IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No: 167/21

In the matter between:

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

ENGEN'S PRACTICE NOTE

NATURE OF PROCEEDINGS

1 Mfoza has applied for leave to appeal against a decision of the Gauteng Local Division, Johannesburg (per Opperman J). Leave to appeal was refused by the Supreme Court of Appeal.

ISSUES TO BE ARGUED

2 The first issue is whether an arbitrator appointed under section 12B of the Petroleum Products Act, 1977 ("**the PPA**"), in the exercise of her or his remedial powers to "correct" an unfair or unreasonable "contractual practice", has the power to award damages.

3 The second issue is whether the court *a quo* exceeded its powers by substituting the award of Mr Maleka SC with its own order.

RELEVANT PORTIONS OF THE RECORD

4 It is necessary to read the pleadings before the arbitrator, and the arbitrator's award, specifically:

4.1 the statement of case (record: vol 1, p. 62)

4.2 the statement of response (record: vol 2, p. 83)

4.3 the award (record: vol 1, p. 36)

5 It is necessary to read the affidavits filed in the High Court, specifically:

5.1 the founding affidavit (record: vol 1, p. 6);

5.2 the answering affidavit (record: vol 2, p. 135);

5.3 the replying affidavit (record: vol 2, p.148).

6 Lastly, it is necessary to read the judgment of the Court *a quo* (record: vol 4, p. 256).

ESTIMATED DURATION

7 One day.

SUMMARY OF THE ARGUMENT

8 Engen argues that, on a proper interpretation of section 12B, having regard to its text, purpose and context, as well as constitutional considerations, the arbitrator has no power to award damages.

9 On the question of substitution, Engen argues that the review application concerns a discrete legal question regarding the scope of an arbitrator's powers. It would absurd to interpret section 33(4) of the Arbitration Act to preclude substitution relief where the arbitrator’s decision is set aside on the basis of a pure question of law that goes to jurisdiction.

AUTHORITIES ON WHICH PARTICULAR RELIANCE WILL BE PLACED

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

11 Crompton Street Motors CC v Bright Idea Projects 66 (Pty) Ltd 2022 (1) SA 317 (CC)

12 Engen Petroleum Limited v The Business Zone 1010 CC t/a Emmarentia Convenience Centre [2015] ZASCA 176

GILBERT MARCUS SC

MOHAMMED DESAI

MICHAEL MBIKIWA

First respondent's counsel
Chambers, Sandton

24 February 2022