ORIGINAL

IN THE CONSTITUTIONAL COURT

REPUBLIC OF SOUTH AFRICA

CCT CASE NUMBER:

SCA CASE NUMBER: 290/20

GJ CASE NUMBER: 37883/2016

In the matter between: -

SEEBED CC t/a SIYABONGA CONVENIENCE CENTRE

(REGISTRATION NUMBER: 2004/125873/23)

Applicant

and

ENGEN PETROLEUM LIMITED

(REGISTRATION NUMBER: 1989/003754/06)

Respondent

NOTICE OF MOTION

TAKE NOTICE that SEEBED CC t/a SIYABONGA CONVENIENCE CENTRE (*"the Applicant"*) hereby applies to the Constitutional Court for an order in the following terms: -

1. The Applicant is granted leave to appeal against the whole judgment and costs granted by the High Court (Gauteng, Johannesburg) on 26 July 2018.

2. The appeal is upheld.

3. The order of the High Court is set aside and replaced with the following: -

   "1. The eviction application is stayed pending the outcome of the referral of the dispute to the Controller in terms of section 12B of the Petroleum Products Act.

   2. The costs are reserved"

4. Costs of the application, only in the event of opposition, including costs occasioned by the employ of two counsel, where applicable.

5. Further and/or alternative relief.

TAKE NOTICE that the accompanying affidavit of MOHAMED ABED, together with annexures, will be used in support of this application.

TAKE NOTICE FURTHER that within 10 (ten) days from the date upon which this application is lodged, the Respondent may respond in writing indicating whether or not it opposes the application for leave to appeal and, if so, the grounds for such opposition. The Respondent must, in that event, appoint a correspondent within the area of the Constitutional Court to accept service of all documents in this matter.

DATED at JOHANNESBURG on the 30th day of NOVEMBER 2020.

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TO: **THE REGISTRAR OF THE CONSTITUTIONAL COURT**
BRAAMFONTEIN, JOHANNESBURG

AND TO: **LANHAM LOVE ATTORNEYS**
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the 20 day of November 2020

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LANHAM-LOVE ATTORNEYS
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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)

FOUNDING AFFIDAVIT

I, the undersigned,

MOHAMED ABED

do hereby take the prescribed oath and state that: -

DEPONENT

1. I am an adult businessman, presently residing at 7544 Makrial Street, Lenasia Extension 8, Johannesburg, Gauteng, and hold a 50% members' interest in the Applicant. The remaining 50% members' interest is held by Abdul Cader Kadwa.

2. The facts contained herein are within my personal knowledge, unless stated otherwise to the contrary, and are to the best of my belief both true and correct.

3. Any legal submissions made herein follow from the advice obtained from the Applicant's legal representatives, which advice the Applicant has no reason to doubt. To the extent necessary, the Applicant fully associates itself with such advice.

THE PARTIES

4. The Applicant is **SEEBED CC t/a SIYABONGA CONVENIENCE CENTRE** (REGISTRATION NUMBER: 2004/125873/23) (*"Seebed"*), a close corporation duly registered in accordance with the laws of the Republic of South Africa, with its registered address at No 8176 Pisces Street, Lenasia Extension 9, Johannesburg and its principal place of business at 1046 Anvil Road (corner Granville Road),

Robertville, Gauteng.

5. The Respondent is **ENGEN PETROLEUM LIMITED** (REGISTRATION NUMBER: 1989/003754/06) (*"Engen"*), a public company with limited liability, duly registered in accordance with the company laws of the Republic of South Africa, with its registered address at Eight Floor, Engen Court, Thibault Square, Cape Town.

PURPOSE OF APPLICATION

6. This is an application for leave to appeal against the whole judgment and order delivered by the High Court (Gauteng Local Division) on the 31st of July 2019, in terms whereof an order was granted evicting Seebed from the commercial leased premises owned by Engen and situated at Erf 378, Robertville Extension 10, Registration Division IQ, Gauteng (*"the leased premises"*) with retrospective effect from 31 July 2017. A copy of the judgment and order is attached hereto marked annexure **"FA1"**.

7. The issues raised in this case, firstly concern a matter of great importance to the general public which involves the constitutional right of every citizen to trade freely in terms of section 22 of the Constitution, 1996.

8. Secondly, this matter relates to the disparity in bargaining powers which continue to exist between wholesalers and retailers in the fuel industry.

9. Lastly, in this matter this Court will be required to address and clarify the application of reasonableness and fairness to petroleum contracts in the context of the Petroleum Products Act, 120 of 1977 (*"the Act"*), where two different adjudicative standards, one equitable and one not, depending on the forum (court or arbitration) currently prevail. 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 when currently uncertainty exists as a result of conflicting judgments following upon this Court's decision in The Business Zone 1010 CC t/a Emmarentia Convenience Centre v Engen Petroleum Limited and Others (CCT09/16) [2017] ZACC 2; 2017 (6) BCLR 773 (CC) ("*The Business Zone*").

10. In The Business Zone, this Court had to determine what the proper interpretation of section 12B of the Act is. In this application the Court is called upon to determine the standard which courts must apply when determining disputes relating to petroleum contracts.

LEAVE TO APPEAL TO COURT A QUO AND SUPREME COURT OF APPEAL

11. The High Court dismissed Seebed's application for leave to appeal on 3 March 2020. A copy of the judgment and order is attached hereto marked annexure **"FA2"**.

12. The Supreme Court of Appeal dismissed Seebed's application for leave to appeal on the grounds that there was no reasonable prospect of success in an appeal and there was no other compelling reason why an appeal should be heard. A copy of the order is attached hereto marked annexure **"FA3"**.

13. Seebed applied for a reconsideration in terms of section 17(2)(f) of the Superior Courts Act, 10 of 2013. The application was dismissed on the 9th of November 2020. A copy of the order is attached hereto marked annexure **"FA4"**.

BACKGROUND

14. Seebed is a licensed retailer and Engen is a licensed wholesaler of petroleum products, each as contemplated by the Act.

15. During 2009, Seebed purchased a fuel and service station business situated at the leased premises. Seebed then concluded a written agreement of lease and operation of service station (*"the lease agreement"*), in terms whereof Seebed conducted an Engen filling station from the leased premises. The salient terms for purposes of the present application are as follows:

"41. DEALER' RIGHTS ON TERMINATION

41.1 Subject to any provisions to the contrary, where the Dealer's tenure is prematurely terminated by the Company in terms of this Agreement,

for whatever reason, the Dealer shall not have the right to any compensation in respect of his loss of the business capital. The Company shall have the right to appoint a new dealer, and the Dealer shall be entitled to negotiate with such new dealer the terms of any take-over of stock and or equipment belonging to the Dealer on the premises; alternatively the Dealer shall have the right to remove such stock or equipment owned by itself.

