



CONSTITUTIONAL COURT OF SOUTH AFRICA

Seebed CC t/a Siyabonga Convenience Centre v Engen Petroleum Limited

CCT 290/20

Date of judgment: 20 July 2022

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 Wednesday, 20 July 2022 at 10h00, the Constitutional Court handed down judgment in an application for leave to appeal against a judgment and order of the High Court of South Africa, Gauteng Local Division, Johannesburg (High Court). This application was brought by Seebed CC t/a Siyabonga Convenience Centre (Seebed) against Engen Petroleum Limited (Engen), and concerns the question whether the High Court was entitled to grant the eviction order, notwithstanding a pending dispute between the parties which had been referred to trial.

Seebed is a licenced retailer operating a fuel and service station business in Robertville, Johannesburg, which is located on premises owned by Engen. In 2009, Seebed entered into a written lease and operation of a service station agreement (lease agreement) with Engen. According to the terms of the lease agreement, the lease period was from 1 April 2008 to 31 May 2010 (original lease agreement). This lease period was subsequently extended, in writing, to 31 July 2017. Seebed and Engen concluded a further written agreement on 24 August 2011, which reduced the extended lease period to 31 July 2015. This agreement contained a “whole contract” clause – which would ordinarily preclude reliance on an oral agreement. Seebed alleged that the reduction of the extended lease period was done pursuant to an oral agreement, in terms of which the parties agreed that the lease period would be subject to a subsequent extension, which would end on 31 July 2020.

In 2010, Engen decided to introduce a Corner Bakery franchise, under franchisor Retsol Stores (Pty) Limited (Retsol), on the leased premises. Seebed took exception to the franchise agreement and requested that it be amended. Engen refused. Seebed, in turn,

refused to sign the franchise agreement. This prompted Engen to cancel the lease agreement and demand that Seebed vacate its property; however, Seebed did not do so.

As a result, during September 2012, Engen launched eviction proceedings against Seebed in the High Court (first eviction proceedings). Seebed opposed these proceedings on the basis that Engen had unilaterally decided to establish the Corner Bakery on the leased premises, without conducting a profitability or feasibility study of the franchise. Seebed also alleged that Engen had committed fraudulent misrepresentation and could not rely on Seebed's refusal to sign the franchise agreement as breach of the extended lease agreement.

The matter was heard by the High Court in May 2016. During the proceedings, Seebed's representatives submitted that Engen's fraudulent misrepresentation precluded it from relying on a breach of the extension agreement as a basis for cancellation and that, as a result of the Engen's misrepresentation, the extended lease agreement was invalid. According to them, this meant that the original lease agreement subsisted between the parties. The terms of the original lease agreement provided that if the parties failed to agree on the extension of the lease agreement, the agreement would remain in operation on a month-to-month basis, terminable on one month's written notice. Seebed advanced that the parties were engaged in a month-to-month agreement, which could be terminated on notice by any of the parties.

On 26 May 2016, the High Court referred the application to trial. On 31 May 2016, the Engen gave Seebed one month's notice to vacate; however, Seebed did not comply. On 24 August 2016, Seebed filed a counterclaim, wherein it alleged that the extension of the lease period to July 2017 had been truncated to July 2015, based on Engen's oral undertaking to extend the lease period to July 2020. On these grounds, Seebed contended that it had a reasonable expectation that the lease agreement would be extended to 31 July 2020, therefore, it had a right to remain in occupation of the leased premises until July 2020.

In October 2016, Engen launched the second eviction proceedings, relying on the concessions made on Seebed's behalf that the lease agreement could be terminated on one month's notice. On account of institution of the second eviction proceedings, the first eviction proceedings were postponed *sine die*. Seebed opposed the second eviction proceedings on the grounds that the matter: was *lis pendens*; involved a material dispute of fact to be decided during the trial; and the concessions Engen relied on were of law and not fact, and were thus not binding. On 30 June 2017, Seebed referred alleged unreasonable or unfair contractual practices to the Controller of Petroleum Products in terms of section 12B of the Petroleum Products Act. In August 2017, Seebed filed an application to stay the second eviction proceedings, pending the section 12B arbitration, and asked for Engen's consent – but Engen refused. Seebed also sought to introduce the issue of unreasonable or unfair contractual practices through a second supplementary answering affidavit.

The High Court refused to stay the proceedings on the basis that it had jurisdiction to assess the fairness, reasonableness and equitability of a petroleum contract and that it was

well-placed to hear and decide the second eviction proceedings, in the light of its inherent jurisdiction to interpret contracts, as well as the need to bring the matter to finality without further delay. The High Court further refused to grant Seebed leave to file a second supplementary answering affidavit, because Seebed had failed to seek the requisite consent from either Engen or the High Court before filing, and that it had not proffered a satisfactory explanation for the delay in placing the information before the High Court.

