CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 149/22

In the matter between:

SASOL CHEVRON HOLDINGS LIMITED Applicant

and

COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

Neutral citation:	*Sasol Chevron Holdings Limited v Commissioner for the South African Revenue Service* [2023] ZACC 30
Coram:	Zondo CJ, Maya DCJ, Kollapen J, Madlanga J, Majiedt J, Makgoka AJ, Rogers J, Theron J and Van Zyl AJ
Judgments:	Theron J (unanimous)
Heard on:	4 May 2023
Decided on:	3 October 2023
Summary:	Promotion of Administrative Justice Act 3 of 2000 (PAJA) — delay in instituting application for review — section 7(1) of PAJA — 180-day period — leave to appeal refused

---

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Gauteng Division, Pretoria):

1. Leave to appeal is granted.
2. The appeal is dismissed with costs.

JUDGMENT

THERON J (Zondo CJ, Maya DCJ, Kollapen J, Madlanga J, Majiedt J, Makgoka AJ, Rogers J, and Van Zyl AJ concurring):

Introduction

[1] This matter concerns the interpretation and application of two statutes and some of the regulations that relate to them. The first is section 7(1) of the Promotion of Administrative Justice Act[1] (PAJA). The second relates to the procedures for the granting of Value-Added Tax (VAT) refunds to qualifying purchasers conducting business in export countries in terms of the regulations[2] (Export Regulations) issued under section 74(1) read with paragraph (d) of the definition of "exported" in section 1 of the Value-Added Tax Act[3] (VAT Act).

Background

[2] The applicant is Sasol Chevron Holdings Limited (Sasol Chevron), a joint venture company. Two joint venture partners, Middle East and India (Pty) Ltd (previously known as Sasol Synfuels International (Pty) Ltd) and Chevron GTL Ltd,

[1] 3 of 2000.

[2] Regulations issued in terms of section 74(1) read with paragraph (d) of the definition of "exported" in section 1 (1) of the Value-Added Tax Act, 1991, GN R316 *GG* 37580, 2 May 2014.

[3] 89 of 1991.

each hold a 50% share in Sasol Chevron. Sasol Chevron is a foreign company that is not resident in South Africa. The respondent is the Commissioner for the South African Revenue Service (Commissioner).

[3] Sasol Catalyst is a division of Sasol South Africa Ltd (previously known as Sasol Chemical Industries (Pty) Ltd). During 2014, Sasol Catalyst, a vendor as contemplated in the VAT Act,[4] supplied, on a flash title basis,[5] certain movable goods (catalysts of a specific nature and makeup manufactured for a Gas-to-Liquid plant situated in Nigeria) to Sasol Chevron. The supply, on an ex-works basis, was by way of a sale of the goods (initial sale), which were kept in a warehouse at the Durban Harbour, a designated commercial port for the purposes of the Export Regulations. While the goods were still at the Durban Harbour, Sasol Chevron onsold them to Escravos Gas-to-Liquids Project (Escravos), a joint venture operating in Nigeria and the end-purchaser and user of the catalysts, for export by Escravos to its plant in Nigeria.

[4] It is the initial sale agreement that is under the spotlight in these proceedings. Sasol Catalyst issued VAT zero-rated invoices to Sasol Chevron dated 20 August 2014, 22 September 2014, 22 October 2014, 24 November 2014 and 2 December 2014, respectively. Sasol Catalyst, being the vendor, elected to supply the goods to Sasol Chevron at the VAT zero rate. That being the case, the VAT consequences of the transaction were governed by Part Two – Section A of the Export Regulations.

[5] Regulation 8 prescribes procedures for a vendor who elects to supply movable goods at the zero rate to a qualifying purchaser, where the goods are initially delivered to a harbour in the Republic before being exported. Regulation 8 must be read with

[4] A "vendor" is "any person who is or is required to be registered under [the VAT Act]".

[5] "Flash title" is defined in the Export Regulations as—

> "a supply of movable goods by a vendor to a qualifying purchaser contemplated in paragraph (f) of the definition of 'qualifying purchaser' and that qualifying purchaser subsequently supplies the movable goods to another qualifying purchaser and ownership of the goods vests in the first mentioned qualifying purchaser only for a moment before the goods are sold to such other qualifying purchaser."

regulation 15(1)(a), which provides that, in order to qualify for a VAT zero-rating, the goods must be exported within 90 days from the date of the tax invoice.[6] For various reasons not relevant to this matter, Sasol Chevron did not export the goods within 90 days of the date of the tax invoices, as required by the Export Regulations.

