



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case no: 1044/2020

In the matter between:

**COMMISSIONER FOR THE SOUTH
AFRICAN REVENUE SERVICE**

APPELLANT

and

SASOL CHEVRON HOLDINGS LIMITED

RESPONDENT

Neutral citation: *Commissioner, South African Revenue Service v Sasol
Chevron Holdings Limited* (Case no 1044/2020) [2022]
ZASCA 56 (22 April 2022)

Coram: PETSE DP and ZONDI, MOCUMIE and HUGHES JJA and
MEYER AJA

Heard: 09 March 2022

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 09H45 on 22 April 2022.

Summary: Administrative law – Promotion of Administrative Justice Act 3 of 2000 (PAJA) – application for review of administrative action – delay in instituting application – s 7(1) of PAJA – no agreement between the parties under s 9(1) for extension of period prescribed in terms of s 7(1) – nor application to court under s 9(2) for extension of the prescribed 180 day period.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (A J Louw AJ, sitting as court of first instance):

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the court below is set aside and in its place is substituted the following order:

'The application is dismissed with costs, including the costs of two counsel where so employed.'

JUDGMENT

Petse DP (Zondi, Mocumie and Hughes JJA and Meyer AJA concurring):

Introduction

[1] This is an appeal by the Commissioner for the South African Revenue Service (the Commissioner) against a decision of the Gauteng Division of the High Court, Pretoria (the high court) in favour of Sasol Chevron Holdings Limited (Sasol Chevron), the respondent in this appeal, delivered on 20 December 2019. In terms of its decision, the high court (per A J Louw AJ) reviewed and set aside the Commissioner's decision of 6 December 2017, namely that Sasol Chevron was not entitled to a refund of the Value Added Tax levied on the supply of the goods sold to Sasol Chevron as envisaged in

s 11(2)(a)(ii)(bb) of the Value Added Tax Act¹ (the VAT Act) read with regulation 6, Part One of the Export Regulations.² In addition, the high court remitted the dispute between the protagonists to the Commissioner for reconsideration. Costs followed the event.

Factual background

[2] The background facts are briefly as follows. Sasol Chevron is an incorporated joint venture company registered in accordance with the laws of Bermuda. In 2014, Sasol Chevron purchased certain movable goods³ 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,⁴ the goods were supplied to Sasol Chevron on what is known as an 'ex-works' and 'flash title' basis.⁵ 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.

[3] 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,

¹ Value Added Tax Act 89 of 1991.

² Regulations promulgated under Government Notice No R316, Government Gazette 37580 of 2 May 2014.

³ The goods comprised catalyst of a specific nature and make-up manufactured for the Gas to Liquid Plant in Nigeria.

⁴ See the Value Added Tax Act 89 of 1991 and Regulations promulgated under Government Notice No R.316, Government Gazette 37580 of 2 May 2014 pursuant to s 74(1) of the Value Added Tax Act.

⁵ The term '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.

22 September 2014 and 22 October 2014. Sasol Catalyst, the seller of the goods, elected as the vendor⁶ to supply the goods to Sasol Chevron and levy tax at the zero rate in terms of s 11(1)⁷ of the VAT Act.

[4] For reasons not germane for present purposes, Sasol Chevron did not export the movable goods within 90 days of the date of the tax invoice 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)⁸ of the

⁶ The Value Added Tax Act defines a vendor as:

'any person who is or is required to be registered under this Act: Provided that where the Commissioner has under section 23 or 50A determined the date from which a person is a vendor that person shall be deemed to be a vendor from that date.'

⁷ Section 11(1) of the Value Added Tax Act reads, 'Where, but for this section, a supply of goods would be charged with tax at the rate referred to in section 7(1), such supply of goods shall, subject to compliance with subsection (3) of this section, be charged with tax at the rate of zero per cent where—

(a) the supplier has supplied the goods (being movable goods) in terms of a sale or instalment credit agreement and—

(i) ...

(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); or ...'

