



## CONSTITUTIONAL COURT OF SOUTH AFRICA

### **Former Way Trade and Invest (Pty) Limited v Bright Idea Projects 66 (Pty) Limited**

**CCT 237/20**

**Date of hearing: 9 March 2021  
Date of judgment: 28 September 2021**

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### **MEDIA SUMMARY**

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*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 Tuesday, 28 September 2021 at 10h00, the Constitutional Court handed down judgment in an application for leave to appeal against a judgment and order of Supreme Court of Appeal and that of the High Court of South Africa, KwaZulu-Natal Division, Pietermaritzburg.

The applicant, Former Way Trade and Invest (Pty) Limited, carried on business as a petroleum retail service station, in terms of a franchise agreement concluded with the first respondent, Bright Idea Projects 66 (Pty) Limited, a wholesaler of petroleum products. The business relationship between the applicant and the first respondent arose through a series of cession agreements. The first respondent and Chevron (Pty) Limited – formerly known as Caltex – concluded a retail assignment agreement. The first respondent then concluded a franchise agreement with Tomdia Service Station CC (Tomdia). Tomdia sold the service station and ceded its rights under the retail assignment agreement to the applicant. No right of renewal of the franchise agreement was conferred upon the applicant following the cession.

The applicant was dissatisfied that the franchise agreement did not include a renewal clause and raised its concerns with the first respondent. The first respondent offered to consider this on condition that the applicant pays R3.25 million as a “brand fee”. The applicant agreed to pay the amount, provided that a new franchise agreement would be on standard terms and only lapse after 10 years, that is, a five-year term, with an option to renew. After realising that the brand fee would be an additional cost, the applicant approached Tomdia and requested that the purchase price be reduced. Tomdia agreed and the price was reduced

to R6 million. The first respondent sent a draft franchise agreement, which provided for an extension together with the invoice for the brand fee. The applicant refused to pay the brand fee before being furnished with a signed copy of the new franchise agreement. As a result, the first respondent furnished the applicant with the agreement in terms of which only the franchise agreement rights were ceded, and the applicant signed it. The applicant did not pay the brand fee or sign a new franchise agreement with an extended tenure.

Six months before the franchise agreement was set to terminate, the first respondent gave the applicant notice of termination. The applicant acknowledged receipt thereof but did not vacate the premises on the required date. Instead, it asserted that there was an agreement between itself and the first respondent to extend the duration of the franchise agreement, with an option to renew. It also referred the matter to arbitration before the Controller of Petroleum Products, eight days before the expiry of the agreement. The first respondent sought an eviction order from the High Court. The applicant filed a counter-application to enforce the “new franchise agreement” it alleged had been entered into and permitted it to conduct business until 1 March 2025, with a right of renewal. Alternatively, that the proceedings be stayed pending arbitration in terms of section 12B of the Petroleum Products Act (the Act).

The High Court considered whether the parties had concluded a “new franchise agreement”; and whether it was required to stay the eviction proceedings pending the arbitration proceedings in terms of section 12B of the Act. It held that the applicant had not proved the existence of a “new franchise agreement” as it had been unable to produce proof of its conclusion or produce a copy thereof. The applicant’s failure to pay the brand fee, despite undertaking to do so, indicated that no renewal agreement could have materialised, and the Court held that the parties had not agreed to extend the original franchise agreement beyond 31 December 2017. The High Court then considered whether the applicant was entitled to a stay pending the section 12B arbitration. Relying on this Court’s decision in *Business Zone*, the High Court held that section 12B does not automatically suspend proceedings. Instead, a court may stay proceedings pending the outcome of a section 12B arbitration, subject to such terms and conditions as may be considered just in the general exercise of the courts’ powers to regulate their own processes. The High Court dismissed the counter-application, including the application for a stay of proceedings pending the outcome of the section 12B referral. The applicant was ordered to vacate the premises.