41.2 *Not less than twelve months prior to the Termination Date of this Agreement, the Company shall advise the Dealer whether or not it intends offering the Dealer a further opportunity to lease the Premises. Should the Company advise the Dealer that it does not intend renewing the lease between the parties, the Dealer shall be entitled to attempt to sell the Business during the remaining period of the lease, and the Company shall not unreasonably withhold its consent to such sale. Should the Dealer not have sold the Business prior to the expiry of the lease, the provisions of sub-clause 41.1 of this Schedule 2 shall apply.*

41.3 *Should the Company terminate this Agreement pursuant to clause 4.5 of clause 8.3 of the First Part, the Dealer shall be entitled to attempt to sell the Business during the remaining nine months period of the lease, and the Company shall not unreasonably withhold its consent to*

such sale. Should the Dealer not have sold the business prior to the end of that nine-month period the provisions of sub-clause 41.1 of this Schedule 2 shall apply."

16. The initial lease period commenced on 1 April 2008 and terminated on 31 May 2010. This period was subsequently extended to 31 July 2017.

17. In mid-2010 Engen decided to provide additional facilities at the leased premises, more particularly a Corner Bakery franchise. The franchisor of the Corner Bakery was Retsol Stores (Pty) Ltd (*"Retsol"*).

18. Seebed did not sign a franchise agreement with Retsol. As a result of Seebed's query and request for changes to the Retsol franchise agreement, Engen purported to cancel the lease agreement and demanded that Seebed vacate the leased premises. Seebed disputed Engen's entitlement to cancel the lease based on its failure to conclude a franchise agreement with Retsol. As a result, and during 2012, Engen instituted eviction proceedings (*"the first eviction"*) against Seebed. Seebed opposed the application on the following grounds: -

18.1. Seebed had the right to elect whether it wished to establish a Corner Bakery or not;

18.2. Feasibility studies in relation to the implementation of the Corner Bakery concept at Engen service stations had not been conducted;

18.3. Certain misrepresentations were made by Engen and Retsol regarding the profitability of the Corner Bakery franchise. Despite the representations to the contrary, the Corner Bakery franchises were not lucrative profit centres.

19. The first eviction was brought by way of motion. On 26 May 2016, after hearing argument, Meyer J referred the application to trial. Pleadings closed in the trial action and the matter was enrolled for hearing on the 15th of May 2019 but postponed by agreement between the parties.

20. In the trial action, Seebed brought a counterclaim wherein it contended that: -

20.1. It has a reasonable expectation that the lease agreement would be extended for a further five-year period to July 2020;

20.2. The lease extension for the period ending July 2017, for which Seebed was charged R1,995,000.00, was reduced to July 2015 on the promise that the lease period would be extended to 2020 as compensation, thus enabling Engen to add new clauses to the lease agreement to incorporate the RAS module;

20.3. 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 Act.

21. During October 2016, Engen brought a further application for the eviction of Seebed (*"the second eviction"*).

22. 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.

23. Seebed opposed the second eviction on the following grounds: -

23.1. The first eviction was pending and had been referred to trial;

23.2. In the light of the material disputes of fact on the papers, the second eviction should be referred to trial to be heard simultaneously with the first eviction;

23.3. 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;

23.4. 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;

23.5. The concessions made by counsel for Seebed, upon which Engen wished to place reliance for its contention that a month-to-month lease existed, were concessions of law and not of fact, and hence not binding.

24. On 25 April 2017, Seebed requested Engen to agree to a stay of the Court proceedings, pending a referral of the dispute between the parties to arbitration in terms of the Act. The request was refused.

25. On 30 June 2017 Seebed submitted a request for arbitration in terms of section 12B of the Act to the Controller of Petroleum Products (*"the Controller"*).

26. On 23 August 2017 Seebed brought an application for a stay of the second eviction pending Seebed's request for a referral to arbitration in terms of section 12B of the Act.

27. The reason for seeking the stay was premised on the judgment by this Court in the case of The Business Zone where this Court found that the scope of disputes which are referred to arbitration in terms of section 12B is significantly wide enough to include disputes relating to the interpretation of contracts insofar as it relates to what

is fair and reasonable and not merely by the terms of the contract.

28. It was further argued on behalf of Seebed that the High Court was not required to determine the issue for a claim in terms of section 12B and that it was therefore not in a position to assess whether there would be any success in the referral. It was also submitted that an arbitrator appointed in terms of section 12B may well determine that Seebed's right of occupation only terminates in 2020 and to determine the issues now in 2018 meant a term of two-year prejudice to Seebed.

29. Lastly it was contended on behalf of Seebed that the application was exceptional in that the Constitutional Court had only then determined that an arbitration in terms of section 12B of the Act is sufficiently wide to include a determination of what is fair and equitable and reasonable in all petroleum concepts.

30. Engen opposed the application to stay which came before Victor J (as she then was) on 5 July 2018. On 6 July 2018, the application to stay was refused, with costs, on the following grounds: -

30.1. There was no bar to a Court finding that a petroleum contract and any clause relating thereto was equitable, fair and reasonable;

30.2. The Court was in an appropriate position to hear the second eviction application;

30.3. In light of the fact that the jurisdiction of the Court and its inherent right to interpret contracts, was similar to the powers of the Controller and that, in order to avoid further delay, the litigation should proceed before the Court.

31. On 2 August 2018, Seebed delivered a supplementary affidavit in the second eviction together with an application for leave to file such affidavit.

32. The reasons for applying for leave to supplement were the following: -

32.1. Seebed initially elected to refer the unfair or unreasonable contractual practices committed by Engen to arbitration in terms of section 12B of the Act and to seek a stay of the second eviction pending determination of those issues;

32.2. The stay application was dismissed with costs;

32.3. In the first eviction Seebed instituted a counterclaim based on its contention that it had a reasonable expectation that the lease agreement between Seebed and Engen would be extended for a further five-year period to the year 2020. Due to the nature of the second eviction and the basis upon which it had been instituted, Seebed's counterclaim as referred to was not part of the second eviction;

32.4. The agreement, alternatively Seebed's reasonable expectation and the unfair or unreasonable contractual practice of Engen, constituted defences to Seebed's eviction and render its occupation of the premises lawful;

32.5. It was therefore imperative for Seebed to place before the Court *a quo* the issues which had been included in the first eviction;

32.6. The issues which were raised in the first eviction were included in a counterclaim wherein Seebed asserted its right to occupy the premises. These issues are pending before the trial Court. The right to occupy the premises is self-evidently a fundamental issue in the second eviction;

32.7. If Seebed establishes in the first eviction that it is lawfully entitled to occupy the premises, then the second eviction would inevitably fail. It was for this reason that Seebed sought to refer the Court to the selfsame issues which were contained in the first eviction;

32.8. The issues in the first eviction were inextricably linked to the issues in the second eviction and could and should not have been determined separately. Both matters relate to the lawfulness of Seebed's occupation of the premises;

32.9. On 25 September 2018, Engen served a reply to Seebed's supplementary affidavit;

32.10. On 19 March 2019, the second eviction was argued before the Court *a quo*;

32.11. On 31 July 2019, the Court *a quo* ordered the eviction of Seebed from the leased premises with effect from 31 July 2017 and ordered Seebed to pay the costs of the application;

32.12. The Court *a quo* did not allow Seebed's supplementary affidavit in circumstances where Engen already replied to the allegations contained in the supplementary affidavit and where the Court, although it did not allow the supplementary affidavit, dealt with the content thereof on a piecemeal basis.