The High Court held that the issues concerning unfair and unreasonable contractual practices were not central to the second eviction proceedings. It also rejected Seebed's *lis pendens* defence and held that the causes of action in the two eviction proceedings were distinct. The High Court further held that Seebed had made a factual concession – that the contract that subsisted between the parties was on a month-to-month basis – and Engen was entitled to cancel the lease agreement on one month's notice. In the result, the High Court upheld Engen's application and granted the eviction order with retrospective effect from 31 July 2017.

Seebed sought leave to appeal to the Full Court of the High Court, but the application was dismissed. Seebed's application for leave to appeal to the Supreme Court of Appeal was dismissed, and so too its application for reconsideration. This led to Seebed launching this application in the Constitutional Court.

Before the Constitutional Court, Seebed submitted that: the matter concerned the proper interpretation of legislation, which implicated the constitutional right to freedom of trade; the matter involved important legal questions surrounding the correct application of the principles of fairness and reasonableness in relation to the Act; and that there are conflicting judgments on the issues. Seebed submitted that it would be in the interests of justice to grant leave and provide legal certainty on the issue.

On the merits, Seebed submitted that its case was distinguishable from *Crompton Street Motors CC t/a Wallers Garage Service Station v Bright Idea Projects 66 (Pty) Ltd (Crompton)*, both in fact and in law. Additionally, Seebed submitted that the High Court erred in finding that the standards of reasonableness and fairness were not relevant to the second eviction proceedings. Seebed submitted that it had the right to sell the service station if the eviction is granted, in accordance with clause 41 of the lease agreement.

Engen submitted that this matter does not raise any constitutional issue or arguable point of law of general public importance, and that there are no conflicting judgments on the salient legal issues. Engen further submitted that, in any event, the relief sought by Seebed has been rendered moot, since Seebed was no longer entitled to occupy its premises on the strength of any of its versions, due to the effluxion of time.

On the merits, Engen submitted that Seebed had failed to appreciate the nature of the proceedings, in that the matter referred to trial had no bearing on the second eviction proceedings. Engen further submitted that a request for referral to a section 12B arbitration does not oust the High Court's jurisdiction. The High Court was entitled to exercise a discretion, in terms of section 6 of the Arbitration Act, to decide whether to grant such a

stay. Engen argued that the lapse of the lease agreement, as was also the case in *Crompton*, cannot in itself be considered a contractual practice. Engen further submitted that, in any event, a section 12B referral could be used to compel the parties to enter into a further agreement.

Engen submitted that the argument that Seebed was entitled to sell the service station had been raised for the first time in the Constitutional Court. Additionally, Engen submitted that, due to the expiry of the lease agreement, all of Seebed's claims had prescribed. Thus, Seebed's application should be dismissed for lack of reasonable prospects of success.

The matter was decided without a hearing. In a unanimous judgment penned by Mhlantla J, the Constitutional Court held that this matter raises constitutional issues and thus, the Court's jurisdiction is engaged. Regarding the question whether it is in the interests of justice to grant leave, the Court considered the merits of the matter. On the first issue, it held that the decision to allow the filing of further affidavits after the replying affidavit amounts to a true discretion, and there was no basis to interfere with the High Court's exercise of this discretion. Therefore, the High Court did not err when it refused to allow Seebed to file its second supplementary answering affidavit in the second eviction proceedings.

On the question whether the High Court erred in dismissing Seebed's *lis pendens* defence, the Court held that the issues to be determined in both the first and second eviction proceedings were distinct and, consequently, Seebed's *lis pendens* defence was rejected.

With regards to the question whether the eviction order was proper, the Constitutional Court held that the concessions made on behalf of Seebed in the first eviction proceedings were factual concessions which bound Seebed. The Court also held that the High Court was correct in concluding that, on the strength of Seebed's version, the contract that subsisted between the parties at the time of the second eviction proceedings was on a month-to-month basis and that Engen was entitled to terminate it on a month's notice.

The Constitutional Court further held that Seebed's allegation that Engen had made an undertaking to extend the lease period to 2020 could not be considered as it was not raised during the second eviction proceedings. The Court also held that Seebed's submission that it is entitled to sell the service station if the eviction is granted was raised for the first time in this Court, therefore it was not in the interests of justice to determine that issue as the Court would act as a court of first and last instance. On Seebed's contention that the granting of the eviction order in the second eviction proceedings has precluded it from raising any of its defences in the first eviction proceedings, the Court held that it would not be in a position to take the matter any further as the first eviction proceedings had been rendered moot.

In the result, the Court held that it was not in the interests of justice to grant leave to appeal and ordered Seebed to pay the costs.