The applicant approached the Supreme Court of Appeal for leave to appeal. This application was dismissed. The applicant then applied for the reconsideration of the order refusing leave to appeal in terms of section 17(2)(f) of the Superior Courts Act. That application was referred for oral argument. The Supreme Court of Appeal considered whether the application had reasonable prospects of success and determined two issues. First, whether the applicant had established a right of occupation of the premises in terms of a “new franchise agreement”. Second, whether the referral to arbitration in terms of section 12B ousted the High Court’s jurisdiction. On the first question, the Supreme Court of Appeal held that the agreement contended for by the applicant did not exist. The Court held that the first respondent did not provide the applicant with a signed new franchise

agreement, as the refusal by the applicant to pay the brand fee prevented this. Therefore, the Supreme Court of Appeal agreed with the High Court that the applicant had failed to establish a right of occupation. Regarding the ouster question, the Court rejected the applicant's contention that the referral to arbitration suspended the litigation. No circumstances warranted a finding that a referral to arbitration under section 12B ousts a court's jurisdiction, and there was no basis for a stay pending the referral to arbitration. It also noted that the applicant had conceded that it was not seeking a corrective order from the arbitrator in respect of an alleged unfair or unreasonable practice *per se*, but rather, the arbitrator was being requested to make a *factual finding* regarding the existence of a new franchise agreement. This concession undermined the applicant's primary defence, being that a "new franchise agreement" had been concluded granting it occupational rights. Consequently, there were no reasonable prospects of success of establishing the factual defence at the section 12B arbitration. The order dismissing the application for leave to appeal was confirmed.

The applicant sought leave to appeal to the Constitutional Court. It submitted that an application for a stay pending the section 12B arbitration ousts the jurisdiction of the High Court. The applicant contended that, since it had made a referral to the Controller before the institution of the eviction proceedings, the High Court did not have the authority to entertain the first respondent's eviction application. Alternatively, this Court should find that the High Court has a narrow discretion to refuse to stay proceedings, and a refusal to do so is unconstitutional as it deprived the applicant of its right to access a specialist forum. Further, the applicant submitted that it rejected the draft franchise agreement because it wanted a signed agreement before paying the brand fee. In its view, the demand for an upfront, non-refundable payment of a brand fee was incongruent with the original franchise agreement.

The first respondent submitted that *Business Zone* did not apply as the agreement here had expired and an application for a stay did not oust the High Court's jurisdiction. The first respondent submitted that the Petroleum Products Act in no way abolishes an owner's common law rights to obtain an eviction order and the High Court and Supreme Court of Appeal correctly held that no new agreement was concluded. It further reiterated that the original franchise agreement was set to expire by effluxion of time on 31 December 2017 and, after that date, no contract existed between the parties. Therefore, the applicant had no right of occupation and eviction proceedings were competent.

In a unanimous judgment penned by Mhlantla J (Mogoeng CJ, Jafta J, Khampepe J, Madlanga J, Majiedt J, Theron J, Tlaletsi AJ and Tshiqi J concurring), the Constitutional Court dismissed the application for leave to appeal with costs. On jurisdiction, this Court held that the matter engaged its jurisdiction. The Court then considered whether the interests of justice favour the granting of leave. The Court held that it could not arrive at a different conclusion to that of the High Court and the Supreme Court of Appeal. This Court has already determined in *Crompton Street Motors CC v Bright Idea Projects 66 (Pty) Limited*, a matter that was heard together with this application, that section 12B does not oust the jurisdiction of the High Court pending arbitration. However, refusing a stay should be done judicially. This Court also held that

the High Court exercised its discretion judicially. This was because the applicant's undue delay in bringing the stay application before the High Court tilted the scale against granting the stay application. Again, the applicant did not demonstrate a right of occupation. The applicant further conceded that the main issue for the arbitrator was whether there was a new agreement between the parties, and this had already been determined to be non-existent as the applicant failed to pay the brand fee. Thus, this Court held that the dispute here was not one relating to an unfair or unreasonable contractual practice but whether there was a further franchise agreement concluded to extend the life of the franchise.

In conclusion, this Court emphasised that section 12B is an invaluable resource for licensed retailers. But this is not an unfettered avenue for parties to abuse. Therefore, in the absence of a new franchise agreement, and submissions as to what the applicant wished the arbitrator to decide, it was unlikely that this Court would reverse the decision on the stay. In the result, the Court concluded that there was no basis for it to interfere with the exercise of the High Court's discretion in refusing to stay the proceedings. Therefore, leave to appeal was refused with costs.