⁸ Regulation 8(2) reads:

The vendor may only elect to levy tax at the zero rate where—

(a) the vendor ensures that the movable goods are delivered (irrespective of the contractual conditions of delivery) to any of the harbours or airports listed in the definition of "designated commercial port" from where the movable goods are to be exported by the qualifying purchaser. The export of movable goods as well as the declaration of such goods at ports other than those ports listed in the definition of "designated commercial port", may be allowed in exceptional circumstances on application to and after approval by the Commissioner;

(b) the movable goods are exported by means of a pipeline or electrical transmission line;

(c) the vendor supplies the goods to a qualifying purchaser on a flash title basis;

(d) the vendor supplies the movable goods to a qualifying purchaser and—

(i) the time of supply is regulated by sections 9(1) or 9(3)(b)(i) or (ii) of the Act;

(ii) the movable goods are subject to a process of repair, improvement, manufacture, assembly or alteration by a vendor other than the vendor who supplied the goods in the Republic;

(iii) the vendor ensures that the movable goods are delivered to the premises of the vendor responsible for further processing, repair, improvement, manufacture, assembly or alteration for such further processing, repair, improvement, manufacture, assembly or alteration; and

(iv) the vendor responsible for the further processing, repair, improvement, manufacture, assembly or alteration ensures that the movable goods are subsequently delivered to any of the harbours or airports listed in the definition of "designated commercial port"; or

(e) the vendor supplies movable goods to a qualifying purchaser or registered

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)⁹ of the VAT Act.

[5] 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)¹⁰ 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 ECTL in respect of the tax invoices issued by the former during August, September, October, November and December 2014.

[6] In support of its application, Sasol Catalyst stated:

'The delay in the exportation of the goods is as a result of various factors, including the delay in obtaining the required tax import clearance certificates from the Nigerian authorities; industrial action in Nigeria during November and December, delays in finalising contracts between the Nigerian entity and the freight forwarders.'

vendor and the movable goods are–

- (i) situated at the designated harbour or airport;
- (ii) delivered to either the port authority, master of the ship, a container operator, the pilot of an aircraft or are brought within the control area of the airport authority; and
- (iii) destined to be exported from the Republic.'

⁹ Section 7(1) provides:

'Subject to the exemptions, exceptions, deductions and adjustments provided for in this Act, there shall be levied and paid for the benefit of the National Revenue Fund a tax, to be known as the value-added tax–

- (a) on the supply by any vendor of goods or services supplied by him on or after the commencement date in the course or furtherance of any enterprise carried on by him;
- (b) on the importation of any goods into the Republic by any person on or after the commencement date; and
- (c) on the supply of any imported services by any person on or after the commencement date, calculated at the rate of 15 per cent on the value of the supply concerned or the importation, as the case may be.'

¹⁰ Section 11(1)(a)(ii) reads:

'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.'

[7] And elaborating on this, it asserted in its founding affidavit, in support of the relief sought in the high court, that:

'The delay in exporting the goods from South Africa was mainly due to a delay in obtaining the required import clearance certificates from the Nigerian authorities which in turn caused delays in finalizing contracts between EGTL and the freight forwarders as well as industrial action being experienced in Nigeria during November and December 2015.'

Sasol Chevron amplified this in its replying affidavit and stated that:

'The industrial action referred to in the applicant's founding affidavit paragraph 19, and which was a contributing cause in the delay of the exportation of the goods, was experienced during November and December 2014, and not 2015 as stated therein.'

[8] In the interim, and presumably in anticipation that its request for an extension would be acceded to, Sasol Catalyst issued new and revised tax invoices in substitution of those previously issued in August, September, October, November and December 2014 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.

[9] 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 revised 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.

[10] 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. SARS' response seemingly failed to convince the non-fatigable Sasol Catalyst that SARS too was unrelenting. 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, consistent with what it had earlier communicated to Sasol Catalyst's attorneys in its letter of 7 November 2016.

Before the high court

[11] Some five months later, on 21 September 2018, and with a stalemate having arisen, Sasol Chevron instituted a review application under PAJA seeking, inter alia, an order to review and set aside SARS' decision of 6 December 2017.¹¹

¹¹ The relief sought by Sasol Chevron in terms of its notice of motion was for an order in the following terms:
'1. That the decision by the Respondent dated 06 December 2017 to the effect that the Applicant ". . . is not entitled to a refund of the VAT levied on the supply of the goods, as envisaged in section 11(1)(a)(ii)(bb) read with Regulation 6 of Part I of the Export Regulation" be reviewed and set aside;

