



CONSTITUTIONAL COURT OF SOUTH AFRICA

The Business Zone 1010 CC t/a Emmarentia Convenience Centre v Engen Petroleum Limited

CCT 09/16

Date of hearing: 25 August 2016

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 25 August 2016 at 10h00, the Constitutional Court will hear an application for leave to appeal concerning the circumstances under which the Controller of Petroleum Products (Controller) may refer a matter to arbitration following a request by a licensed retailer under section 12B of the the Petroleum Products Act 120 of 1977 (Act).

The Business Zone 1010 CC t/a Emmarentia Convenience Centre (Business Zone) and Engen Petroleum Limited (Engen) entered into lease and operation of service station agreements in terms of which Engen let a service station to Business Zone. In 2010 a dispute arose between the parties regarding improvements made to the site of the service station by Business Zone which resulted in Engen purporting to cancel the agreements. Notwithstanding, the parties concluded an interim arrangement in terms of which Engen continued to supply Business Zone with products up until 24 March 2011, at which point Engen gave 48 hours' notice of its intention to terminate the supply of fuel to Business Zone.

Business Zone then brought an urgent application and obtained an order compelling Engen to continue supplying petroleum products to it, pending a referral of the dispute to the Controller in terms of section 12B of the Act. Business Zone then addressed a request to the Controller for a referral of the dispute to arbitration in terms of section 12B of the Act, alleging the occurrence of a number of unfair and unreasonable contractual practices including the cancellation of the contract by Engen.

The Controller refused Business Zone's request for arbitration. Business Zone appealed to the Minister of Minerals and Energy (Minister) against the Controller's decision in

terms of section 12A of the Act. The Minister also dismissed the Business Zone's appeal.

Business Zone successfully brought an application to review the decisions of the Controller and the Minister before Prinsloo J in the Gauteng Division of the High Court (High Court). The High Court set aside the decisions of both the Controller and the Minister and ordered that the dispute be referred to arbitration in terms of section 12B of the Act as a matter of urgency.

Engen appealed the High Court's decision to the Supreme Court of Appeal (SCA). The SCA rejected the interpretation placed on section 12B of the Act by Prinsloo J and upheld the interpretation of the Controller and the Minister. Engen's appeal was therefore upheld with costs and the High Court's order replaced with one dismissing Business Zone's challenge.

In this Court, Business Zone argues that the Controller, the Minister and the SCA were mistaken in their interpretation of section 12B of the Act. They submit that the cancellation of a contract may in itself constitute an unfair or unreasonable contractual practice that triggers the application of section 12B of the Act. Business Zone submits that section 12B of the Act imposes a standard of equity on the parties in the context of the wholesaler-retailer relationship effectively seeking to resolve inequality in the bargaining power inherent to that relationship; it is in this context that section 12B of the Act must be construed. It would defeat the purpose of the section to say that, although the arbitrator may require the conduct of the parties in the implementation of their contract to be fair and reasonable, the cancellation of the contract by either of them is beyond her jurisdiction.

Engen argues that a single act of cancellation of the contract between a licensed wholesaler and a licensed retailer falls outside the ambit of section 12B of the Act and accordingly cannot be referred to arbitration under the section. Second, if a separate dispute over the termination of a contract between a licensed wholesaler and a licensed dealer is pending before the High Court, it would be inappropriate to refer any alleged unfair and unreasonable contractual practice for determination under the section. Lastly, Engen submits that the alleged unfair and unreasonable contractual practices relate to matters other than the supply of petroleum products which fall outside the ambit of section 12B of the Act even if they relate to contracts between licensed wholesalers and licensed retailers.