33. The Court *a quo* found, insofar as the referral to the Controller was concerned, that: -

33.1. the issue had already been determined and the contentions rejected by the Court in the stay application;

33.2. raising the issue of the referral again was an attempt to reintroduce the issue and to delay the final adjudication of the dispute and extend Seebed's alleged unlawful occupation;

33.3. Engen correctly contended that in any event, Seebed was precluded from relying on Engen's alleged failure to enter into an operating lease and that

that failure constituted an unfair or unreasonable contractual practice when Seebed, in its plea and counterclaim in the trial and its affidavit in the second eviction, contended that in fact such agreement was orally concluded;

33.4. the unfair or unreasonable contractual practice was an issue to be decided at trial;

33.5. Seebed's application involved an enquiry into lawfulness, while the section 12B enquiry was directed at the reasonableness or fairness of a contractual practice;

33.6. Engen was entitled to cancel the operating lease if a contractual breach was proved;

33.7. the common law does not recognise fairness and reasonableness as independent substantive rules that Courts can employ to intervene in contractual relationships (South African Forestry Co Ltd v York Timbers Ltd 2005(3) SA 323 (SCA) paragraph [26]);

33.8. the Supreme Court of Appeal found that the Courts do not determine cases on the basis of reasonableness and fairness because this would lead to intolerable legal uncertainty (Potgieter and Another v Potgieter NO and Others 2012 (1) SA 637 (SCA));

33.9. the High Court had found that the Court had no equitable jurisdiction to decline the grant of an eviction application (AJ Properties CC v Sello 2008 (1) SA 535 (GJ));

33.10. the eviction application was concerned solely with enforcement of the terms of the contract which are determined in terms of the common law principles and which did not invoke the principles of fairness and reasonableness;

33.11. if Seebed had elected to keep the contract alive despite the alleged fraud or misrepresentation, Seebed was obliged to comply with the terms and provisions of the contract;

33.12. at best for Seebed it was only entitled to remain in occupation of the leased premises until 31 July 2017.

34. In Seebed's application for leave to appeal, it contended that the Court *a quo*: -

34.1. failed to find that section 12B of the Act imposed the principle of fairness and reasonableness in all disputes between fuel wholesalers and fuel retailers;

34.2. failed to find that there was sufficient context and justification to accept that the equitable standard of fairness and reasonableness prevailed in all petroleum contracts, regardless of whether they were subject to statutory

arbitration or ordinary Court litigation;

34.3. failed to find that there was 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 was done in the context of labour or rental housing contracts;

34.4. failed to take cognisance of the fact that the purpose of introducing a fairness standard in petroleum contracts was better given effect to without shielding the common law from statutory development;

34.5. failed to find that section 12B of the Act offered a statutory guarantee of a mechanism that has become ubiquitous in contract, which may otherwise not exist possibly due to the unequal bargaining positions retailers vis-à-vis wholesalers find themselves in;

34.6. erred in finding that a request for referral was akin to an application to stay proceedings;

34.7. erred in finding that section 12B of the Act had been raised by Seebed to delay the final adjudication of the dispute and to extend its unlawful occupation;

34.8. erred in finding that an eviction application was concerned solely with the enforcement of the terms of the contract which were required to be determined in terms of the common law principles which did not invoke the principles of fairness and reasonableness.

35. In granting the second eviction, the Court *a quo* has effectively precluded Seebed from raising not only its defences arising from section 12B of the Act, but all of its other defences raised in the first eviction. Simply put, the Court *a quo*, in granting the second eviction, rendered the referral to trial of the first eviction meaningless.

CONFLICTING JUDGMENTS ON THE MATTERS UNDER CONSIDERATION

36. Section 17(1)(a)(ii) of the Superior Courts Act, 10 of 2013 acknowledges that conflicting judgments on matters under consideration constitute a compelling reason for an appeal to be heard.

37. In Hansco Motors CC v BP Southern Africa (Pty) Ltd 2011 JDR 1397 (KZP) the Applicant averred that the termination of the agreement between it and the Respondent amounted to an unfair and unreasonable contractual practice as envisaged in section 12B of the Act. At the time of the judgment there were no other reported judgments on the interpretation or effect of section 12B. The Court found that the arbitrator does not have the power to concern itself with the termination of the sublease agreement and the franchise agreement. The Court therefore granted

the eviction application.

38. The Victor judgment in this matter on the application to stay determined that Courts have similar jurisdictional powers to that of the Controller to interpret contracts and to make findings on the equitable standard of fairness and reasonableness in contracts.

39. The Mosam AJ judgment in this matter on the other hand found that the principles of reasonableness or fairness have no place in an eviction application arising from a contractual breach, and that Engen's application involved an enquiry into lawfulness, whilst the section 12B enquiry was directed at the reasonableness or fairness of a contractual practice. The court therefore found as in Potgieter that Courts do not determine cases on the basis of reasonableness and fairness because this would lead to intolerable legal uncertainty. This was in conflict with the earlier decision of Victor J in the stay application.

40. In Engen Petroleum Ltd and Rissik Street One Stop CC t/a Rissik Street Engen and Another (High Court, Limpopo Division, Polokwane, case number 1583/2019), Engen and Rissik Street concluded an operating lease for a fixed period of time. The operating lease was also extended on several occasions. The decision to extend the operating lease was in the discretion of Engen. However, in the event that Engen elected not to offer Rissik Street a further renewal of the lease, together with the right to operate an Engen branded fuel filling and service station from the

premises, Engen was required to notify Rissik Street at least 12 months in advance.

41. On 2 October 2017 Engen notified Rissik Street of its decision not to renew the operating lease beyond its termination date. Engen further advised Rissik Street of its entitlement to source a buyer for the business of Rissik Street.

42. Rissik Street introduced a potential buyer to Engen, who did not consider the application as it alleged that the application lacked compliance. On 26 July 2018, Rissik Street approached the Controller in terms of section 12B of the Act. The referral was for arbitration in relation to alleged unfair and/or unreasonable contractual practice committed by Engen.

43. Whilst waiting for a decision by the Controller, Rissik Street introduced a second potential buyer to Engen. Engen did not consider the application as it considered the operating lease to have terminated through effluxion of time.

44. On 22 January 2019 Engen gave Rissik Street written notice to vacate the premises. Rissik Street refused to vacate the premises and as a consequence an application for its eviction was launched.

45. It was argued on behalf of Rissik Street that the eviction proceedings be stayed pending a referral for arbitration which would include the conclusion of that arbitration. It was contended that the arbitration stands separate from any other

process and that section 12B of the Act was simply a consideration in terms of a legislated measure that has been implemented for a very specific purpose to address the imbalances in the relationship between retailers and wholesalers in the petroleum industry. Rissik Street further submitted that an arbitrator is empowered to make interim orders which may include an order that Rissik Street remains in occupation on the same terms and conditions.