[6] By letter dated 30 January 2015, Sasol Catalyst applied to the South African Revenue Service (SARS) for a binding private ruling in terms of section 41B of the VAT Act,[7] read with section 79 of the Tax Administration Act[8] (Tax Act), to extend the period for the exportation of the goods from South Africa as contemplated in section 11(1)(a)(ii)[9] of the VAT Act read with regulation 15(1) in respect of the invoices issued by Sasol Catalyst to Sasol Chevron.[10] This letter was followed by another, dated 18 March 2015, in which a further extension was requested.

[7] On 30 June 2015, Sasol Catalyst issued new and revised tax invoices in substitution of those previously issued, in which VAT was levied at a standard rate of 15%. Sasol Chevron paid the VAT levied by Sasol Catalyst. The goods were, in the interim, exported on 24 April 2015.

---

[6] Regulation 15(1)(a) of the Export Regulations, which sets out the general rule for export time periods applicable to Section A of Parts One and Two and Section B of Part Two, provides:

> "Subject to the exceptions listed in subparagraph (2), movable goods must be exported from the Republic within 90 days from the earlier of the time an invoice is issued or the time any payment of consideration is received by the vendor. In the case of Part One, the movable goods must be exported within 90 days from the date of the tax invoice."

[7] In terms of section 41B, the Commissioner may issue a VAT ruling, which is "a written statement issued by the Commissioner to a person regarding the interpretation or application of this Act".

[8] 28 of 2011.

[9] Section 11(1)(a)(ii) provides as follows—

> "(ii) the goods have been exported by the recipient and the supplier has elected to supply the goods at the zero rate as contemplated in Part 2 of the regulation referred to in paragraph (d) of the definition of 'exported' in section 1: Provided that—
>
> (aa) where a supplier has supplied the goods to the recipient in the Republic otherwise than in terms of this subparagraph, such supply shall not be charged with tax at the rate of zero per cent; and
>
> (bb) where the goods have been removed from the Republic by the recipient in accordance with the regulation referred to in paragraph (d) of the definition of 'exported' in section 1, such tax shall be refunded to the recipient in accordance with the provisions of section 44(9)"

[10] The issues relating to the November and December invoices were subsequently resolved.

[8] On 6 July 2015, Sasol Catalyst applied to SARS in terms of section 44(9) of the VAT Act[11] for the extension of the period within which to submit an application to the VAT Refund Authority (VRA) for a refund of the VAT paid in respect of Sasol Catalyst's revised tax invoices.

[9] On 7 November 2016, SARS responded to Sasol Catalyst's request and ruled as follows:

(a) No extension was granted to Sasol Catalyst of the 90-day period envisaged in regulation 15(1)(a) to export the goods from the Republic reflected in the invoices of 20 August, 22 September and 22 October 2014. This was because Sasol Catalyst did not submit a timeous written application in terms of regulation 15(2)(f)(i). Extensions were, however, granted in respect of the goods reflected in the invoices of 24 November and 2 December 2014.

(b) No extension was granted to Sasol Catalyst for the 90-day period envisaged by regulation 15(1)(a) within which Sasol Catalyst should have applied for an extension to export the goods from the Republic of South Africa, as such an application is not envisaged in regulation 15(2)(f)(ii).

(c) No extension was granted in terms of regulation 6(6)(b) for the period within which an application must be made for a VAT refund, as the goods were not exported from the Republic within 90 days from the date of the tax invoices.

[10] On 13 June 2017, SARS modified its 7 November 2016 ruling, in the following terms:

[11] Section 44(9) provides that "[t]he Commissioner may make or authorise a refund of any amount of tax which has become refundable to any person under the provisions of any regulation referred to in paragraph (d) of the definition of 'exported' in section 1".

(a) SARS adhered to its previous ruling that no extension was granted to Sasol Catalyst of the 90-day period to export the goods from the Republic for the invoices dated 20 August 2014 and 22 September 2014 but now granted an extension not only in respect of the goods reflected in the invoices of 24 November and 2 December 2014 but also in respect of the goods reflected in the invoice dated 22 October 2014.

(b) An extension was granted to Sasol Catalyst of the 90-day period within which Sasol Catalyst should have applied for an extension to export the catalysts.

(c) SARS did not alter its previous ruling refusing to grant an extension of the period for making an application for a VAT refund.

[11] Sasol Catalyst made further representations to SARS to reconsider the application by Sasol Chevron to submit the application for a refund of the VAT paid by Sasol Chevron on the goods sold by Sasol Catalyst. In a letter dated 6 December 2017, SARS stated that Sasol Chevron was not entitled to a refund.

