IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT Case No: 131/2018
SCA Case No: 150/2017
High Court Case No: 57506/2013

In the matter between:

NATIONAL ENERGY REGULATOR OF SOUTH AFRICA	First Applicant
SASOL GAS LIMITED	Second Applicant
and	
PG GROUP (PTY) LTD	First Respondent
THE SOUTH AFRICAN BREWERIES (PTY) LTD	Second Respondent
CONSOL GLASS (PTY) LTD	Third Respondent
NAMPAK LTD	Fourth Respondent
MONDI LTD	Fifth Respondent
DISTRIBUTION & WAREHOUSING NETWORK LTD	Sixth Respondent
ILLOVO SUGAR SOUTH AFRICA LTD	Seventh Respondent

FIRST APPLICANT'S SUBMISSIONS

INTRODUCTION

1. The genesis of this dispute lies in maximum gas price and transmission tariff decisions made by the First Applicant; the National Energy Regulator of South Africa, ("NERSA") a regulatory authority established as a juristic person in terms of Section 3 of the National Energy Regulator Act 40 of 2004.

2. NERSA regulates piped gas, electricity and petroleum pipeline industries in South Africa in terms of the Gas Act, 48 of 2001 ("Gas Act"), the Electricity Regulation Act 4 of 2006, and the Petroleum Pipelines Act 60 of 2003.

3. NERSA made the impugned decisions on 26 March 2014 pursuant to applications by the Second Applicant, Sasol Gas Limited ("SASOL") for approval of maximum piped gas prices and transmission tariffs.

4. The Respondents are some of the users of piped gas purchased from SASOL. They allege that SASOL's determination was wholly irrational and that NERSA failed in its statutory purpose mainly because it did not constrain SASOL's monopoly prices.

5. The Supreme Court of Appeal ("Supreme Court") endorsed this reasoning; notwithstanding the fact that there are other significant gas users who purchase piped gas from SASOL, who experienced significant price decreases as a result of the regulatory measures brought by NERSA.

6. In order to demonstrate that the Supreme Court erred in finding NERSA's determination irrational and unreasonable, and in finding that the methodology does not constitute administrative action as envisaged under Section 6 of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"), we have structured these submissions as follows:

6.1 First, in Section **A**, we set out relevant aspects of the factual background.

6.2 Second in Section **B**, we set out the relevant statutory mandate of NERSA.

6.3 Third, in Section **C**, we set out the relevant aspects of the judgment of the court *a quo*.

6.4 Fourth, in Section **D**, we set out the relevant aspects of the judgment of the Supreme Court.

6.5 Fifth, in Section **E**, we set out NERSA's consultative processes in order to demonstrate that NERSA reasonably and rationally discharged its mandate when it made the impugned decisions.

6.6 Sixth, in Section **F**, we demonstrate that NERSA did not follow an illogical sequence in making the decision.

6.7 Seventh, in Section **G**, we demonstrate that the Supreme Court's finding that NERSA's decision is irrational is erroneous.

6.8 In the eighth instance, in Section **H**, we address the Supreme Court's finding that NERSA's decision is unreasonable.

6.9 Ninth, in Section **I**, we demonstrate that the Supreme Court erred in finding that the methodology did not on its own constitute administrative action.

6.10 We conclude by highlighting in Section **J,** the regulatory uncertainty arising from the judgment of the Supreme Court.

A. ASPECTS OF THE FACTUAL BACKGROUND

7. In the late 1990's and early 2000's, SASOL and a Mozambican partner developed natural gas fields in Mozambique and built a pipeline to pump gas to South Africa.

8. In consideration for this investment, the government and SASOL concluded a Mozambican Gas Pipeline Agreement on 26 September 2001.[1]

9. It incorporated a Regulation Agreement which allowed SASOL to determine its gas prices by "*market value pricing*", that is the cost of switching from piped gas to an alternative fuel. This was done in order to compensate SASOL for its development in the Mozambican gas fields.[2]

10. The Pipeline Agreement, (including the Regulatory Agreement) was conditional upon the inclusion of a provision in the Gas Act (which was in the making) that made the agreement binding on NERSA for ten years.[3]

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[1] Mozambican Gas Pipeline Agreement 26 September 2001 CB Vol 1 page 1-13.

[2] Regulatory Agreement 26 September 2001 CB Vol 1 page 14-15 at Clause 1.16.

[3] Pipeline Agreement supra page 13, Clause 14.2 read with Clause 36 of the Gas Bill B18- 2001 published on 23 March 2001.