2. That a declaratory order be issued in terms whereof it is declared that in respect of the movable goods (catalysts) purchased by the Applicant from Sasol Catalyst, a division of Sasol South Africa (Pty) Ltd (previously Sasol Chemical Industries (Pty) Ltd) in terms of the latter's tax invoices dated 20 August 2014 and 22 September 2014 (referred to in and attached to the Applicant's founding affidavit), in respect of which goods the Applicant was responsible for the exporting thereof from the Republic of South Africa:

2.1 The Applicant qualifies for submission to the Respondent of a request for extension of the period within which the Applicant may submit an application for a refund of the value-added tax paid by the Applicant as

[12] It is common cause between the parties that the review application papers were served on SARS on 25 September 2018. Thus, SARS asserted that by then the 180 day period provided for in s 7(1) of PAJA, reckoned either from 7 November 2016 or 6 December 2017, had long expired. Accordingly, in argument before the high court, SARS contended that absent an application for an order that the 180 day period be extended in terms of s 9(2) of PAJA, the review application fell to be dismissed on that ground alone without consideration of the merits of the review application itself. I pause here to observe that it is 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.

[13] In the event, the high court dismissed the preliminary objection raised by SARS and thereafter proceeded to determine the substantive merits of the review. The high court then upheld the application and, in the result, granted an order in the terms foreshadowed in paragraph 1 above. The present appeal, with the leave of the high court, is directed against that order.

provided for on the aforementioned tax invoices, in accordance with the provisions of Regulation 6(6)(b) of the 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 89 of 1991 (as amended), and that all the other requirements prescribed in Part 1 of the said regulations were complied with;

3. Alternatively to the relief sought in prayer 2 above, that:

3.1 The Respondent be ordered to reconsider the Applicant's written request that an extension be granted to it to submit an application for a refund to the VAT Refund Administrator in accordance with the provisions of Regulation 6(6)(b) (of the Regulations referred to in prayer 2 above) (a copy of which earlier written request is referred to in and attached to the Applicant's founding affidavit) on the basis that the Respondent has to consider whether "all the other requirements prescribed in this Part" were complied with, as contemplated in Regulation 6(6)(b) in Part 1 of the Regulations referred to in prayer 2 above alternatively that the Respondent be ordered to reconsider the Applicant's written request that an extension be granted to it to submit an application for a refund to the VAT Refund Administrator in accordance with the provisions of regulation 6(6)(b) (of the Regulations referred to in prayer 2 above);

4. That the Respondent be ordered to pay the costs of this application only in the event of Respondent opposing any of the relief sought herein.'

The remaining two paragraphs sought costs and further or alternative relief.

[14] Insofar as the issue of delay is concerned, the high court, in essence, held that as the Commissioner provided his reasons for his decision of 6 December 2017 only on 26 March 2018, this meant that the 180 day period commenced to run from 27 March 2018. And, having regard to the fact that the 'review application was issued on 21 September 2018 . . . [on] the 179th day after the reasons were provided on the 26th March 2018', it followed that 'the review application was timeously instituted within the prescribed 180 day period' as required in s 7(1) of PAJA. With this procedural obstacle now out of the way, the high court then – as stated above – proceeded to consider the merits of the review application. The high court's conclusion on the issue of delay raises the question whether the high court was right to reach such a conclusion. Therefore, it is necessary to first determine this antecedent question, for if it is 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.

Statutory framework

[15] Section 7(1) of PAJA provides as follows:

'Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date–

(a) subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection 2(a) have been concluded; or

(b) where no such remedies exist, on which 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.'

Self-evidently, with a view to ameliorate the position of a litigant hit by the time limitation provision in s 7(1), s 9(1) of PAJA provides that the 180 day period may, either by agreement between the parties or absent such agreement, by a

court on application, be extended for a fixed period. And a court may grant an extension of the 180 day period referred to in s 7(1) if, in terms of s 9(2) of PAJA, the interests of justice so require.

[16] What the interests of justice will demand in any given situation will largely depend on the facts of each case. In *Camps Bay Ratepayers and Residents Association and Another v Harrison and Another*,¹² this court put it thus:

'[A]nd the question whether the interests of justice require the grant of such extension depends on the facts and circumstances of each case: the party seeking it must furnish a full and reasonable explanation for the delay which covers the entire duration thereof and relevant factors include the nature of the relief sought, the extent and cause of the delay, its effect on the administration of justice and other litigants, the importance of the issue to be raised in the intended proceedings and the prospects of success.' (Footnote omitted.)

