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# DISPUTE RESOLUTION ALERT

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### The Petroleum Products Act, section 12B arbitrations and the limits of an arbitrator's power

In the recent judgment of *Engen Petroleum Limited (1989/3754/6) v Mfoza Service Station (Pty) Ltd and Another* [2020] ZAGPJHC 242, the High Court deals with the powers of an arbitrator in terms of section 12B of the Petroleum Products Act 120 of 1977 (as amended) (PPA). An arbitration in terms of section 12B is an arbitration convened under a special law as determined by section 40 of the Arbitration Act 42 of 1965.

## The Petroleum Products Act, section 12B arbitrations and the limits of an arbitrator's power

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In the recent judgment of *Engen Petroleum Limited (1989/3754/6) v Mfoza Service Station (Pty) Ltd and Another* [2020] ZAGPJHC 242, the High Court deals with the powers of an arbitrator in terms of section 12B of the Petroleum Products Act 120 of 1977 (as amended) (PPA). An arbitration in terms of section 12B is an arbitration convened under a special law as determined by section 40 of the Arbitration Act 42 of 1965.

The facts were straightforward: Mfoza requested a referral to arbitration in terms of section 12B of the PPA for alleged unreasonable and unfair contractual practices by Engen. In its statement of claim, Mfoza alleged breaches pursuant to its agreement concluded with Engen and contended that it suffered financial losses to the tune of R8,117,872.63 excluding interest. Engen, in its statement of response, set out that an arbitrator acting under the auspices of section 12B(4)(a) of the PPA, cannot grant damages for patrimonial loss because the section does not contemplate a remedy for damages. The arbitrator dismissed Engen's jurisdictional objection, finding that the PPA did not limit his power to grant damages for patrimonial loss.

In its findings, the High Court referred to *Engen Petroleum Limited v The Business Zone 1010 CC t/a Emmarentia Convenience Centre* (20513/2014) [2015] ZASCA 176 (27 November 2015) where the Supreme Court of Appeal (SCA) distinguished between a "corrective

remedial jurisdiction" which can only operate prospectively and a "compensatory remedial jurisdiction" which can operate retrospectively. The High Court in *Mfoza* held that the jurisdiction conferred in terms of section 12B(4)(a) is corrective - that is, it is the jurisdiction to make awards that operate prospectively only. The implication of this finding is that, according to the High Court, an arbitrator who is imbued with corrective remedial jurisdiction can only direct that future practices be modified in order to confer a remedy, but cannot grant monetary relief in the form of damages for past wrongs and patrimonial loss suffered by the victim of the legal injury complained of.

Furthermore, the High Court noted that in the *Business Zone* case both the SCA and the Constitutional Court held that the jurisdiction conferred in terms of section 12B(4)(a) is corrective.

Having found that the arbitrator was not empowered to grant compensatory relief (in the form of patrimonial damages), the court went on to confirm trite law that a tribunal created by legislation is "a creature of statute with no inherent powers" which cannot by its own ruling or decisions "confer a jurisdiction upon itself which it does not in law possess". Thus, an arbitrator's incorrect decision on jurisdiction and competence in terms of section 12B(4)(a) is one that amounts to an ultra vires act with no force or effect. Such an error constitutes a gross irregularity, as the arbitrator would have exceeded his powers, rendering the decision reviewable.

## The Petroleum Products Act, section 12B arbitrations and the limits of an arbitrator's power

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The High Court found that the arbitrator had exceed his powers as contemplated in section 33(1)(b) of the Arbitration Act.

In this case, the High Court found that the arbitrator had exceed his powers as contemplated in section 33(1)(b) of the Arbitration Act.

