REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED: YES / ~~NO~~

30/9/16
DATE

SIGNATURE

CASE NO.: 57506/2013

4/10/2016

In the matter between:

PG GROUP (PTY) LTD	**FIRST APPLICANT**
THE SOUTH AFRICAN BREWERIES (PTY) LTD	**SECOND APPLICANT**
CONSOL GLASS (PTY) LTD	**THIRD APPLICANT**
NAMPAK LIMITED	**FOURTH APPLICANT**
MONDI LIMITED	**FIFTH APPLICANT**
DISTRIBUTION & WAREHOUSING NETWORK LTD	**SIXTH APPLICANT**
ILLOVO SUGAR SOUTH AFRICA LIMITED	**SEVENTH APPLICANT**

and

NATIONAL ENERGY REGULATOR OF SOUTH AFRICA	**FIRST RESPONDENT**
SASAL GAS LIMITED	**SECOND RESPONDENT**

Heard: **12 May 2016**

Delivered 4 October 2016

JUDGMENT

A.A.LOUW J

Introduction

[1] The seven applicants are all companies which operate in the industrial sector in South Africa. They are also large-scale consumers of piped gas delivered to it by the second respondent, Sasol Gas Limited.

[2] The first respondent is NERSA, a regulatory authority established as a juristic person in terms of section 3 of the National Energy Regulator Act 40 of 2004(the "NERSA Act") with its physical address at Kulawula House 526 Madiba (former Vermeulen) Street, Arcadia, Pretoria. NERSA regulates the piped-gas, electricity and petroleum pipeline industries in South Africa in terms of the Gas Act, 48 of 2001 (the "Gas Act"), the Electricity Regulation Act, 4 of 2006, and the Petroleum Pipelines Act, 60 of 2003. The decision that are the subject of this review application relate to NERSA's function as the regulator of the piped-gas industry in South Africa.

[3] The second respondent is Sasol Gas, a company duly registered and incorporated in accordance with the company laws of South Africa, with its principal place of business at 272 Kent Avenue, Randburg and its registered address at 1 Strudee Avenue, Rosebank. Sasal Gas is a wholly-owned subsidiary of Sasol Limted ("Sasol Ltd"), which is an international energy and chemical company listed on the JSE Limited and on the New York Stock Exchange. Sasol Gas is the sole (monopoly) supplier of piped-gas in South Africa. The decisions that are the subject of this review application concern the grant of

applications made by Sasol Gas to NERSA for the approval of maximum prices for the supply of piped-gas in South Africa.

[4] In their amended notice of motion the applicants ask for the following relief:

"1. The decision by the first respondent on 26 March 2013 to approve two applications by the second respondent, namely:

1.1. an application for maximum gas prices and for a trading margin for the period 26 March 2014 to 30 June 2017;

1.2. an application for transmission tariffs for the period 26 March 2014 to 30 June 2015.

are reviewed and set aside.

2. If it is found to constitute a reviewable decision, the methodology adopted by the first respondent on 28 October 2011 to approve maximum gas pricing is reviewed and set aside; alternatively is declared to be invalid for the purposes of the first respondent's consideration of the application referred to in 1.1 above.

3. In the event that the relief set out in paragraph 1 and 2 is granted, any maximum gas prices subsequently approved by the first respondent for the second respondent shall apply retrospectively with effect from 26 March 2014 until the date of termination of such approval.

4. The costs of this application shall by paid by those respondents who oppose the relief sought herein on a joint and several basis, the one paying the other to be absolved."

Background

Sasol's special dispensation

[5] In the late 1990s and early 2000s, Sasol and a Mozambican partner developed natural gas fields in Mozambique and built a pipeline to pump gas to South Africa. In consideration for this investment, the government and Sasol entered into a Mozambican Gas Pipeline Agreement on 26 September 2001.[1] It incorporated a Regulatory Agreement, which allowed Sasol to determine its gas prices by "*market value pricing*".[2] This method allowed Sasol to charge each customer a price based on what it would cost the customer to switch out of gas to an alternative fuel.[3]

[6] It is common cause that only a monopolist, unconstrained by any competition, can price on this basis. It allows the monopolist to exact the highest possible price from each individual customer. NERSA described it as follows:

> "*The conditions in the South Africa piped-gas market manifest those of a monopolist who has an influence in the market in terms of gas supply and prices. Notably, the price of natural gas and synthetic gas is referenced to the cost of an alternative energy source available to an individual customer ... This is an example of perfect price discrimination by a dominant supplier who possesses market power and it must be noted that this price discrimination is allowed in terms of clause 1.16 of (the Regulatory Agreement)*".[4]

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1 Mozambican Gas Pipeline Agreement 26 September 2001 vol 2 p 94.

