CONSTITUTIONAL COURT OF SOUTH AFRICA

The Business Zone v Engen Petroleum Limited and Others

CCT 09/16
Date of hearing: 24 August 2016
Date of judgment: 9 February 2017

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On 9 February 2017, the Constitutional Court handed down its judgment in an application for leave to appeal brought by The Business Zone 1010 CC trading as Emmarentia Convenience Centre (Business Zone) against a decision of the Supreme Court of Appeal (SCA). The matter deals with the proper interpretation of Section 12B of the Petroleum Products Act 120 of 1997 (Act) and the reviewability of decisions of the Controller of Petroleum Products (Controller) and the Minister of Minerals and Energy (Minister) in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

Business Zone, pursuant to a lease agreement concluded in 2005 with Engen Petroleum Limited (Engen), operates a fuel and service station that sells and distributes petroleum products supplied exclusively by Engen. In 2008, the parties concluded a second lease and operation of service station agreement according to which Engen undertook to provide Business Zone with the premises in accordance with a site development plan and two additional access points to the site. In 2010, after having sent notification to Engen and not receiving a response, Business Zone made certain alterations to the property. As a result, Engen declared Business Zone to have breached the terms of their agreement since no prior consent had been given to Business Zone to implement these alterations. Engen, in a letter to Business Zone, stated that Business Zone's conduct constituted a repudiation of the lease agreement and that it had accepted the repudiation. Engen thus advised Business Zone that the lease agreement had been cancelled. Business Zone approached the Controller and alleged that Engen's conduct amounted to an unfair or unreasonable contractual practice. Thereafter, Business Zone lodged a request that the dispute be referred to arbitration in terms of section 12B of the Act.

The Controller refused to refer the dispute to arbitration. He concluded that the requirements of section 12B of the Act had not been met because the agreement which formed the basis of the dispute had been cancelled. Furthermore, the allegations of unfair or unreasonable contractual practice were in respect of agreements which were being considered by the Gauteng Local Division of the High Court, Johannesburg. Aggrieved by this decision, Business Zone appealed to the Minister who dismissed the appeal on the same grounds as the Controller.

Business Zone further launched an application in the Gauteng Provincial Division of the High Court, Pretoria (High Court) for review of the decisions by the Controller and the Minister. The High Court concluded that section 12B contained an extremely low referral threshold. The Court therefore upheld Business Zone's application, reviewed and set aside the decision of the Controller. The High Court substituted the Controller's decision with a referral to arbitration. However, on appeal to the SCA, Engen was successful.

Business Zone then applied to the Constitutional Court for leave to appeal against the decision of the SCA. It challenged the SCA's conclusion and sought a reinstatement of the High Court's order, including its decision to substitute the decision of the Controller with a referral to arbitration in terms of section 12B of the Act.

In an unanimous judgment written by Mhlantla J (Mogoeng CJ, Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mbha AJ, Musi AJ and Zondo J concurring) leave to appeal was granted and the appeal by Business Zone was upheld. The Court held that the decisions of the Minister and the Controller amounted to administrative action and were subject to review in terms of PAJA. Regarding the interpretation of section 12B, this Court stated that one of the purposes of the Act was to transform the petroleum industry and that section 12B had brought in an equitable standard in the petroleum industry to ensure that fairness and reasonableness prevail. Furthermore, section 12B requires that an allegation of an unfair or unreasonable contractual practice by either a licenced retailer or wholesaler must be made. In this regard, the Controller's discretionary threshold is low as no proof of that allegation is necessary when the request is considered by him.

The Court further considered the question whether a single act of cancellation amounts to a contractual practice in terms of the Act. The Court concluded that to exclude "practice" from constituting a singular act would go against the transformative purpose of the Act which is demanded by the interpretive jurisprudence of the Court. It therefore held that a single act of cancellation could amount to a contractual practice under section 12B. On the decisions of the Controller and the Minister, the Court found that in refusing to refer the dispute to arbitration, the Controller and the Minister had laboured under a material error of law as they misunderstood their powers under sections 12B and 12A. Therefore, the Court held that the refusal to refer the dispute to arbitration constituted a ground of review under section 6 (2) (d) of PAJA.

The Constitutional Court therefore upheld the appeal with costs. It restored the order of the High Court referring the dispute to arbitration under section 12B of the Petroleum Products Act.