In our view, the High Court's application of *stare decisis* warrants further comment. We agree with the court's finding that it was bound by the interpretations of section 12B by the Constitutional Court and the SCA. The apparent purpose behind section 12B is to provide for fair and equitable redress for alleged unfair or unreasonable contractual practice flowing from the contractual relationship between licensed wholesalers and/or licensed retailers of petroleum products. It is for this reason that there is a low threshold for the Controller of Petroleum Products to direct licensed wholesalers and retailers to a 12B arbitration under the PPA. The appointed arbitrator is required only to determine whether a particular

contractual practice constitutes an "unfair or unreasonable" practice. Due to the low threshold requirement, the referral by the Controller of a dispute to arbitration under the PPA is independent from the existence or not of any underlying arbitration clause in the commercial agreement between the parties. The independent nature of referrals under section 12B of the PPA ensures that any appointed arbitrator's assessment of the merits of a complaint is limited to determining whether in fact an unfair or unreasonable contractual practice exists, and if so make such an award that he or she deems necessary to correct such practice. At this stage, it is unclear whether Mfoza will appeal the judgment but, given the SCA's position on the correct interpretation of section 12B, such an appeal appears unlikely to be successful.

*Jackwell Feris and Mukelwe Mthembu and Imraan Abdullah*



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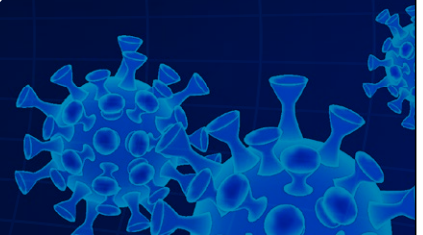
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## OUR TEAM

For more information about our Dispute Resolution practice and services, please contact:



**Tim Fletcher**  
National Practice Head  
Director  
T +27 (0)11 562 1061  
E tim.fletcher@cdhlegal.com



**Thabile Fuhrmann**  
Chairperson  
Director  
T +27 (0)11 562 1331  
E thabile.fuhrmann@cdhlegal.com

**Timothy Baker**  
Director  
T +27 (0)21 481 6308  
E timothy.baker@cdhlegal.com

**Eugene Bester**  
Director  
T +27 (0)11 562 1173  
E eugene.bester@cdhlegal.com

**Jackwell Feris**  
Director  
T +27 (0)11 562 1825  
E jackwell.feris@cdhlegal.com

**Anja Hofmeyr**  
Director  
T +27 (0)11 562 1129  
E anja.hofmeyr@cdhlegal.com

**Tobie Jordaan**  
Director  
T +27 (0)11 562 1356  
E tobie.jordaan@cdhlegal.com

**Corné Lewis**  
Director  
T +27 (0)11 562 1042  
E corne.lewis@cdhlegal.com

**Richard Marcus**  
Director  
T +27 (0)21 481 6396  
E richard.marcus@cdhlegal.com

**Burton Meyer**  
Director  
T +27 (0)11 562 1056  
E burton.meyer@cdhlegal.com

**Rishaban Moodley**  
Director  
T +27 (0)11 562 1666  
E rishaban.moodley@cdhlegal.com

**Mongezi Mpahlwa**  
Director  
T +27 (0)11 562 1476  
E mongezi.mpahlwa@cdhlegal.com

**Kgosi Nkaiseng**  
Director  
T +27 (0)11 562 1864  
E kgosi.nkaiseng@cdhlegal.com

**Byron O'Connor**  
Director  
T +27 (0)11 562 1140  
E byron.oconnor@cdhlegal.com

**Lucinde Rhoodie**  
Director  
T +27 (0)21 405 6080  
E lucinde.rhodie@cdhlegal.com

**Belinda Scriba**  
Director  
T +27 (0)21 405 6139  
E belinda.scriba@cdhlegal.com

**Tim Smit**  
Director  
T +27 (0)11 562 1085  
E tim.smit@cdhlegal.com

**Joe Whittle**  
Director  
T +27 (0)11 562 1138  
E joe.whittle@cdhlegal.com

**Roy Barendse**  
Executive Consultant  
T +27 (0)21 405 6177  
E roy.barendse@cdhlegal.com

**Pieter Conradie**  
Executive Consultant  
T +27 (0)11 562 1071  
E pieter.conradie@cdhlegal.com

**Nick Muller**  
Executive Consultant  
T +27 (0)21 481 6385  
E nick.muller@cdhlegal.com

**Jonathan Witts-Hewinson**  
Executive Consultant  
T +27 (0)11 562 1146  
E witts@cdhlegal.com

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### JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.  
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

### CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.  
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

### STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.  
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

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