11. The market value pricing regime came to an end on the 25th of March 2014 and from then, SASOL's gas prices where to be regulated by NERSA.

12. On 1 May 2009, NERSA published guidelines for Monitoring and Approving Piped-Gas Transmission and Storage Tariffs ("the Tariff Guidelines").

13. On the 28th of October 2011 NERSA approved the methodology it would follow in determining maximum piped gas prices in South Africa.

14. On 29 February 2012, NERSA made the final determination in terms of Section 21(1) (p) of the Gas Act that there was inadequate competition in the gas market.[4]

15. On 24 December 2012, SASOL submitted an application to NERSA to approve its transmission tariffs for the period 25 March 2014 to 30 June 2015.[5] On 26 March 2013, NERSA approved the transmission tariffs.[6]

16. On 24 December 2012, SASOL submitted an application to NERSA for approval of maximum gas prices for the period 25 March 2014 to 30 June 2017[7] and approval of a trading margin for the period 25 March 2014 to 30 June 2015.

17. On the 26th of March 2013, NERSA approved an overall maximum Gas Energy price of R117.69/GJ as at 23 March 2013. [8]

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[4] Final Inadequate competition determination 29 February 2012 SCA CB Vol 1 page 136-151.

[5] Annexure RAD 11 SCA CB Vol 2 page 177-204.

[6] Annexure RAD 29 SCA CB Vol 3 page 248-266.

[7] Annexure RAD 10 SCA CB Vol 2 page 152-176.

18. NERSA further approved a trading margin of R8.21/GJ for the period 25 March 2014 to 30 June 2014 and R10.40/GJ for the period 1 July 2014 to 30 June 2015.

19. The lifespan of maximum gas prices which are the subjects-matter of this appeal came to an end on 30 June 2017. The lifespan of associated gas transmission tariffs expired on 30 June 2015. Consequently, their legal validity has ended on 30 June 2017 and 30 June 2015, respectively.

B. RELEVANT STATUTORY MANDATE OF NERSA

20. The Gas Act[9] came into force from 1 November 2005. By virtue of section 4(1)(a) of the National Energy Regulator Act[10], NERSA is the gas regulator referred to in the Gas Act.

21. Of immediate importance to this appeal are the statutory functions of NERSA to regulate prices of gas;[11] monitor and approve, and if necessary regulate tariffs for transmission of gas;[12] and promote competition in the gas industry.[13]

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[8] Annexure RAD 28 SCA CB Vol 3 page 207-247.

[9] 48 of 2001 ("the Gas Act").

[10] 40 of 2004 ("the NER Act").

[11] Section 4(g) of the Gas Act.

[12] Section 4(h) of the Gas Act.

[13] Section 4(i) of the Gas Act.

22. When it regulates gas prices NERSA is required to act consistently with section 21(1) (p) of Gas Act. That section requires NERSA to determine, as a condition imposed in a licence of a regulated entity such as SASOL, "maximum prices" which it must approve where NERSA has determined that there is inadequate competition in the gas market.

23. NERSA has an express mandate to *"regulate prices of gas in terms of Section 21(1) (p) of the Act in the prescribed manner*."[14]

24. It also has a duty to *"monitor and approve, and if necessary regulate transmission and storage tariffs and take appropriate action when necessary to ensure that they are applied in a non-discriminatory manner as contemplated in section 22 of the Act."*[15]

25. The Regulations promulgated by the then Minister of Minerals and Energy[16] indicate how NERSA must go about to determine maximum gas prices. For the present purposes we direct attention to Regulation 4(3). It requires NERSA, *inter alia*, to be objective, in that the maximum prices it determines must be

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[14] Section 4(g) of the Gas Act.

[15] Section 4(h) of the Gas Act.

[16] Government Notice R.321, Government Gazette No. 29792 of 20 April 2007 ("the Regulations").

"*based on a systematic methodology applicable on a consistent and comparable basis*";[17] be fair;[18] and be non-discriminatory.[19]

26. The prescribed manner referenced in section 4(g) of the Act is described in Regulations 4(3) and (4) of the Regulations.[20]

27. Regulation 4(3) provides that, "*the gas regulator must, when approving the maximum prices in accordance with Section 21(1) (p) of the Act -*

(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

(f) Include efficiency incentives."

28. Regulation 4(4) provides that -

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[17] Regulation 4(3)(a).

[18] Regulation 4(3)(b).

[19] Regulation 4(3)(c).

[20] The relevant regulations have been published in the Government Notice R 321 Government Gazette Number 29792 of 20 April 2007.

