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DISPUTE RESOLUTION ALERT

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Eviction in face of section 12B arbitration proceedings

Does the referral of a matter to a 12B arbitration under the Petroleum Products Act 120 of 1977 (as amended) oust the jurisdiction of the High Court and automatically stay eviction proceedings instituted in the High Court? *The High Court in KZN Oils (Pty) Ltd v Nelta (Pty) Ltd t/a Keyway Motors* [2021] JOL 49756 (KZP) recently dealt with these issues.

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Eviction in face of section 12B arbitration proceedings

The court did not agree with the respondent's submission that a section 12B referral automatically stays or suspends the eviction proceedings.

Does the referral of a matter to a 12B arbitration under the Petroleum Products Act 120 of 1977 (as amended) oust the jurisdiction of the High Court and automatically stay eviction proceedings instituted in the High Court? *The High Court in KZN Oils (Pty) Ltd v Nelta (Pty) Ltd t/a Keyway Motors* [2021] JOL 49756 (KZP) recently dealt with these issues.

The facts in this matter are common cause, the parties concluded a franchise agreement and lease agreement (the agreements) for the duration of 15 years where after the agreements were not renewed and terminated through the effluxion of time. Despite this, the parties attempted to negotiate a new agreement. It was only when these attempts, which lasted in excess of 12 months had failed, that KZN Oils instituted the eviction proceedings.

The first issue the court determined was whether KZN Oils was entitled to the eviction order sought. It was common cause that KZN Oils was the lawful owner of the premises and that the agreements which regulated the relationship between the parties terminated through the effluxion of time, consequently Nelta was required to return the premises to KZN Oils on the termination of the agreements. The court found that in the absence of a written agreement between the parties, Nelta had no right to continued occupation.

The second issue the court was tasked to determine was whether the eviction application ought to be stayed pending either the arbitration in terms of clause 20 of the franchise agreement or pending

the arbitration proceedings referred in terms of section 12B of the PPA. It is worth noting that the request by Nelta to refer the matter to a section 12B arbitration was only done after the eviction proceedings had been instituted by KZN Oils.

In this regard, the court stated that section 6 of the Arbitration Act enjoins a party to apply for the stay of any legal proceedings which have been instituted pending the finalisation thereof i.e. pending the outcome of the section 12B arbitration. The court did not agree with the respondent's submission that a section 12B referral automatically stays or suspends the eviction proceedings. The court was fortified in this view having regard to the decision of Ploos Van Amstel J in *Crompton Streets Motors* which states that although the court has a discretion to stay the proceedings, the facts of the matter did not warrant the court exercising such discretion, given that the respondent in that matter did not immediately bring the application to stay the proceedings and filed extensive answering affidavits and a counter-application.

Of further relevance and worth noting in this case was that the issues raised by Nelta in its 12B referral were, a) non-renewal of the franchise agreement; b) KZN Oils not permitting Nelta to sell its business after the expiry of the franchise agreement; c) short delivery of petroleum products over a period of time; d) increased rental; and e) requiring Nelta to pay KZN Oils a Brand Fee or Goodwill Royalty, which issues did not relate to the termination of the agreements insofar as the right of occupation was concerned. Nelta did

Eviction in face of section 12B arbitration proceedings...continued

The referral was clear: the arbitrator was not required to deal with any eviction proceedings nor with KZN Oil's ownership of the property.

not ask the arbitrator to deal with the *rei vindicatio* nor did the 12B referral deal with KZN Oils' ownership of the property. Consequently, the eviction was not an issue before the arbitrator.

The court recorded that the arbitrator in terms of section 12B is required to determine whether KZN Oils engaged in any unfair and unreasonable contractual practices in relation to Nelta. The referral was clear: the arbitrator was not required to deal with any eviction proceedings nor with KZN Oil's ownership of the property.

In its findings, the court held the view that the section 12B referral does not stay eviction proceedings based on the issues referred to the arbitrator for determination, and the powers conferred on the arbitrator by the PPA. The court stated that Section 12B of the PPA provides that a referral to arbitration can be made by the Controller of Petroleum Products on request by a licensed retailer who alleges an unfair or unreasonable

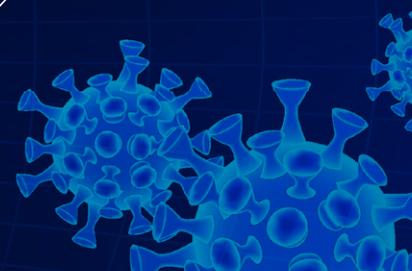
contractual practice by a licensed wholesaler. The section does not appear to be pre-emptory, and it appears that the Controller has a discretion in this regard. Once a referral has been made, the Controller can submit the matter to arbitration and the provisions of sections 12B(2) and (3) apply.

The importance of this judgment is a) once an eviction application has been instituted in the High Court, parties who wish to refer the matter to a section 12B arbitration are required to immediately apply for the stay of the eviction proceedings pending the finalisation of the section 12B arbitration and b) it is important to first consider whether the issues before the arbitrator relate to the continued occupation of the premises, if not, it is unlikely that the court will grant the stay of the eviction proceedings since such issues are not before the arbitrator for determination.

Mukelwe Mthembu and Tiffany Jegels

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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