[12] Further correspondence was exchanged between the parties, culminating in a letter dated 26 March 2018 from SARS to Sasol Chevron in which SARS reaffirmed its previous stance, as communicated to Sasol Catalyst's attorneys in its letter of 7 November 2016. For Sasol Chevron, SARS provided its reasons in the correspondence dated 26 March 2018 and, therefore, that date is relevant for the purposes of the calculation of the 180-day period provided for in section 7(1) of PAJA.[12]

[13] On Friday, 21 September 2018, Sasol Chevron filed a review application under PAJA in the High Court of South Africa, Gauteng Division, Pretoria (High Court). It was served on SARS on the next business day, 25 September 2018. In the application,

[12] In terms of section 7(1) of PAJA, review proceedings must be instituted no later than 180 days after the date that internal remedy proceedings have been concluded or, where no such remedy exists, after the date that "the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons".

Sasol Chevron sought, inter alia, an order to review and set aside SARS' decision of 6 December 2017 to the effect that it was not entitled to a VAT refund, as envisaged by section 11(1)(a)(ii)(bb) read with regulation 6 of Part 1 of the Export Regulations.

[14] SARS raised a preliminary objection to the review application on the ground that Sasol Chevron had not complied with section 7(1) of PAJA. The High Court dismissed the objection and upheld the review, finding, inter alia, that the review application was instituted on 21 September 2018, the 179th day after reasons were provided. The High Court held that the relevant correspondence from SARS was that of 26 March 2018, because this was when SARS first provided reasons for its ruling.

[15] On appeal, the Supreme Court of Appeal confirmed that the time period within which to institute a review application starts to run from the date on which the reasons for the administrative action became known to the applicant. It further held that the decision sought to be reviewed and the reasons therefor were communicated to Sasol Chevron on 6 December 2017, which was the date from which the 180-day period began running. Consequently, the review application was instituted outside of the 180-day period prescribed in section 7(1) of PAJA.

Jurisdiction and leave to appeal

[16] PAJA gives effect to section 33 of the Constitution and it follows that matters relating to its interpretation and application will be constitutional matters.[13] Moreover, the interpretation of the VAT regime as it pertains to export goods is an arguable point of law of general public importance. The VAT regime affects all exporters of goods and is therefore of general public importance. More broadly, the manner in which SARS collects tax revenue is a matter of concern to all citizens. The issue is also arguable, as evidenced by the High Court's interpretation of the applicable legislation which diverges from SARS' practice in terms of the Export Regulations.

[13] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 25.

[17] It is thus in the interests of justice to grant leave to appeal. The VAT issues, if this Court reaches them, involve complex regulatory questions that would be considered for the first time by this Court.

Issues

[18] The issues to be determined are:

(a) Did Sasol Chevron bring its review application within the period of 180 days stipulated by section 7(1)(b) of PAJA? Relatedly, when is an application "instituted" for purposes of PAJA?

(b) On a proper application of the Export Regulations, was Sasol Chevron entitled to an extension of time within which to claim a refund of the VAT levied on a supply of export goods?

Merits

[19] The reasoning of the Supreme Court of Appeal appears from the following paragraphs of its judgment:

> "[28] However, the counter-argument advanced by counsel for Sasol Chevron and the reasoning of the [High Court] on this score must be tested with reference to the following fundamental considerations. First, as was submitted on behalf of the Commissioner, SARS' letter of 26 March 2018 was no more than a recapitulation of the position that SARS had consistently adopted since 2016. The letter itself makes explicit reference to the earlier decision – termed the ruling – made on 6 December 2017, as are virtually all the subsequent letters from SARS to Sasol Chevron. SARS' letter of 6 December 2017, in turn, makes reference to the ruling made on 7 November 2016 in which the background facts are comprehensively set out, Sasol Chevron's request summarised, the relevant statutory framework set out and, finally, the decision (ruling) – supported with comprehensive reasons – is articulated.

[29] In contending that the impugned decision was not taken on 26 March 2018, counsel for the Commissioner called into his aid the decision of this Court in *Aurecon South Africa (Pty) Ltd v City of Cape Town*,[14] in which Maya ADP said the following:

> 'The decision challenged by the City and the reasons therefor were its own and were always within its knowledge. Section 7(1) unambiguously refers to the date on which the reasons for administrative action became known or ought reasonably to have become known to the party seeking its judicial review. The plain wording of these provisions simply does not support the meaning ascribed to them by the court a quo, i.e. that the application must be launched within 180 days after the party seeking review became aware that the administrative action in issue was tainted by irregularity. That interpretation would automatically entitle every aggrieved applicant to an unqualified right to institute judicial review only upon gaining knowledge that a decision (and its underlying reasons), of which he or she had been aware all along, was tainted by irregularity, whenever that might be. This result is untenable as it disregards the potential prejudice to the respondent (the appellant here) and the public interest in the finality of administrative decisions and the exercise of administrative functions. Contrary to the court a quo's finding in this regard, the City far exceeded the time frames stipulated in section 7(1) and did not launch the review proceedings within a reasonable time. In that case, it clearly needed an extension as envisaged in section 9(1)(b) without which the court a quo was otherwise precluded from entertaining the review application.'