"(4) Maximum prices referred to in sub regulation (3) must enable the licensee to-

(a) Recover all efficient and prudently incurred investment and operation costs; and

(b) Make a profit commensurate with its risk.

29. The express language employed in these Regulations makes it clear that NERSA has an obligation and not a discretion to comply with the Regulations when it decides to regulate gas prices in terms of Section 4(g) of the Act.

30. The express provisions of Regulation 4(3) make it clear that NERSA must be objective when it approves maximum prices, in that its decision must be based on a *"systematic methodology"* which is applicable on a consistent and comparable basis.

31. The formulation and application of a systematic methodology is thus a pre-condition to the approval of maximum prices for gas.

32. We point out that neither the Act nor the Regulations prescribe to NERSA what systematic methodology it should formulate and apply when approving maximum gas prices. That choice is left to NERSA.

33. When it executes the above statutory functions, NERSA is required to promote the statutory objectives of the Gas Act. The statutory objects of NERSA as set out in Sections 2(a), 2(b), 2(e) and 2(h) of the Act make it clear that the interests and

needs of all parties concerned and not a section thereof must be taken into account when NERSA discharges its functions and duties, more particularly the functions and duties set out in sections 4(g) and (h) of the Act. In the end, NERSA has to strike a balance which takes into account the interests and needs of all involved parties.

34. In *Borbet*[21] the Court emphasized that a rational and reasonable execution of regulatory functions and duties require a regulator to promote statutory objectives of its regulatory powers in a balanced manner, having regard to the problem at hand.[22]

35. That approach is manifestly evident from the statutory objectives NERSA is obliged to promote, as are set out in section 2 of the Gas Act, *inter alia* - to facilitate investment in the gas industry;[23] promote access to gas in an

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[21] *National Energy Regulator of South Africa and Another v Borbet SA (Pty) Limited and Others, Eskom Holdings SOC Limited and Another v Borbet SA (Pty) Ltd and Others* [2017] 3 All SA 559 (SCA); *Minister of Mineral Resources and Others v Sishen Iron Ore Co (Pty) Ltd* 2014(2) SA 603 (CC), paras 42 and 43.

[22] Paras 110 and 117.

[23] Section 2(b) of the Gas Act.

affordable and safe manner;[24] and ensure that the needs and interests of all stakeholders in the gas industry are taken into account on an equitable basis.[25]

36. We respectfully submit that the decisions of NERSA to approve the maximum gas prices for SASOL and gas transmission tariffs promoted the above statutory objectives, in a balanced manner, having regard to the interest of the role players. The Respondents' interests were not the only considerations at issue. The fact that they are disappointed with the use of the Methodology by NERSA to ultimately approve the piped gas prices does not render those decisions irrational or unreasonable.

37. We also point out that NERSA does not fix actual prices at which SASOL or other licensee will be entitled to sell piped gas to their customers.[26] NERSA is neither called upon to do so nor is it permitted to do so when it exercises the powers invested upon it in terms of Section 21(p) of the Act, and Regulations 4(3) and (4) of the Regulations. NERSA is only mandated to set a ceiling of piped gas prices beyond which a licencee such as SASOL may not price its piped gas to customers.

[24] Section 2(j) of the Gas Act.

[25] Section 2(e) of the Gas Act.

[26] Vol 7 page 679 para 57; Vol 14 page 1291 para 5.2-5,4.

38. All that NERSA is called upon to do, when it approves maximum gas prices and transmission tariffs is to set a ceiling beyond which SASOL cannot sell piped gas to its customers.

39. Below that ceiling, SASOL and its customers are entitled to negotiate actual prices and discounts at which the piped gas is purchased and sold. Those prices depend upon the relative bargaining strengths of the licensee and its customers. In any event, the Respondents failed to establish a competitive piped gas price(s) which, on their contention, would not have rendered the maximum gas price approved by NERSA irrational and unreasonable.

C. THE DECISION OF THE HIGH COURT

40. The Respondents applied to the court *a quo* to review and set aside the Tariff Decision and the Maximum Price Decision.

41. They alleged that because the new tariffs led to substantial increases in the prices they had been paying; the increases were unreasonable and irrational.

42. The court *a quo* did not enter the merits of the matter. Instead it held that the Respondents had delayed unreasonably in bringing the review, without explaining the delay. It dismissed the application on this ground alone.[27]

[27] CB Vol 10 page 981-991 paras 26 and 27.