46. The Court found that it was a material term of the operating lease that Rissik Street be notified at least 12 months in advance should Engen elect not to renew the operating lease for a further fixed period. During the notice period the existing operating lease agreement remained valid and the parties were still bound by the terms of that agreement.

47. The Court also noted that Rissik Street had been operating the same business for the past 20 years and during that period improved and built the goodwill of the business. 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"*. Rissik Street was given an opportunity to salvage something out of the business which they have operated for the past 20 years by sourcing a buyer, which they did, but the buyer did not meet Engen's requirements. The approval of the buyer is solely at the discretion of Engen who is under no duty to give Rissik Street reasons for its refusal. The Court found that that the relationship between Rissik Street and Engen was unbalanced. The state of affairs only favoured Engen. It is for this reason, the Court found, that

the introduction of section 12B of the Act addressed the imbalances. Rissik Street had invoked the provisions of section 12B before the operating lease had expired and was justified in doing so.

48. The Court pointed out that it was common cause between the parties that the notice period given to Rissik Street had expired on the 31st of October 2018 and that under normal circumstances Rissik Street was required to vacate the premises. However, the Court found that there was a pending dispute which Rissik Street requested the Controller to refer to arbitration and that that process had not been exhausted.

49. The Court disagreed with Engen's contention that a referral to the Controller did not bar Engen proceeding with the eviction application. The Court did not agree with Engen for the following reasons: -

49.1. It would defeat the purpose and spirit of section 12B, which introduced arbitrations;

49.2. 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;

49.3. Once Rissik Street was evicted, its source of income would be diminished, which would be placed in a weaker position to finance the pending litigation;

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

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

50. The Court accordingly found that the referral should be given an opportunity to run its course and therefore stayed the proceedings pending the decision by the Controller and interdicted Engen from taking any steps that would adversely affect the operations of Rissik Street pending the final outcome of the process referred to the Controller.

51. In Phambili Petroleum (Pty) Ltd v Chamdor Service Station CC 2017 JDR 1909 GP the Applicant (petroleum retailers) brought an application for the eviction of the Respondent (Chamdor), which application arose from a franchise agreement of the sale of fuel entered into between Chamdor and Caltex. The Applicant took over from Caltex and problems arose in the relationship. The Applicant refused to supply fuel to Chamdor as it contended that Chamdor failed to order 38,000 litres of fuel in breach of the agreement. The Applicant also had concerns that Chamdor was buying fuel from third parties, which allegations were disputed by Chamdor. On

20 April 2015 the Applicant's attorneys addressed a letter to Chamdor's attorneys cancelling the franchise agreement and demanding that Chamdor vacate the premises. Chamdor disputed the Applicant's right to cancel and it remained in occupation. On 29 July 2016 Chamdor addressed a letter to the Controller requesting a referral of the dispute to arbitration in terms of section 12B of the Act. On 15 March 2017 Chamdor received a notice of set-down for the eviction application. The Court found that although a referral in terms of section 12B is not absolute, the purpose of section 12B could not be ignored and that it enabled a party to resolve a dispute through arbitration rather than Court proceedings. It further found that: -

> *"Sight should not be lost that Courts generally have no power to determine the fairness or reasonableness of a contractual term or the fairness, reasonableness and good faith of the implementation of a contractual practice. They are not vested with any remedial power in terms of section 12B."*

52. In the circumstances the Court stayed the application for eviction pending the outcome of the section 12 arbitration proceedings.

53. In Bright Idea Projects 66 (Pty) Ltd v Formal Way Trade and Invest (Pty) Ltd 2018 (6) SA 86 (KZP) the Court was also faced with an application for eviction by a petroleum retailer. The Court found that it was not necessary to stay the eviction

application until the outcome of the section 12B arbitration. The Court found that the application and the arbitration were separate processes dealing with separate issues and what the Court decided would not be decided by the arbitrator and *vice versa*. The Court found that the fact that an arbitrator had powers of determining the fairness and reasonableness of contracts was commendable insofar as the context specific considerations of the petroleum industry would inform the meaning to be given to unfair and unreasonable contractual practices. However, the Courts dealt with the arbitrator's powers to go beyond declaring a practice to be unfair or unreasonable for doing so would be creating a new contract for the parties which was doubtful in view of the constitutional right to individual freedom to contract and the fact that Courts have no power to create contracts for parties, nor could they refuse to give effect to agreements if in the opinion of the Court they were unfair or unreasonable. The Court also opined that: -

> *"Whether arbitration becomes the process of choice instead of adjudication as the CC seems to anticipate, will depend very much on cooperation and deficiencies within the industry. Ultimately the degree of consensus about the choice of arbitrators, the rules of arbitration and the terms of reference for arbitration will determine the usefulness and integrity of the section 12B dispute system design."*

54. The Court's approach to the referral was that a section 12B arbitration is a discreet process, parallel to litigation. Accordingly, the Court dismissed the application for a

stay pending the outcome of the section 12B referral to arbitration. It evicted the dealer.

55. In Formal Way Trade and Invest (Pty) Ltd v Bright Idea Projects 66 (Pty) Ltd 2020 JDR 2072 (SCA), pursuant to the dismissal of an application for leave to appeal in the Court *a quo* and the dismissal of leave to appeal by the Supreme Court of Appeal, the application to reconsider the dismissal of the application for leave to appeal succeeded. The SCA found that arbitration proceedings envisaged in section 12B of the Act did not serve as an exclusive forum for the adjudication of disputes arising between wholesalers and retailers of petroleum products. The Court found that there were no circumstances which warranted a finding that a referral to arbitration under section 12B of the Act ousted the Court's jurisdiction to adjudicate a dispute, especially where the referral to arbitration occurred after commencement of the litigation in which case it fell within the discretion of the Court to stay proceedings pending the arbitration.

56. In Beadica 231 CC and Others v Trustees, Oregon Trust and Others 2020 (5) SA 247 (CC) this Court held that Barkhuizen remained the leading authority in our law on the role of equity and contract as part of public policy considerations. It found that the Court may not refuse to enforce contractual terms on the basis that the enforcement would in its subjective view be unfair, unreasonable or unduly harsh, as these abstract values have not been accorded autonomous, self-standing status as contractual requirements. Fairness and reasonableness, however, have been

incorporated into petroleum contracts by virtue of section 12B of the Act.

57. Our Highest Courts have repeatedly recognised that good faith underlies our law or contract. It has been used as an informing value for the development of our law in relation to anticipatory breach of contract (Tuckers Land), cession (LTA Engineering Co Ltd v Seacat Investments (Pty) Ltd 1974 (1) SA 747 (A)), auction bids and the modification of notice terms by conduct (Garlick Ltd v Phillips 1949 (1) SA 121 (A)) and for allowing for a relaxation of the principle of reciprocity and the award of a reduced contract price (BK Tooling).

58. The present matter raises constitutional questions insofar as they relate to the interpretation of legislation infused by the Constitution and the fundamental rights to freedom of trade. This case also implicates the Court's powers and obligations both to apply reasonableness and fairness to disputes arising from petroleum contracts and to promote the spirit, purport and objects of the bill of rights when developing the law.