[17] In *Mulaudzi v Old Mutual Life Assurance Company (South Africa) Limited*,¹³ this court said that in applications for condonation (extension of time in the context of s 9(2) of PAJA), the substantive merits of the principal case may be relevant. The court proceeded to say that in circumstances where the merits are considered to be relevant, they are not necessarily decisive. In *Opposition to Urban Tolling Alliance and others v The South African National Roads Agency Limited and Others*¹⁴ this court stated that absent an extension, 'the court has no authority to entertain the review application.' However, this

¹² *Camps Bay Ratepayers' and Residents' Association v Harrison* [2010] ZASCA 3; [2010] 2 All SA 519 (SCA) para 54.

¹³ *Mulaudzi v Old Mutual Life Assurance Company (South Africa) Limited and Others, National Director of Public Prosecutions and Another v Mulaudzi* [2017] ZASCA 88; [2017] 3 All SA 520 (SCA); 2017 (6) SA 90 (SCA) para 34.

¹⁴ *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) (*OUTA*) para 26.

statement was qualified in *South African National Roads Agency Limited v City of Cape Town*,¹⁵ in which Navsa JA said that this dictum 'cannot be read to signal a clinical excision of the merits of the impugned decision, which must be a critical factor when a court embarks on a consideration of all the circumstances of a case in order to determine whether the interests of justice dictates that the delay should be condoned.'¹⁶

[18] However, it is necessary to emphasise that in this case, as already indicated above, Sasol Chevron did not bring any application for the extension of the 180 day period as contemplated in s 9(2) of PAJA. Accordingly, the fate of this appeal hinges entirely on the question whether or not Sasol Chevron's review application was instituted within the 180 day period prescribed in s 7(1) of PAJA. If not, that will be the end of the matter, and the appeal would fall to be dismissed without further ado.

[19] In *OUTA*,¹⁷ this court held that:

'... 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 has no authority to entertain the review application at all. Whether or not the decision is unlawful no longer matters. The decision has been "validated" by the delay.'

[20] The rationale for what has come to be known as the delay rule under s 7(1) of PAJA, whose roots are embedded in common law, was reiterated by Brand

¹⁵ *South African National Roads Agency Limited v City of Cape Town* [2016] ZASCA 122; [2016] 4 All SA 332 (SCA); 2017 (1) SA 468 (SCA) para 81.

¹⁶ See also: *Asla Construction (Pty) Limited v Buffalo City Metropolitan Municipality and Another* [2017] ZASCA 23; [2017] 2 All SA 677 (SCA); 2017 (6) SA 360 (SCA) para 12.

¹⁷ *OUTA* para 26.

JA in *Associated Institutions Pension Fund and Others v Van Zyl and Others*¹⁸ as follows:

'Since PAJA only came into operation on 30 November 2000 the limitation of 180 days in s 7(1) does not apply to these proceedings. The validity of the defence of unreasonable delay must therefore be considered with reference to common law principles. It is a longstanding rule that courts have the power, as part of their inherent jurisdiction to regulate their own proceedings, to refuse a review application if the aggrieved party had been guilty of unreasonable delay in initiating the proceedings. The effect is that, in a sense, delay would "validate" the invalid administrative action (see eg *Oudekraal Estates (Pty) Ltd v City of Cape Town and others* [2004] 3 All SA 1 (SCA) 10b-d, para 27). The *raison d'etre* of the rule is said to be twofold. First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Second, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions (see eg *Wolgroeiens Afslalers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) 41).

The scope and content of the rule has been the subject of investigation in two decisions of this court. They are the *Wolgroeiens* case and *Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie en 'n Ander* 1986 (2) SA 57 (A). As appears from these two cases and the numerous decisions in which they have been followed, application of the rule requires consideration of two questions:

- (a) Was there an unreasonable delay?
- (b) If so, should the delay in all the circumstances be condoned?

(See *Wolgroeiens* 39C-D.)