D. THE DECISION OF THE SUPREME COURT OF APPEAL

43. The Respondents took the decision of the court *a quo* on appeal to the Supreme Court. The Supreme Court summarised the issues before it as:

43.1 Whether determination of a methodology used to regulate gas prices under Section 21(1)(p) of the Gas Act 48 of 2001 is administrative action[28]; and

43.2 Whether a determination by a regulator under that Section which resulted in an increase in permissible gas prices was rational.[29]

44. On the 10th of May 2018, the Supreme Court handed down a unanimous judgment in terms of which it set aside the order of the court *a quo* and substituted it with the following:

44.1 The decisions by the First Respondent on 26 March 2013 to approve applications by the Second Respondent (i) for maximum gas prices and for a trading margin for the period 26 March 2014 to 30 June 2017, and

[28] Judgement dated 10 May 2018; CB Vol 11 page 1029.

[29] Judgment supra.

(ii) for transmission tariffs for the period 26 March 2014 to 30 June 2015, are reviewed and set aside.[30]

44.2 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.[31]

44.3 The costs of this application shall be paid by the Respondents jointly and severally, the one paying the other to be absolved.[32]

45. This order is as a result of the Supreme Court having made the critical findings that:

45.1 The methodology on its own did not constitute administrative action. The court *a quo* therefore erred in not recognizing that the administrative action that fell to be reviewed was NERSA's decision on SASOL's

[30] Judgment supra Order 2 (a).

[31] Judgement supra Order 2 (b).

[32] Judgement supra Order 2 (c).

applications and consequently, ought not to have declined to hear the matter due to undue delay;[33]

45.2 The appeal still had practical effect; and there was considerable public interest in resolving whether the basic methodology NERSA adopted, and which it presumably intended to utilise again in the future, was valid;[34]

45.3 NERSA followed an illogical sequence in its determination of inadequate competition. Logic demanded that NERSA investigate the state of competition as a necessary preliminary issue; but NERSA instead; proceeded in reverse order, and first set out to determine a methodology to be applied in setting maximum prices;[35]

45.4 And finally that when one bears in mind that the object of NERSA's regulatory powers was to combat prices that NERSA already regarded as being too high, the application of a method that NERSA knew would lead to the opposite result was clearly irrational.[36]

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[33] Supreme Court Judgement supra para 39.

[34] Supreme Court Judgment supra para 28.

[35] Supreme Court Judgement supra para 13.

[36] Supreme Court Judgement supra para 53.

46. We now turn to an analysis of NERSA's processes in order to demonstrate that NERSA acted rationally and reasonably in discharging its statutory mandate.

E. NERSA'S REGULATORY FUNCTIONS AND DUTIES

47. In the Consultation Document NERSA identified at least four different methodologies for regulation of maximum piped gas prices and transmission tariffs:

47.1 the first is the marginal costs of supply;[37]

47.2 the second is the basket of fuel alternatives;[38]

47.3 the third is international bench marking;[39] and

47.4 the fourth is the pass-through of imported gas price method.[40]

[37] CB Vol 1: pages 27 to 28, para (i), where that methodology is discussed.

[38] CB Vol 1: pages 28 to 29.

[39] CB Vol 1: pages 29 to 30.

[40] CB Vol 1: page 30, para (iv).

48. The Respondents preferred the latter methodology, and have consistently argued that NERSA should have applied it.

49. NERSA analysed the advantages and disadvantages of each methodology. It identified them, not only in its narrative discussion but also in a comparative tabular format, having regard to the applicable statutory objectives.[41] The Respondents do not suggest that NERSA's analysis was irrational or unreasonable. They also do not dispute the advantages and disadvantages identified by NERSA relating to each of the methodologies.

50. NERSA was aware that the methodology it proposed to use had to ensure that maximum prices it was required to approve, based on such methodology, had to mimic or in its words "*shadow the hypothetical price that would occur if competition were not limited".*[42] It then concluded that a hypothetical price in a competitive market falls within the range of the intersection of the supply and demand curve depicted by it.[43]

51. What is crucially significant about NERSA's approach is that it did not specify a specific price of piped gas as competitive. It could not lawfully have done so, as

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[41] CB Vol 1: pages 32 and 33, which describes the tabular analyses.

[42] CB Vol 1: page 25, para 6 - lines 30 to 34.

[43] CB Vol 1: page 26 which depicts the hypothetical gas supply demand curve.

its statutory function or duties do not empower it to fix the actual prices at which piped gas may be sold.

