's alleged breach. However, Seebed did not commit a breach as the evidence in the first eviction shows. There is therefore no conceivable basis for Engen's refusal to allow Seebed to sell the business and to recover what it has invested.

17. In this regard it is apposite that in Engen Petroleum Ltd and Rissik Street One Stop CC t/a Rissik Street Engen and Another, the Court found that *"the cruelty of a lease is that when one leaves at the end of the term of lease he/she leaves with nothing"* and stated that:

17.1 In terms of section 12B(2) the parties determined the rules of arbitration and they are at liberty to include any dispute which in the case at hand may include eviction;

17.2 The terms of reference of the arbitration has not yet been determined and Rissik Street is therefore at liberty to seek reinstatement of the operating licence and the arbitrator would be empowered to order that;

17.3 Therefore, even if the notice period had already expired, it would not preclude the arbitrator to make an award as he/she deems necessary to correct such alleged unfair and/or unreasonable contractual practice, which may include reinstatement of the operating lease agreement.

18. Unequal bargaining power in the petroleum industry is pervasive and still continues. Currently it is easy for Oil Companies with the proverbial bigger cheque book to pay lip service to or even completely disregard the provisions of section 12B and to simply proceed forcefully with litigation. Therefore, the real significance of section 12B does not lie in the Controller's power to compel the parties to refer the dispute to arbitration, but in the equitable standard it imposes. A standard that overrides the terms of the contract to ensure that fairness and reasonableness prevail.

CONCLUSION

19. In light of the above, the court *a quo* should have found that Engen was not entitled to an order for the eviction of Seebed in circumstances where a referral to arbitration was still pending, alternatively, the Court ought to have applied the principles of reasonableness and fairness as envisaged by section 12B of the Act when determining the application for eviction.

20. This court has already found that the contention that two different adjudicative standards, one equitable and one not, depending on the forum that the parties find themselves in, is unsustainable. There is sufficient context and justification to accept that the equitable standard of fairness and reasonableness prevails in all petroleum contracts, regardless of whether they are subject to statutory arbitration or ordinary court litigation. The Court a quo failed to take cognisance of the unfair and/or unreasonable conduct of the respondent when assessing the application. These aspects were fully canvassed in the answering affidavits.

21. Therefore, it is imperative that the law applied to petroleum contracts, whether by a Court or by an arbitrator, should introduce a fairness standard without shielding the common law from statutory development. It is on this point that this court is requested to make a definitive finding.

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23 September 2021