THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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Commissioner, South African Revenue Service v Sasol Chevron Holdings Limited (1044/2020) [2022] ZASCA 56 (22 April 2022)

Today the Supreme Court of Appeal (SCA) handed down a judgment upholding, with costs, an appeal against the Gauteng Division of the High Court, Pretoria (the high court).

The preliminary issue before the SCA concerned whether or not Sasol Chevron's review application was instituted within the 180 day period prescribed in s 7(1) of Promotion of Administrative Justice Act 3 of 2000 (PAJA).

Sasol Chevron is an incorporated joint venture company registered in accordance with the laws of Bermuda. In 2014, Sasol Chevron purchased certain movable goods from Sasol Catalyst, a division of Sasol Chemical Industries (Pty) Ltd for exportation from South Africa to Nigeria. In line with the applicable statutory and regulatory framework, the goods were supplied to Sasol Chevron on what was known as an 'ex-works' and 'flash title' basis. Consequently, the goods were delivered by Sasol Catalyst to a warehouse at the Durban Harbour, from where they were sold to Sasol Chevron and then immediately on-sold to Escravos Gas-to-Liquids Project (EGTL) for export to Nigeria. The goods were specially manufactured for EGTL and could not be used in any other application.

Regulation 15(1) of the Export Regulations requires that goods sold for exportation must be exported within 90 days of the date of sale. The relevant tax invoices for the sale of the goods concerned were dated 20 August 2014, 22 September 2014 and 22 October 2014. Sasol Catalyst, the seller of the goods, elected as the vendor to supply the goods to Sasol Chevron and levy tax at the zero rate in terms of s 11(1) of the Value Added Tax Act 89 of 1991 (the VAT Act).

However, Sasol Chevron did not export the movable goods within 90 days of the date of the various tax invoices as required by regulation 15(1). The goods were ultimately exported on 24 April 2015. Accordingly, Sasol Catalyst was, by operation of regulation 8(2) of the regulations, required to levy value added tax at the standard rate on the supply of the goods to Sasol Chevron as prescribed in terms of s 7(1) of the VAT Act.

Cognisant of the fact that value added tax would be payable in respect of the goods, Sasol Catalyst then addressed a letter to the South African Revenue Service (SARS) on 30 January 2015 in which it sought from SARS that the latter should issue a ruling in accordance with s 11(1)*(a)*(ii) of the VAT Act read with regulation 15(1) extending the prescribed 90 day period within which the goods sold to Sasol Chevron were required to be exported to EGTL in respect of the tax invoices issued by the former during August, September, October, November and December 2014.

In the interim, and presumably anticipating that SARS would accede to its request, Sasol Catalyst purportedly issued new and revised tax invoices in substitution of those previously issued in August, September, October, November and December 2014, in terms of which it sought to replace the previously issued tax invoices, thereby substituting the initial zero-rated tax invoices with new tax invoices in which value added tax was levied at the standard rate of 14% that was operational at the time. Sasol Chevron, in turn, duly paid the value added tax levied by Sasol Catalyst in respect of the latter's replacement tax invoices.

On 6 July 2015, Sasol Catalyst applied to SARS for the extension of the period within which to submit an application to the Vat Refund Authority (VRA) for a refund of the value added tax paid in respect of Sasol Catalyst's replacement tax invoices. In a comprehensive letter of 7 November 2016 to Sasol Catalyst's attorneys, SARS responded to Sasol Catalyst's request and declined the application for an extension of the 90 day period for the exportation of the goods sold in terms of the tax invoices issued in August, September and October 2014. However, SARS acceded to Sasol Catalyst's request in relation to the tax invoices issued in November and December 2014.

Undaunted by this setback, Sasol Catalyst made further representations to SARS to 'reconsider the application by Sasol Chevron to submit the application for a refund of the South African VAT paid by Sasol Chevron on the goods sold by Sasol Catalyst'. However, in a letter dated 6 December 2017, SARS was not prepared to budge and reiterated its unwavering stance that Sasol Chevron was not entitled to a refund of the value added tax levied on the supply of the movable goods sold to Sasol Chevron.

In the high court, Sasol Chevron instituted a review application under PAJA seeking, inter alia, an order to review and set aside SARS' decision of 6 December 2017. The SCA held that the high court's conclusion on the issue of delay raised the question whether the high court was right to reach such a conclusion. Therefore, it was necessary for the SCA to first determine this antecedent question, for if it was answered against Sasol Chevron, that result would be determinative of the outcome of this appeal, thus rendering it unnecessary to enter into the substantive merits of the review application.

The SCA held that it was common cause between the parties that Sasol Chevron did not bring any application for the extension of the 180 day period in terms of s 9(2) of PAJA. In addition, the SCA held that where no application for the extension of the 180 day period in terms of s 9(2) had been made – as in this instance – a court had no authority to enter into the substantive merits of a review application brought outside the 180 day period as prescribed in s 7(1).

Furthermore, the SCA held that there could be no doubt that s 7(1) was a time limitation provision. Thus, its object and purpose would not be served if the decision-maker was not made aware, by service of the process impugning the decision, that his or her or its decision was being challenged and, whilst at the same time, the beneficiaries of the decision arrange their affairs on the acceptance that the decision concerned was beyond question because they are completely oblivious to the pending challenge.

Therefore, in the context of the undisputed facts of this case, the SCA held that it therefore followed that Sasol Chevron's review application was instituted outside the 180 day period prescribed in s 7(1). Thus, in the words of Brand JA in *Opposition to Urban Tolling Alliance and Others v The South African National Roads Agency Ltd and Others* [2013] ZASCA 148; 2013 (4) All SA 639 (SCA), 'after the 180 day period the issue of unreasonableness was predetermined by the legislature; it is unreasonable per se.' The inevitable consequence of this conclusion was that absent an application in terms of s 9(2) of PAJA, the high court should have dismissed the review application for want of compliance with the prescripts of s 7(1) as it had no power to enter into the substantive merits of the review. Consequently, the SCA found that the Commissioner's preliminary point ought to have been upheld, hence the appeal was upheld.

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