The reasonableness or unreasonableness of a delay is entirely dependent on the facts and circumstances of any particular case (see eg *Setsokosane* 86G). The investigation into the reasonableness of the delay has nothing to do with the court's discretion. It is an investigation into the facts of the matter in order to determine whether, in all the circumstances of that case, the delay was reasonable. Though this question does imply a value judgment it is not to be

¹⁸ *Associated Institutions Pension Fund and Others v Van Zyl and Others* [2004] ZASCA 78; [2004] 4 All SA 133 (SCA) paras 46 - 48.

equated with the judicial discretion involved in the next question, if it arises, namely, whether a delay which has been found to be unreasonable, should be condoned (See *Setsokosane* 86E-F).'

[21] In *Gqwetha v Transkei Development Corporation Ltd and Others*,¹⁹ Nugent JA elaborated on this theme and said the following regarding the delay rule:

'Underlying that latter aspect of the rationale is the inherent potential for prejudice, both to the efficient functioning of the public body, and to those who rely upon its decisions, if the validity of its decisions remains uncertain. It is for that reason in particular that proof of actual prejudice to the respondent is not a precondition for refusing to entertain review proceedings by reason of undue delay, although the extent to which prejudice has been shown is a relevant consideration that might even be decisive where the delay has been relatively slight . . .'

[22] What an application for an extension of the 180 day period in terms of s 9 contemplates – just like any other application for condonation for that matter – is that the applicant must, in general, proffer a reasonable and satisfactory explanation for the delay. This entails that the explanation proffered must not be bereft of particularity and candour and that a full explanation must be proffered not only for the nature and extent of the delay,²⁰ but also for the entire period covered by the delay. And the explanation proffered for the delay must also be reasonable. It is as well to bear in mind that in considering whether the court should come to the aid of the applicant, the substantive merits of the review application will also be a critical factor in determining whether the interests of

¹⁹ *Gqwetha v Transkei Development Corporation Ltd and Others* [2006] 3 All SA 245; 2006 (2) SA 603 (SCA) para 23 (*Gqwetha*).

²⁰ See, for example *Aurecon South Africa (Pty) Ltd v City of Cape Town* [2015] ZASCA 209; [2016] 1 All SA 313 (SCA); 2016 (2) SA 199 (SCA) para 17. See also: *Van Wyk v Unitas Hospital and Another* [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) para 20 and *eThekweni Municipality v Ingonyama Trust* [2013] ZACC 7; 2013 (5) BCLR 497 (CC); 2014 (3) SA 240 (CC) para 28.

justice dictate that the delay should be condoned.²¹ But in the present matter, there is no application such as is contemplated in s 9(2) of PAJA. Thus, these considerations do not arise in this case.

[23] Where no application for the extension of the 180 day period in terms of s 9(2) has been made – as in this instance – a court has no authority to enter into the substantive merits of a review application brought outside the 180 day period prescribed in s 7(1). In *Mostert NO v Registrar of Pension Funds and Others*²² it was stated that:

'Section 7(1) of PAJA provides that proceedings for judicial review must be instituted without unreasonable delay and not later than 180 days after the dates specified in subsections (a) and (b). In *Opposition to Urban Tolling Alliance* Brand JA said (para 26):

"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 . . . 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. Before the effluxion of 180 days, the first enquiry in applying s 7(1) is still whether the delay (if any) was unreasonable. 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 has no authority to entertain the review application at all." '

[24] As already indicated above in this case Sasol Chevron adopted the stance that the review application was instituted within 180 days after the dates

²¹ *Asla Construction (Pty) Ltd v Buffalo City Metropolitan Municipality* [2017] ZASCA 23; 2017 (6) SA 360 (SCA).

²² *Mostert NO v Registrar of Pension Funds and Others* [2017] ZASCA 108; 2018 (2) SA 53 (SCA) para 34.

stipulated in paragraphs (a) and (b) of s 7(1). It, therefore, elected to argue the case on the footing that an application for an extension of the 180 day period was wholly unnecessary.

Counsel's submissions

[25] The diametrically opposing contentions advanced by counsel on behalf of the parties in this court may broadly be summarised as follows. On behalf of SARS, it was submitted in the heads of argument that the Commissioner declined the application made by Sasol Chevron in response to the latter's application made in July 2015 on 7 November 2016. Accordingly, so the argument went, SARS' response – communicated to Sasol Chevron in writing on 7 November 2016 – constituted its written decision supported with reasons underpinning such decision. Before us, and to meet the counter-argument advanced on behalf of Sasol Chevron – counsel for the Commissioner accepted for purposes of the appeal that SARS' decision was taken on 6 December 2017. Indeed, this is the very decision that Sasol Chevron sought to have reviewed and set aside in its notice of motion.