59. In dealing with the conflicting judgments referred to above, this Court will be required to address how reasonableness and fairness are to be applied to petroleum contracts in the context of the Act, regardless of the forum.

60. In light of the above, it is submitted that 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 is still pending, alternatively, the Court should have applied the principles of reasonableness and fairness as envisaged by section 12B of the Act.

61. The conflicting judgments in the same division constitute compelling reasons for granting leave to appeal.

UNFAIR AND UNREASONBLE CONTRACTUAL PRACTICES

62. On the 23rd of October 2019, Seebed informed Engen that it had found a purchaser for the service station who qualifies in all respects to purchase the service station. A copy of the concluded agreement between Seebed and the purchaser was provided to Engen. On the 29th of October 2019, Engen advised that they considered the agreement but would not be considering any sale.

63. Clause 41 of the lease agreement afforded Seebed an opportunity to sell the business. Engen disagreed that the clause applied in light of Seebed's alleged breach. *"[T]he cruelty of a lease is that when one leaves at the end of the term of lease he/she leaves with nothing"*. However, Seebed did not commit a breach as the evidence in the first eviction showed. There is therefore no conceivable basis for Engen's refusal to allow Seebed to sell the business and to recover what it has invested.

64. Unequal bargaining power in the petroleum industry is pervasive and still continues. 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

65. 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.

66. There is therefore no reason why the specifics of the general standard of fairness and good faith in the common law of contracts should not be given shape in the context of petroleum contracts as has been done in the context of labour law or rental housing contracts.

67. The difficulty however is that forum shopping between two adjudicative regimes – one transformatively equitable and the other not – still continues especially within the context of petroleum contracts. 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.

68. In the circumstances, it is respectfully submitted that: -

68.1. the appeal would have a reasonable prospect of success; and

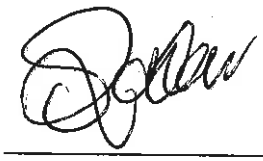
68.2. there are compelling reasons why the appeal should be heard by this Court, including conflicting judgments on the matters under consideration.

69. In the event of leave to appeal being granted, Seebed will respectfully seek an order upholding the appeal with costs, including the costs of two counsel, setting aside the order of the Court *a quo* and replacing it with an order that the eviction application is dismissed with costs, alternatively that the eviction application is stayed pending the outcome of the referral in terms of section 12B of the Act.

WHEREFORE the Applicant prays for an order in terms of the notice of motion prefixed to this affidavit.

DEPONENT

THUS SIGNED AND SWORN TO AT JOHANNESBURG ON THIS THE 30TH DAY OF NOVEMBER 2020, THE DEPONENT HAVING ACKNOWLEDGED THAT HE KNOWS AND UNDERSTANDS THE CONTENTS OF THIS AFFIDAVIT, THAT IT IS BOTH TRUE AND CORRECT TO THE BEST OF HIS KNOWLEDGE AND BELIEF, THAT HE HAS NO OBJECTION TO TAKING THE PRESCRIBED OATH AND THAT THE PRESCRIBED OATH WILL BE BINDING ON HIS CONSCIENCE.



COMMISSIONER OF OATHS

FULL NAMES:
DESIGNATION:
ADDRESS:

SAFRAAZ LAHER
EX OFFICIO COMMISSIONER OF OATHS
PRACTISING ATTORNEY
48 TWICKENHAM AVE AUCKLAND PARK
JOHANNESBURG
TEL: (011) 482-9933 / FAX: (011) 726-8850

"FA1 "36

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 2016/37883

JOHANNESBURG, 31 July 2019

BEFORE THE HONOURABLE ACTING JUDGE MOOSA obo ACTING JUDGE MOSAM

In the matter between:

ENGEN PETROLEUM LIMITED **Applicant**

and

SEEBED CC t/a SIYABONGA CONVENIENCE CENTRE
REG NO. 04/125873/23 **Respondent**

HAVING *read the documents filed of record and having considered that matter:-*

IT IS ORDERED THAT

1. Evicting the Respondent and all those occupying the property through or under the Respondent from the immovable property, being the Engen Service Station situated at Erf 378, Robertsville Extension 10, Registration Division I.Q. Gauteng with effect from 31st July 2019.

2. Authorising and directing the Sheriff of the above Honourable Court to take such steps as are necessary to give effect to the above.

3. The Respondent is to pay the Applicant's costs of this application.

Private Bag X7, Johannesburg 2000
2019 -08- 14
GLD-2016-050

BY THE COURT

REGISTRAR
/bbn

Moosa AJ
Court A

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 37083/16

In the matter between:

ENGEN PETROLEUM LIMITED

Applicant

and

SEEBED CC t/a SIYABONGA CONVENIENCE CENTRE (Reg. No. 04/125873/23)

Respondent

JUDGMENT

MOSAM, A J

Introduction

1. This is an application to evict the Respondent from the Engen Service Station situated at Erf 378, Robertville, Roodepoort

Background Facts

2. Briefly, the facts are as follows:

2.1. The Applicant is the registered owner of the immovable property which is the site from which the Respondent conducts an Engen Service Station known as Siyabonga Service Centre *("the Property")*.

2.2. The parties concluded an agreement of lease and operation of service station.[1]

2.3. The Applicant instituted action seeking the eviction of the Respondent under case number 35614/12 on the 10 September 2012.

2.4. The application was opposed and argued before the Court on 26 May 2016.

2.5. During the hearing, the Court referred the application to trial.

2.6. On 31 May 2016, the Respondent received a letter in terms of which the Applicant advised that it had elected to terminate the operating lease on one calendar months' notice, calculated from 1 June 2016 and that the Applicant therein insisted that the Respondent vacate the Property from 1 July 2016.

2.7. The Respondent remains in occupation of the Property and has refused to vacate same.

[1] FA p.13 para 8 and pp.13-15 para 8.1; AA p.258 para 32

The Filing of Further Affidavits

3. The Applicant complains that some 10 months after the filing of the replying affidavit, the Respondent, without consent of the Applicant, filed a supplementary affidavit on 3 August 2016.

4. The Applicant avers that in the supplementary affidavit, the Respondent does not raise any issue of substance which is not already a matter of record. However, the issue of the *"reasonable expectation"* and/or unlawful/unreasonable contractual practice is raised and there is no explanation why these issues were not raised earlier or in the answering affidavit.

5. The Applicant contends that it is clear that the allegations in the supplementary affidavit:

   5.1. Do not serve the interests of justice;

   5.2. Do not relate to recent developments;

   5.3. Are not conducive to a fair and expeditious resolution of the pending litigation;

   5.4. Do not justify the filing of a supplementary affidavit; and

   5.5. Are not new and seek to delay the adjudication of this application.

6. The Applicant, therefore, opposed the filing of the supplementary affidavit on the basis that it will suffer prejudice and that the Respondent is merely seeking to delay the adjudication of the hearing and the determination of this matter.