[30] Aurecon was cited with approval by the Constitutional Court in *City of Cape Town v Aurecon South Africa (Pty) Ltd*,[15] in which the following was stated:

> 'On a textual level, the City's contention confuses two discrete concepts: reasons and irregularities. Section 7(1) of PAJA does not provide that an application must be brought within 180 days after the City became aware that the administrative action was tainted by

[14] *Aurecon South Africa (Pty) Ltd v City of Cape Town* [2015] ZASCA 209; 2016 (2) SA 199 (SCA) (*Aurecon*) at para 16.

[15] *City of Cape Town v Aurecon South Africa (Pty) Ltd* [2017] ZACC 5; 2017 (6) BCLR 730 (CC); 2017 (4) SA 223 (CC) at para 41.

> irregularity. On the contrary, it provides that the clock starts to run with reference to the date on which the reasons for the administrative action became known (or ought reasonably to have become known) to an applicant.'
>
> Thus, section 7(1) explicitly provides that the proverbial clock begins to tick from the date on which the reasons for the administrative action became known (or ought reasonably to have become known) to the applicant, in this instance, Sasol Chevron.
>
> [31] There is, to my mind, considerable force in the contentions advanced on behalf of the Commissioner. On this score, it is instructive to keep at the forefront of one's mind that the fact that the parties continued to exchange further correspondence beyond 6 December 2017 cannot detract from the truism that SARS' impugned decision was taken on 6 December 2017. What is more, is that this is the very decision that Sasol Chevron sought to have reviewed and set aside. And yet no attempt was made by Sasol Chevron in its founding papers to explain any correlation between the decision of 6 December 2017 and SARS' letter of 26 March 2018 to support its belated contention that in instituting its review application on 21 September 2018, it was still within the time frame prescribed by section 7(1) of PAJA."[16]

[20] The reasoning of the Supreme Court of Appeal is unassailable and is endorsed by this Court. In a letter dated 6 December 2017, the Commissioner explained that the refund was denied because, in his view, Sasol Chevron was not entitled to a refund of the VAT levied on the supply of goods as it had not exported the goods within the time required by regulation 15(1)(a) and the Commissioner had not granted an extension of this period. This explanation was given in response to a request for an extension of the time within which to make the application and with reference to the earlier reasons furnished.

[21] The reasons provided by SARS as to why Sasol Chevron was not entitled to a refund were set out in paragraphs one to three of the letter. In essence, these were that Sasol Catalyst had elected to supply the goods at the zero rate as contemplated in Part 2 of the Export Regulations. Because the goods were not exported within the prescribed

[16] *Commissioner, South African Revenue Service v Sasol Chevron Holdings Limited* [2022] ZASCA 56 at paras 28-31.

90-day period, VAT at the standard rate had to be applied to the supply of goods.[17] In view of the fact that Sasol Catalyst had elected to export the goods under Part 2 of the Export Regulations, Part 1, under which regulation 6 resides, was not applicable to the export of the goods.

[22] These reasons were sufficient for the purposes of PAJA. Based on the content of the Commissioner's letters of 7 November 2016 and 6 December 2017, Sasol Chevron was in a position to formulate an objection and it did not need the further explanation that was furnished in the 26 March 2018 letter. The 26 March 2018 letter did not contain new reasons – it was an elaboration of the reasons given on 6 December 2017. If this Court were to hold that the 180 days in section 7(1) of PAJA only begins to run when a reviewing party is satisfied with the reasons given to it, this would enable parties – especially well-resourced parties – to indefinitely extend the period in section 7(1) by simply requesting additional reasons. This is counterintuitive to the purpose of section 7(1), which is to promote certainty regarding the lawful status of administrative decisions.

[23] This Court agrees with the Supreme Court of Appeal that the finding in relation to section 7(1)(b) of PAJA is dispositive of the matter, and that it is thus not necessary to adjudicate the remaining issues in this matter.

Order

[24] The following order is made:

1. Leave to appeal is granted.
2. The appeal is dismissed with costs.

[17] This is in terms of regulation 16(3). If the vendor does not have timeous documentary proof of compliance with the conditions for supplying goods at the zero rate, the vendor must account for output tax on the supply. In terms of regulation 16(3), the output tax is calculated by applying the tax fraction to the consideration for the supply.

For the Applicant:	P A Swanepoel SC, F B Pelser and O Lugabazi instructed by Cliffe Dekker Hofmeyr Incorporated.
For the Respondent:	A R Sholto-Douglas SC and T S Sidaki instructed by Ledwaba Mazwai Attorneys.