[26] Counsel for the Commissioner went on to highlight that as the application for review was instituted only on 21 September 2018 – some 22 months after the decision was taken and reasons therefor provided – the fact that even on Sasol Chevron's own account, the decision was taken on 6 December 2017 meant that the high court was not empowered to enter into the substantive merits of the review application. Instead, so the argument went, the high court should have dismissed the application simply on the basis that it was instituted outside the 180 day period without an application for the extension of that period as required in terms of s 9(2).

[27] Whilst accepting the submissions advanced on behalf of the Commissioner as to the factual backdrop against which this appeal should be considered, counsel for Sasol Chevron embraced the reasoning that prevailed in the high court. In essence, the high court held that although SARS took its decision on 6 December 2017, it provided its reasons in support of that decision only on 26 March 2018. Therefore, as the review application was instituted on 21 September 2018 (and served on 25 September 2018), this meant that it was still within the 180 day period prescribed by s 7(1). Hence, it concluded that it was not necessary to apply for an extension of time under s 9(2).

[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*,²³ 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, ie 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 s 7(1) and did not launch the review proceedings within a reasonable time. In that case, it clearly needed an extension as envisaged in s 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*,²⁴ 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 irregularity. On the contrary, it provides that the clock starts to run with reference to the date

²³ *Aurecon South Africa (Pty) Ltd v City of Cape Town* [2015] ZASCA 209; [2016] 1 All SA 313 (SCA); 2016 (2) SA 199 (SCA) para 16 (*Aurecon*).

²⁴ *City of Cape Town v Aurecon South Africa (Pty) Ltd* [2017] ZACC 5; 2017 (6) BCLR 730 (CC); 2017 (4) SA 223 (CC) para 41.

on which the reasons for the administrative action became known (or ought reasonably to have become known) to an applicant.'

Thus, s 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 s 7(1) of PAJA.

[32] During argument, there was some debate about whether the word 'institute' in s 7(1) of PAJA ought to be construed to mean that the court process initiating legal proceedings – in this instance the review application – in a court must not only be issued by the court concerned but must also actually be served on the respondent. Counsel for the Commissioner embraced this proposition and contended that this is the sense in which the word 'institute' should be understood. I did not understand counsel for Sasol Chevron to contest this proposition. Rather, he was content to argue that on the facts of this matter, and

having regard to the fact that it was common cause that the review application was served on SARS on 25 September 2018 – that is, on the 179th day of the 180 day period – the requirements of s 7(1) were satisfied. In the circumstances, argued counsel, no application in terms of s 9(2) of PAJA was necessary.

[33] On the facts, counsel's argument cannot be sustained. Taking as one's logical point of departure, the requirement in s 7(1) that 'any proceedings for judicial review . . . must be instituted without unreasonable delay and not later than 180 days' after either of the dates referred to in paragraphs (a) and (b) of s 7(1), it must ineluctably follow that the word 'institute' when considered contextually and purposively,²⁵ as it must be, means to commence the review proceedings by issuing the process and effecting service thereof on the decision-maker whose administrative action is impugned.

[34] Thus, any argument to the contrary would be untenable. This can be tested with reference to the following considerations. If it were otherwise, one may rhetorically ask, what would be the virtue in issuing the review application and thereafter remain supine for months on end without effecting service of the application on the respondent? Could that be said to meet the requirements of s 7(1) of PAJA, which decree that 'any proceedings for judicial review in terms of s 6(1) must be instituted without reasonable delay and not later than 180 days'

²⁵ *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) para 28. See also *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and Others* [2013] ZACC 48; 2014 (3) BCLR 265 (CC) at paras 84-6 and *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (6) SA 199 (CC); 2007 (10) BCLR 1027 (CC) at para 5 for purposive interpretation. In addition, see *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* [2013] ZASCA 76; 2013 (5) SA 1 (SCA) at para 24; *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* [2009] ZASCA 7; 2009 (4) SA 399 (SCA) at para 39 and *Bhana v Dönges NO and Another* 1950 (4) SA 653 (A) at 664E-H for proper contextualisation; *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18 (*Endumeni*).