7. It is trite that the Court has to exercise its discretion in permitting the filing of further affidavits and that a party simply cannot take upon itself to file further affidavits without first having obtained the consent of the other side or leave of the Court to do so.[2]

8. Consequently, it has been held that where further affidavits are filed without the leave of the Court, the Court can simply regard such affidavit as *pro non scripto*.

9. In my view, there is merit in the Applicant's complaint that there has not been a proper or satisfactory explanation by the Respondent why this information has not been put before the Court at an earlier stage.

10. The Applicant correctly contends, in my view, that the affidavit in question is clearly simply to *"relieve the pinch of the shoe"* and thus taking into account that there is no reason why the evidence was not produced earlier, why this new approach adopted which was not adopted in either of the answering affidavit or supplementary affidavit and that there would be substantial prejudice to the Applicant if the affidavit is allowed insofar as it would result in the matter not being

[2] Standard Bank of SA Ltd v Serfontein 2005 (4) SA 148 (C) at 153; [illegible] Trading CC v [illegible] Investments (Pty) Ltd 2013 (1) SA 181 (SCA) 185; Sealed Africa (Pty) Ltd v Kelly [illegible] at 67

heard, that the litigation has reached an advance stage and in fact, has been set down for hearing on at least one occasion.

11. In consideration of the above and generally the need for finality of judicial proceedings, the Court is not inclined to allow the affidavits.[4]

Referral to Trial

12. It is necessary, however, to deal with the Respondent's averments in the additional affidavit that this matter be referred to trial.

13. The Respondent's reasons are premised on the issue of whether the Applicant's conduct constitutes an unfair or unreasonable contractual practice and whether the Respondent had a reasonable expectation for its lease to be extended until 31 July 2020.

14. The Applicant correctly submitted, in my view, that this is unnecessary because those issues are already part of the issues which require determination in the trial of the first application.

15. The effect of what the Respondent now seeks is to incorporate those issues of an unfair and unreasonable contractual practice in terms of section 128 of the

[3] Standard Bank supra
[4] Transvaal Racing Club v Jockey Club of SA 1958 (2) SA 509 (W) at 534

Petroleum Products Act and thus seeks in effect to stay the determination of this application to a Trial Court.

16. This issue has already been determined by the Court to the extent that the Respondent sought a stay of proceeding in order that this issue can be determined by the Controller of Petroleum Products. The Court in the hearing of the stay application rejected these contentions.[5]

17. This, as correctly submitted by the Applicant, is merely an attempt to re-introduce this issue and again it is raised by the Respondent to delay the final adjudication of this dispute and to simply extend its unlawful occupation of the service station pending the determination of the trial.

18. The Applicant correctly contends that in any event, the Respondent is precluded from relying on the Applicant's alleged failure to enter into an operating lease and that that failure constitutes an unfair or unreasonable contractual practice when the Respondent, in its plea and counterclaim in the trial and its affidavit in this matter contends that in fact such agreement was orally concluded. This is an issue to be dealt with at the trial.

19. In any event, the Applicant's application involves an enquiry into lawfulness while the section 12B enquiry is directed at the reasonableness or fairness of a contractual practice. Put simply, the Applicant avers in the eviction application that

[5] Judgment of Victor J

owing to a contractual breach, it is entitled to cancel the operating lease and has done so.

20. In ***AJ Properties CC v Sello,***[6] **Spilg J** found that the Court has *"no equitable jurisdiction to decline the grant of an eviction application"*.

21. The common law does not recognise fairness and reasonableness as:

> *"independent substantive rules that courts can employ to intervene in contractual relationships. These abstract values perform creative, informative and controlling functions through established rules of law of contract. They cannot be acted upon by the courts directly. Acceptance of the notion that judges can refuse to enforce a contractual provision merely because it offends their sense of fairness and equity will give rise to legal and commercial uncertainty. After all, it has been said that fairness and justice like beauty, often lie in the eye of the beholder."*[7]

22. In **Potgieter and Another v Potgieter NO And Others**[8] the Supreme Court of Appeal held that the Courts do not determine cases on the basis of reasonableness and fairness because this would lead to intolerable legal uncertainty. The Court went on at para [36] to say that:

> "But be that as it may, I do not believe that the court a quo had any option but to follow the tenets of common law. Its decision to do otherwise in my view offended the principle of legality, which I regard as part of the rule of law, which in turn constitutes a founding value in terms of s 1 of our Constitution. I thus find myself in agreement with Harms DP when he said in *Bredenkamp* (para 39):

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6 2008 (1) SA 535 GJ.

7 ***South African Forestry Co Ltd v York Timbers Ltd*** **2005 (3) SA 323 (SCA)** para [26]

8 2012 (1) SA 637 (SCA).

> "A constitutional principle that tends to be overlooked, when generalised resort to constitutional values is made, is the principle of legality. Making rules of law discretionary or subject to value judgments may be destructive of the rule of law."

23. Hence, the eviction application is concerned solely with enforcement of the terms of the contract which is determined in terms of the common law principles espoused above and which do not invoke the principles of fairness and reasonableness.

Merits of the Application

24. First, insofar as the defence of *lis pendens* is concerned, the Respondent did not pursue this defence. In any event, the cause of action relied upon in the first application was a breach of the agreement between the parties and the Respondent's failure to remedy the breach, which resulted in the cancellation by the Applicant of the operating lease, whereas the cause of action in this application is simply that on the Respondent's own version, it contends that there is a month to month lease which enables the Respondent to regain its possession of the Property.

25. Consequently, the two applications are not based on the same cause of action and do not involve a determination of the same questions of fact or law but are based on separate, distinct and alternative causes of action.

26. Therefore the onus has not been discharged of proving the requisites of *lis pendens*.

27. Second, the Respondent raised fraudulent misrepresentation and as a consequence thereof, the Respondent had a right to remain in occupation of the Property on a month to month basis in terms of the operating lease. This does *not hold water* for the simple reason that the Applicant has elected to give the Respondent one calendar months' notice of cancellation.

28. Thus, as correctly, submitted by the Applicant even on the Respondent's own version:

28.1. The Respondent is required to vacate the Property with effect from 1 July 2016.

28.2. The operating lease has been validly terminated.

29. Put simply, the Applicant is entitled to claim, in law, cancellation, alternatively, specific performance. There is, therefore, no merit to this contention by the Respondent.

30. Third, an issue arose whether the Respondent's concessions were concession of law or concession of fact during the hearing of the matter before the Honourable Court on 6 May 2016.

31. The Applicant contended that the Respondent's case which was placed on record is that its right to remain in occupation of the Property was as a consequence of there being a month to month agreement in terms of the operating lease.

32. During the hearing, Meyer J stated that: *"Well on the concession made by your colleague it seems to me – and I have noted down the exact case before me – is that the misrepresentation induced the contract and hence the contract must be avoided and back to a month to month lease. That is placed on record before me."*[9]

33. A proper consideration of the transcript, in my view, reveals that the Respondent's Counsel made a concession of fact which indicated the factual position of the agreement which the Respondent contended bound the parties and of the basis which entitled the Respondent to remain in occupation of the premises. It would therefore follow, as contended by the Respondent, that taking into account and assuming solely for the purposes of this application that there was a fraudulent misrepresentation, that the extension of the operating lease is void and that, as is contended for by the Respondent, the parties were bound by a month to month lease. If so, then the Applicant was entitled to give a month's notice of termination. Again, there is no merit in this defence of the Respondent.