2 Regulatory Agreement 26 September 2001 vol 2 p 107 at p 116 clause 8.3.

3 Regulatory Agreement 26 September 2001 vol 2 p 107 at p 109 clause 1.16.

4 Final Inadequate Competition Determination vol 4 p 317 at p 325 para 4.2(a)(ii).

[7] The Pipeline Agreement (including the Regulatory Agreement) was conditional upon the inclusion of a provision in the Gas Act (which was then in the making) that made the agreement binding on NERSA for ten years.[5]

[8] The Gas Act was passed on 12 February 2002. It satisfied the condition of the Pipeline Agreement in that s 36(2) provided that the Pipeline Agreement was binding on NERSA for ten years after natural gas was first received from Mozambique.

[9] This dispensation expired on 25 March 2014. This, for the first time, rendered Sasol Gas' gas prices subject to regulation by NERSA.

The Gas Act and Regulations

[10] Section 4(g) of the Gas Act provides that one of NERSA's functions is to regulate gas prices in terms of s 21(1)(p) in the prescribed manner.

[11] Section 21(1)(p) says that, where there is inadequate competition in the market, NERSA must approve the maximum prices for gas.

[12] Regulation 4(3) provides that, when it determines maximum prices, NERSA must,

> "*(a)* *be objective i.e. based on a systematic methodology applicable on a consistent and comparable basis;*
>
> *(b)* *be fair;*
>
> *(c)* *be non-discriminatory;*
>
> *(d)* *be transparent;*
>
> *(e)* *be predictable; and*

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[5] Pipeline Agreement vol 2 p 106 clause 14.2 read with clause 36 of the Gas Bill B18-2001 published on 23 March 2001.

> *(f) include efficiency incentives."*

[13] Regulation 4(4) says that the maximum prices set by NERSA must enable the licensee to

> *"(a) recover all efficient and prudently incurred investment and operational costs; and*
>
> *(b) make a profit commensurate with its risk."*

[14] Quite apart from NERSA's price regulation, s 22 of the Gas Act also prohibited Sasol Gas' discriminatory pricing.

NERSA'S three processes

[15] NERSA followed three interrelated decision-making processes to determine the maximum prices Sasol may charge for its gas.

[16] The first was to determine the methodology it would employ to determine the maximum prices under s 21(1)(p). That process ran from October 2010 to October 2011. Its milestones were the following:

16.1 On 21 October 2010, NERSA published a first draft of its Methodology for public comment.[6]

16.2 In June 2011, NERSA published a second draft of its Methdology.[7]

16.3 It finally approved its Methodology on 28 October 2011.[8]

16.4 NERSA gave its reasons for its adoption of the Methodology on 24 November 2011.[9]

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6 Draft Methodology (1) 21 October 2010 vol 2 p 128.

7 Draft Methodology (2) June 2011 vol 3 p 185.

8 Final Methodology 28 October 2011 vol 3 p 218.

[17] The second process was for NERSA to determine whether there was inadequate competition in the gas market within the meaning of s 21(1)(p). This process ran from September 2011 (a month before finalization of the Methodology) to February 2012, with the following milestones:

17.1 NERSA published a draft of its "*inadequate competition*" determination in September 2011.[10]

17.2 NERSA made its final "*inadequate competition*" determination on 29 February 2012.[11]

[18] The third process was NERSA's determination of Sasol's maximum prices. This process started in December 2012 and was completed in April 2013. Its milestones were:

18.1 Sasol made two applications on 24 December 2012. The one was for determination of its maximum gas prices.[12] The other was for the determination of Sasol's transmission tariffs.[13]

18.2 After initial public comment, on 11 February 2013, NERSA published drafts of its determination of Sasol's two applications.[14]

18.3 After public hearings and further submissions, NERSA finally determined both Sasol's applications on 26 March 2013.[15]

18.4 NERSA published reasons for its determinations of Sasol's maximum gas prices and transmission tariffs on 24 April 2013.[16]

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9 Methodology Reasons 24 November 2011 vol 3 p 260.

10 Draft Inadequate Competition Determination September 2011 vol 4 p 333.

11 Final Inadequate Competition Determination 29 February 2012 vol 4 p 317.

12 Sasol Gas Price Application 24 December 2012 vol 4 p 343.

13 Sasol Transmission Tariff Application 24 December 2012 vol 5 p 377.

14 Draft Price Determination 11 February 2013 vol 5 p 406; Draft Transmission Tariffs Determination 11 February 2013 vol 5 p 428.

15 Final Gas Price Determination 26 March 2013 vol 7 p 562; Final Transmission Tariffs Determination 26 March 2013 vol 7 p 603.

Undue delay

[19] It is common cause that NERSA's decision to make the Maximum Price Decision ("the MPD") falls within the ambit of PAJA.