of the occurrence of either of the events referred to in paragraphs (a) and (b) thereof. And, more fundamentally, would a mere issuing of the review application that is not followed by immediate service thereof on the respondent without unreasonable delay not undermine the legitimate purpose that the delay rule is designed to serve? To my mind, the answer must ineluctably be Yes. To contend otherwise would, as indicated above, undermine the *raison d'être* of the delay rule as aptly articulated by Millar JA in *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad*.²⁶ And, as already observed above, the underlying rationale for the rule lies in the 'inherent potential for prejudice, both to the efficient functioning of the public body and to those who rely upon its decision, if the validity of its decisions remains uncertain.'²⁷

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

[36] In *ABM Motors v Minister of Minerals and Energy and Others*,²⁸ Ploos van Amstel J had occasion to consider whether an application which has been issued but not served on the respondent can be taken to have been made. After

²⁶ *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* [1978] 1 All SA 369 (A); 1978 (1) SA 13 (A) at 375.

²⁷ *Gqwetha* para 23.

²⁸ *ABM Motors v Minister of Minerals and Energy and Others* 2018 (5) SA 540 (KZP) paras 13-18 (*ABM Motors*).

making reference to various decisions of our courts,²⁹ the upshot of which is that not only must the application be issued by the Registrar but must also be served on the affected parties, the learned Judge concluded as follows:

'I do not consider that this approach [issue and service of the process] will place an undue burden on applicants for judicial review in terms of PAJA.³⁰

[37] Before leaving this topic, I consider that it will be useful to make reference to certain dicta of our courts that bear repeating. The first of these is the oft-quoted passage from the judgment of Wallis JA in *Endumeni*.³¹ The learned Judge of Appeal had occasion to explain the import of what he had said some eight years earlier in *Endumeni* in *Commissioner for the South African Revenue Service v United Manganese of Kalahari (Pty) Ltd*³² and stated:

'It is an objective unitary process where consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. . .'

[38] The learned Judge then went on to say:

'The difference in the genesis of statutes and contracts provides a different context for their interpretation. Statutes undoubtedly have a context that may be highly relevant to their interpretation. In the first instance there is the injunction in s 39(2) of the Constitution that statutes should be interpreted in accordance with the spirit, purport and objects of the Bill of Rights. Second, there is the context provided by the entire enactment. . . Fourth, the legislative history may provide useful background in resolving interpretational uncertainty. Finally, the

²⁹ *Tladi v Guardian National Insurance Co Ltd* [1992] 1 All SA 168 (T); 1992 (1) SA 76 (T); *Taboo Trading 232 (Pty) Ltd v Pro Wreck Scrap Metal CC and Others*; *Joubert v Pro Wreck Scrap Metal CC* 2013 (6) SA 141 (KZP); *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Others* [2012] ZASCA 49; 2013 (2) SA 204 (SCA).

³⁰ *ABM Motors* para 19.

³¹ Footnote 25 above para 18.

³² *Commissioner for the South African Revenue Service v United Manganese of Kalahari (Pty) Ltd* [2020] ZASCA 16 (25 March 2020) para 8.

general factual background to the statute, such as the nature of its concerns, the social purpose to which it is directed and, in the case of statutes dealing with specific areas of public life or the economy, the nature of the areas to which the statute relates, provides the context for the legislation.'

[39] There is also the judgment of Rumpff JA in *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk*³³ where it was said that the purpose of a summons or notice of motion is to implicate or involve a respondent into a lawsuit. Thus, it goes without saying that one can only implicate or involve a respondent or defendant in a lawsuit by bringing the summons or notice of motion to his or her notice by effecting service of the process.³⁴

[40] Finally, I must also refer to *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Others*³⁵ in which this court interpreted the word 'initiate' used in a court order granting an interim interdict pending certain review proceedings to be initiated by no later than a certain date, to mean not only the filing of the review application papers with the registrar and the issue thereof, but crucially also service thereof. In reaching that conclusion this court inter alia relied on *Mame Enterprises (Pty) Ltd v Publications Control Board*³⁶ wherein Nicholas J held that it was manifest from uniform rule 6 and from the contents of Form 2(a) that the giving of notice to the respondent in a case in

³³ *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 (A) at 780E-F.