34. Fourth, the Respondent contends that it has elected to stand by the contract notwithstanding the misrepresentation and therefore it is entitled to remain in the occupation of the Property until 31 July 2017. It contradicts the contention of

[9] Transcript p.18 lines 21-26; p.341 lines 24-25; p.342 lines 6-10; p.343 lines 12-17

Counsel at the hearing and the averments under oath in the previous answering affidavit.[10]

35. Where the fraud induces the mind of the innocent party, a mistake of so fundamental nature, there is no consent at all, the contract is void *ab initio*.

36. When the misrepresentation does not render the contract void *ab initio*, the innocent party has an election. A person who has been induced to contract by material and fraudulent misrepresentation by the other party, may either stand by the contract of claim rescission. It follows that the innocent party must make its election between these two inconsistent remedies within a reasonable time after knowledge of the deception and the choice of one necessarily involves the abandonment of the other. The principle being the innocent party cannot both approbate and reprobate.

37. In electing to stand by, uphold and enforce the provisions and terms and conditions thereof, the Respondent then:

37.1. Accepted that the extension of the operating lease is binding on the parties.

[10] Transcript p.201 lines 8-12; p.343 line 15; first application AA "FAA" p.386 para 4.7; p.388 para 4.11; p.386 para 4.12; p.391 para 4.15

37.2. There is no need to prove or debate the misrepresentations, fraudulent or otherwise, by means of a trial, contrary to what the Respondent contends.

37.3. The Respondent cannot avoid the written terms of the agreement

37.4. The Respondent cannot reasonably contend that the Applicant is bound by the agreement, but the Respondent is not "*and cannot be*" in breach of the terms thereof because of other alleged misrepresentations. Either the agreement is binding or it is not, on both parties.

38. Put simply, if the Respondent has elected to keep the "*contract alive*" and despite the alleged fraud, the Respondent is obliged to comply with the terms and provisions of the contract. In any event, as correctly contended by the Applicant at best for the Respondent it is only entitled to remain in occupation of the Property until 31 July 2017.

39. It therefore follows that there is no defence to the relief sought by the Respondent in this application and that the Applicant is entitled to the eviction of the Respondent.

Order

40. In all the circumstances, an Order is made in the following terms:

40.1. Evicting the Respondent and all those occupying the Property through or under the Respondent from the immovable property, being the Engen Service Station situated at Erf 378, Robertville Extension 10, registration division IQ, Gauteng with effect from 31 July 2017.

40.2. Authorizing and directing the Sheriff of the above Honourable to take such steps as are necessary to give effect to the above.

40.3. The Respondent is ordered to pay the Applicant's costs of this application

A MOSAM
ACTING JUDGE OF THE HIGH COURT
OF SOUTH AFRICA, GAUTENG
LOCAL DIVISION, JOHANNESBURG

28 JULY 2018

APPEARANCES:

FOR THE APPLICANT: ADV P L CARSTENSEN SC

Instructed by Lanham Love Attorneys

FOR THE RESPONDENTS: ADV N REDMAN SC

Instructed by Ajoodh Kaka Attorneys

50

4FA2

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 2016/37883

JOHANNESBURG, 12 March 2020

BEFORE THE HONOURABLE JUDGE MOLAHLEHI

In the matter between:

ENGEN PETROLEUM LIMITED **Applicant**

and

SEEBED CC t/a SIYABONGA CONVENIENCE CENTRE
REG NO. 04/125873/23 **Respondent**

HAVING *read the documents filed of record and having considered that matter:-*

IT IS ORDERED THAT

1. Application for leave to appeal is dismissed with costs.

Private Bag X7, Johannesburg 2000

2020 -03- 19

GLD-RR-014

BY THE COURT

REGISTRAR
/bbn

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 37883/16

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: ✓

PP 03/03/20
SIGNATURE DATE

In the matter between:

ENGEN PETROLEUM LIMITED Applicant

and

SEEBED CC t/a SIYABONGA CONVENIENCE CENTRE (Reg. No. 04/125873/23) Respondent

---

LEAVE TO APPEAL JUDGMENT

MOSAM, A J

Introduction

[1] This is an application for leave to appeal against the Judgment and Order handed down on 31 July 2019, evicting the Respondent and all those occupying the property through or under the Respondent from the immovable property being the Engen Service Station situated at Erf 378, Robertville Extension 10, Roodepoort with effect from 31 July 2019.

[2] The particulars of the dispute between the parties are set out in the Judgment and thus there is no need to repeat same.

[3] The Applicant contends in its notice of leave to appeal that the Court erred in the following respects:

3.1 Not allowing the supplementary affidavit of the Respondent into evidence, in circumstances which the Applicant has already answered thereto.

3.2 Finding that there was not a proper or satisfactory explanation by the Respondent why the information contained in its supplementary affidavit was not put before the Court at any earlier stage.

3.3 Finding that by allowing the supplementary affidavit, there would be substantial prejudice to the Applicant in that it would result in the matter not being heard.

3.4 Failing to exercise its discretion by permitting the filing of the further affidavits in the following circumstances:

3.4.1 The Applicant had sufficient time and opportunity to deliver a response thereto;

3.4.2 The Court must exercise its discretion in permitting the filing of further affidavits against the backdrop of the fundamental consideration that a matter should be adjudicated upon all the facts relevant to the issues in dispute;

3.4.3 It is a question of fairness to both sides as to whether or not further sets of affidavits should be permitted;

3.4.4 The Court must be satisfied that no prejudice is caused by the filing of the additional affidavits which cannot be remedied by an appropriate order as to costs;

3.4.5 The balance of prejudice to the Applicant if the application to supplement is refused and the prejudice to the Respondent if it is granted.

3.5 Dealing with the content of the supplementary affidavit on a piece-meal basis, despite the fact that the Court did not allow the affidavit.

3.6 Finding that it was unnecessary to deal with the issue of whether the Applicant's conduct constitutes an unfair or unreasonable contractual practice and whether the Respondent had a reasonable explanation for its lease to be extended until 31 July 2020, because those issues are already part of the issues which required determination in the trial of the first eviction application.

3.7 Failing to find that **section 12B of the Petroleum Products Act, 120 of 1977** (*"the Act"*) imposes the principle of fairness and reasonableness in all disputes between fuel wholesalers and fuel retailers.

3.8 Failing to find that there is sufficient context in 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.

3.9 Failing to find that 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.

3.10 Failing to take cognisance of the fact that the purpose of introducing a fairness standard in petroleum contracts is better given effect to, without shielding the common law from statutory development.

3.11 Failing to find that section 12B of the Act offers a statutory guarantee of a mechanism that has become ubiquitous in contact, which may otherwise not exist possibly due to the unequal bargaining position retailers vis-à-vis wholesalers find themselves in.