[20] Section 7(1) of PAJA provides that proceedings for judicial review must be brought "without unreasonable delay" and not later than 180 days after the person concerned became aware of the administrative action. Section 7(1) means that an applicant who complies with the 180-day rule may nevertheless be non-suited on the basis that he or she delayed unreasonably.

[21] In *OUTA*,[17] the SCA summarised the principles that apply to delay under PAJA:

> *"<u>At common law application of the undue delay rule required a two stage enquiry. First, whether there was an unreasonable delay and, second, if so, whether the delay should in all the circumstances be condoned</u>. Up to a point, I think, s 7(1) of PAJA requires the same two stage approach. The difference lies, as I see it, in the legislature's determination of a delay exceeding 180 days as per se unreasonable. <u>Before the effluxion of 180 days, the first enquiry in applying s 7(1) is still whether the delay (if any) was unreasonable.</u> But after the 180 day period the issue of unreasonableness is pre-determined by the legislature; it is unreasonable per se. It follows that the court is only empowered to entertain the review application if the interest of justice dictates an extension in terms of s 9. Absent such extension the court*

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16 Reasons for Gas Price Determination 24 April 2013 vol 7 p 565; Reasons for Transmission Tariffs Determination 24 April 2013 vol 7 p 604.

17 Opposition to Urban Tolling Alliance and Others v The South African National Roads Agency Ltd and Others [2013] 4 All SA 639 (SCA)

has no authority to entertain the review application at all. Whether or not the decision was unlawful no longer matters. The decision has been 'validated' by the delay. That of course does not mean that, after the 180 day period, an enquiry into the reasonableness of the applicant's conduct becomes entirely irrelevant. Whether or not the delay was unreasonable and, if so, the extent of that unreasonableness is still a factor to be taken into account in determining whether an extension should be granted or not."[18] (our underlining)

[22] As both respondents raise the issue of the applicants' undue delay as a bar to having this review heard, it is appropriate to deal with that at the outset.

[23] The first point of departure between the applicants and the respondents is whether the calculation of delay should run from October 2011 when the methodology was adopted by NERSA or only from the date of taking the MPD. The differing viewpoints of the parties are set out in the applicants' heads of argument as follows:

> "22. *NERSA*[19] *and Sasol*[20] *argue that, in terms of regulation 4(3)(a), NERSA's Methodology was a "rule book" binding on NERSA. It was thus bound to apply the Methdology in its determination of Sasol's applications. They argue that the court cannot entertain a review of NERSA's determination of Sasol's applications without first setting aside the Methodology.*
>
> 23. *In an attempt to avoid this argument, the applicants ask, if necessary, that NERSA's adoption of the Methodology be reviewed and set*

18 OUTA (supra) at para 26

19 NERSA Answer vol 15 p 1331 para 60.2.

20 Sasol Answer vol 8 p 718 paras 155 to 169.

aside.[21] *NERSA and Sasol, however, contend that, because NERSA adopted the Methodology in October 2011, the application for its review, launched in October 2013, was out of time.*

24. *We submit that the respondents' argument is misconceived. NERSA's Methodology was not a "rule book" binding upon NERSA. It was merely a policy NERSA adopted as a preliminary step towards its determination of Sasol's gas prices."*

[24] In advancing its argument that the methodology was not binding, the applicants contend that it flies in the face of one of the fundamental rules of administrative law namely that the decision-maker vested with a discretionary power my not fetter its discretion by rigid adherence to a pre-determined policy. This principle is well established[22]

[25] In advancing this argument the applicants lose sight of the fact that regulation 4(3) provides that when NERSA determines maximum prices it <u>must</u> be objective and based on a systematic <u>methodology</u> applicable on a consistent and comparable basis and must *inter alia* also be <u>predictable</u>. When the MPD was to be made NERSA was not free to jettison the methodology.

[26] This clearly distinguishes this case from the general principles referred to above. There rested a statutory <u>duty</u> on NERSA to lay down a methodology. This was done almost two years before the review application was brought. According to the test set out in *OUTA* the delay is therefore *per se* unreasonable. This court is therefore only

[21] Amended notice of motion vol 7 p 642 prayer 2.

[22] *Kemp NO v Van Wyk* 2005 (6) SA 519 (SCA) para 1; *National Lotteries Board v SA Education and Environment Project 2012* (4) SA 504 (SCA) para 9.

empowered to entertain the review application if the interest of justice dictates an extension in terms of section 9.

[27] For this enquiry, even after the 180 day period, the reasonableness of the applicants' conduct is still relevant. The applicants set out no facts which prevented them from taking the methodology decision on review timeously.

[28] I further have regard to the fact that the applicants are large corporations with access to quality legal advice. They employed three counsel.

[29] My conclusion is that the review should not be entertained because of the unreasonable delay.

Order

The application is dismissed with costs, including the costs of two counsel.

A.A. LOUW

Judge of the High Court