³⁴ See *Marine Trade Insurance Co Ltd v Reddinger* 1966 (2) SA 407(A) at 413 in which the following was stated:

'Although an action is commenced when the summons is issued the defendant is not involved in litigation until service has been effected, because it is only at that stage that a formal claim is made upon him.'

³⁵ *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Others* [2012] ZASCA 49; 2013 (2) SA 204 (SCA) paras 14 - 20.

³⁶ *Mame Enterprises (Pty) Ltd v Publications Control Board* 1974 (4) SA 217 (W) at 220B.

which relief is claimed is an essential first step in an application on notice of motion; and on *Tladi v Guardian National Insurance Co Ltd*.³⁷ In *Tladi*, Botha J held that an application that was required to have been made within a period of 90 days as contemplated in s 14(3) of the Motor Vehicle Accidents Act 48 of 1986, could not be considered to have been made if it had merely been issued but not served.

[41] Although I have derived much assistance from reading the cases referred to in *ABM Motors*, I do not propose to analyse and discuss all of them in detail in this judgment, for to do so would render this judgment unduly prolix. Suffice it to say that all of them underscore the obvious point in a case such as the present that an application for review in terms of s 6(1) of PAJA must be issued and served on the affected parties in order to satisfy the prescripts of s 7(1) of PAJA.

[42] It therefore follows 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 *OUTA* 'after the 180 day period the issue of unreasonableness is predetermined by the legislature; it is unreasonable per se.' The inevitable consequence of this is 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. Therefore, whether or not the impugned decision is unlawful 'no longer matters.' Rather, it became 'validated' by the unreasonable delay.³⁸ Consequently the Commissioner's preliminary point ought to have been upheld.

³⁷ *Tladi v Guardian National Insurance Co Ltd* 1992 (1) SA 76 (T) at 80B (*Tladi*).

³⁸ See *OUTA* footnote 14 above paragraph 26.

[43] The conclusion reached above in relation to s 7(1) of PAJA renders it unnecessary to determine the interesting questions of law, namely whether it is permissible for a vendor as defined in s 1 of the VAT Act once such a vendor has made an election to supply goods at a zero rate in terms of s 11(1)(a)(ii) read with Part Two – Section A of the export regulations to migrate to Part One of the self-same export regulations in respect of the same supply of goods by issuing fresh tax invoices at the standard rate of value added tax in terms of s 7 of the VAT Act. I, therefore, refrain from expressing any opinion on those issues. Indeed, as the Constitutional Court cautioned in *Albutt v Centre for the Study of Violence and Reconciliation, and Others*,³⁹ '[s]ound judicial policy requires us to decide only that which is demanded by the facts of the case and is necessary for its proper disposal.' Thus, those questions, interesting as they appear to be, should be left for another day when the opportunity presents itself again.

[44] Before making the order, it is necessary to express our disquiet at one disturbing feature of this appeal. It is this: the judgment of the high court was handed down on 20 December 2019. On 3 February 2020, the Commissioner filed an application for leave to appeal the high court's judgment. This was outside the time limits prescribed in terms of rule 49(1)(b) of the Uniform Rules by some three days only. The high court rightly described this slight delay as 'of inconsequential duration'; hence it readily condoned the delay.

[45] The application for leave to appeal was heard on 15 May 2020. And the judgment of the high court granting leave to appeal to this court was handed

³⁹ *Albutt v Centre for the Study of Violence and Reconciliation and Others* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (2) SACR 101 (CC); (2010 (5) BCLR 391) para 82.

down on 26 October 2020 after undergoing a period of gestation of some five months. It is necessary to say something about this. An undesirable development appears to be taking root in some courts where applications for leave to appeal are invariably not dealt with and disposed of expeditiously. This is regrettable as delays in the disposition of applications for leave to appeal have a negative impact on the administration of justice. I mention this not to censure the learned Judge a quo but purely to sound a word of caution, namely that if delays of this nature go unchecked, they have the potential to bring the administration of justice into disrepute.

Order

[46] In the result the following order is made:

- 1 The appeal is upheld with costs, including the costs of two counsel.
- 2 The order of the court below is set aside and in its place is substituted the following order:

'The application is dismissed with costs, including the costs of two counsel where so employed.'

X M PETSE
DEPUTY PRESIDENT
SUPREME COURT OF APPEAL

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