3.12 Finding that the Respondent, in raising section 12B of the Act, sought in effect to stay the determination of the second eviction application to a trial court in circumstances where this issue had already been determined.

3.13 Finding that a request for referral was akin to an application to stay proceedings.

3.14 Finding that section 12B of the Act had been raised by the Respondent to delay the final adjudication of the dispute and to simply extend its unlawful occupation of the service station pending the determination of the trial.

3.15 Finding that the eviction application was concerned solely with enforcement of the terms of the contract which was required to be

determined in terms of the common law principles which did not invoke the principles of fairness and reasonableness.

3.16 Finding that on the Respondent's own version, it was required to vacate the lease premises with effect from 1 July 2016.

3.17 Finding that the operating lease had been validly terminated.

3.18 Finding that the Respondent's Counsel made a concession of fact which indicated the factual position of the agreement which the Respondent contended bound the parties and of the basis which entitled the Respondent to remain in occupation of the lease premises.

3.19 Ordering the Respondent to pay the costs of the application.

[4] The test to apply in an application for leave to appeal is governed by the provisions of **section 17 of the Superior Courts Act, 10 of 2013** (*"the Superior Courts Act")* which provides:

> *"1. Leave to appeal may only be given where the judge or judges concerned are of the opinion that:*
>
> *(a) (i) The appeal would have a reasonable prospect of success; or*

(ii) There is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration."

[5] The test envisaged in section 17 received attention in the unreported judgment of Bertelsmann J in **Mont Chevaux Trust (IT 2012/28) v Tina Goosen & 18 others** LCC 14 R/2014 (3 November 2014) where it was said that:

> *"It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court may come to a different conclusion, see Van Heerden v Cronwright & others 1995 (2) SA 342 (T) at 343H. The use of the word "would" in the new statute indicates a measure of certainty that another court will differ from the court where judgment is sought to be appealed against."*

[6] At the hearing of the matter, the Respondent in the main addressed two aspects, namely the failure to allow further affidavits and the equitable standard provided for in 12B of the Act. In doing so, the Respondent repeats the same submissions and contentions it made earlier in the main hearing.

[7] The issues raised by it are in my view fully dealt with in my judgment. I stand by the findings made in my judgment and find no reasons to believe that another Court, faced with the same facts, is likely to arrive at a decision different to that of this Court.

58

ORDER

[8] The Respondent's application for leave to appeal is dismissed with costs.

A. MOSAM
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

DATE OF HEARING:	13 DECEMBER 2019
DATE OF JUDGMENT:	03 MARCH 2020
APPEARANCES:	
FOR THE APPLICANT:	ADV P L CARSTENSEN SC
	Instructed by Lanham-Love Attorneys
FOR THE RESPONDENT:	ADV N REDMAN SC
	Instructed by Ayoob Kaka Attorneys

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"FA3"

Supreme Court of Appeal, Registrar's Office • PO Box 258, Bloemfontein, 9300 • c/o Elizabeth- & President Brand Street, Bloemfontein •
Tel (051) 4127 400 • Fax (051) 4127 449 • www.supremecourtofappeal.gov.za

Enquiries: Mr Myburgh | Date: 22 JULY 2020 | Ref: 290/20

YOUR REF:

Matsepes Inc.
P O Box 256
BLOEMFONTEIN
9300

YOUR REF: C Gerdener/B Hartel/AAS242S

McIntyre & Van Der Post Inc.
P O Box 540
BLOEMFONTEIN
9300

Mr/Ms

APPLICATION FOR LEAVE TO APPEAL
SEEBED CC v ENGEN PETROLIUM LTD

With reference to the application lodged in this office on 26 MARCH 2020 this Court ordered on 20 JULY 2020 that the application be dismissed as per attached order:-

Yours faithfully

P S W MYBURGH (Mr)
REGISTRAR

REGISTERED POST (H/B/D/O)

YOUR REF: 2016/37883 Molahlehi J (Court *a quo*)

Registrar of the High Court
Private Bag X 7
JOHANNESBURG
2000

Copy for your information.

SUPREME COURT OF APPEAL OF SOUTH AFRICA

CASE NO: 290/20
GJ CASE NO: 2016/37663

BEFORE THE HONOURABLE JUSTICES ZONDI AND NICHOLLS JJA
On the 20th JULY 2020

In the application between:

SEEBED CC t/a SIYABONGA CONVENIENCE CENTRE
(Registration number: 2004/126873/23) Applicant

and

ENGEN PETROLEUM LIMITED
(Registration number: 1959/003754/06) Respondent

Having considered the Notice of Motion and the other documents filed.

IT IS ORDERED THAT:

1, Condonation as applied for is granted. The applicant for condonation is to pay the costs of the application.

2. The application for leave to appeal is dismissed with costs on the grounds that there is no reasonable prospect of success in an appeal and there is no other compelling reason why an appeal should be heard.

BY ORDER OF THIS COURT

COURT REGISTRAR
P S W MYBURGH (Mr)

2020 -07- 22

61

"FA4"

Supreme Court of Appeal, Registrar's Office • PO Box 258, Bloemfontein, 9300 • c/o Elizabeth- & President Brand Street, Bloemfontein •
Tel (051) 4127 400 • Fax (051) 4127 449 • www.supremecourtofappeal.gov.za

Enquiries: Mr. Myburgh | Date: 10 November 2020 | Ref: 654/20

YOUR REF: Jenine

Matsepes (BFN) Inc.
P O Box 256
BLOEMFONTEIN
9300

YOUR REF: C Gerdener/B Hartel/AA242S

McIntyre Van Der Post Inc.
P O Box 540
BLOEMFONTEIN
9300

Mr/Ms

APPLICATION FOR LEAVE TO APPEAL
SEEBED CC T/A SIYABONGA CONVENIENCE CENTRE v ENGEN PETROLEUM LIMITED

With reference to the application lodged in this office on 21 SEPTEMBER 2020 this Court ordered on 9 NOVEMBER 2020 that the application be dismissed as per attached order:-

Yours faithfully

P/P C. VAN DER MERWE (Mrs.)
CHIEF REGISTRAR

REGISTERED POST (H/B/D/O)

YOUR REF: 37883/2016 Molahlehi J (Court *a quo*)

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SUPREME COURT OF APPEAL OF SOUTH AFRICA

CASE NO: 654/20
SCA CASE NO: 290/20
GJ CASE NO: 37883/2016

BEFORE THE HONOURABLE JUSTICE MAYA P

On the 9th NOVEMBER 2020

In the application between:

SEEBED CC t/a SIYABONGA CONVENIENCE CENTRE
(Registration number: 2004/125873/23) Applicant

and

ENGEN PETROLEUM LIMITED
(Registration number: 1989/003754/06) Respondent

Having considered the Notice of Motion and the other documents filed.

IT IS ORDERED THAT:

The application in terms of s 17(2)(*f*) of Act 10 of 2013 is dismissed with costs for the reason that no exceptional circumstances warranting reconsideration or variation of the decision refusing the application for leave to appeal have been established.

BY ORDER OF THIS COURT

CHIEF REGISTRAR
C. VAN DER MERWE (Mrs.)