52. NERSA identified a range ("*the envelope*") that provided "a large 'spread' in potential prices" which on the low end takes into account the cost of production, and on the high end considers the opportunity costs value for consumers' reasonable costs of alternatives.[44] Nowhere did the Respondents contend that that range is irrational or unreasonable.

53. It is common ground that the Consultation Document was published for comment and thereafter the Draft Methodology[45] was published in June 2011, also for public comment.[46] The Draft methodology was prepared after consideration of representations received by NERSA.[47] We direct attention to two specific features of the Draft Methodology:

53.1 The first is that it expressly indicated the manner NERSA would consider applications for approval of maximum piped gas prices and transmission tariffs by licensees, utilizing the basket of fuel alternatives.[48] It then

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[44] CB Vol 1: page 25, line 34 to page 26, line 4.

[45] The Draft methodology appears in CB Vol 1: pages 37 to 43.

[46] CB Vol 4: page 298, para 67; CB Vol 7: page 603, para 20.

[47] CB Vol 7: page 603, para 21.

[48] CB Vol. 1: pages 37 and 38, paras 2.3 and 2.3.1.

proceeded to describe the formula which incorporated all alternative fuel types in the basket.[49] It thereafter identified the weight to be attached to each fuel type in the basket, and where the data for the allocation of the relevant weights will be obtained.[50]

53.2 The second feature is the option proposed by NERSA for determination of maximum piped gas prices to opt for the use of the pass-through method by a licensee who purchases gas from an international market at "arms length". [51]

54. The justification for the option proposed by NERSA was that the basket of alternatives methodology will not be appropriate in circumstances where there is a supplier who sources piped gas through importation.[52] We emphasize that

[49] CB Vol. 1: pages 38 to 39, paras 3.1 to 3.2.

[50] CB Vol. 1: pages 39 to 43, paras 3.2 to 3.3.

[51] CB Vol. 1: page 43, para 3.4.

[52] *Ibid.* NERSA said the following in that regard:

"*The Energy Regulator recognizes that this methodology for determining the maximum price of piped-gas energy as explained in Sections 3.1 to 3.3 will be appropriate under the prevailing circumstances characterised by the existence of a single gas supplier, with the vast majority of the gas being sourced from a single imported gas supply.*

However, where a licensee purchases gas from a international market at an "arm's length" transaction (with a fully developed price discovery mechanism), the Energy Regulator will allow such a licensee to opt for the use of the 'pass-through of imported gas prices approach to ensure that the licensee fully recovers all its costs as provided for in the legislation. This of course will apply to both when the price of higher or lower, than what may be determined by using the formula explained in Sections 3.1 to 3.3. This approach will then become the systematic methodology to be consistently applied throughout for such a licensee electing to use this "pass through of imported gas prices" approach.

The onus is upon the licensee to provide the Energy Regulator with the necessary information to substantiate all the elements in the cost-build up required to enable the Energy Regulator to check the "pass-through of imported gas prices" before approval."

the Respondents did not question the option and justification for it as being irrational or unreasonable, during the consultative process which unfolded thereafter.

55. Belatedly, the Respondents contended that NERSA's decision to approve SASOL's maximum piped gas prices on the basis of the Methodology was irrational and unreasonable because it offered SASOL the option to choose whether it preferred the basket of alternatives or the pass-through method, and that SASOL chose the basket of alternatives to maximize its monopolistic gas prices.[53]

56. We submit that the Respondents' criticism is mistaken and the Supreme Court erred in accepting it[54]. The option was not case specific to SASOL. It applied generally to each licensee who could justify the decision to fit within the parameters of the option. In other words, NERSA would not be bound to accept the election of a licensee.

[53] The respondent's SCA heads: pages 10 and 11, paras 30 to 31.

[54] Supreme Court judgement supra paras 37 and 38.

57. By now it should be clear that the Methodology applied to all licensees, and was in fact utilized to consider and approve applications for maximum piped gas prices by other licensees.[55]

58. The Respondents did not produce evidence to show what competitive prices would be had SASOL or any other licensee elected to adopt the pass-through method instead of the basket of fuel alternatives. Consequently, there was lack of credible evidence for the Supreme Court to do the necessary comparison in order to find NERSA's decision irrational.[56]

59. After receipt of representations to the Draft Methodology NERSA adopted the [final] Methodology and published it in October 2011.[57] It subsequently published written reasons for the adoption of the Methodology, on 24 November 2011.[58] The reasons are significant because they indicate that the Supreme Court's finding that NERSA applied the Methodology without explanation, and that it offered the option to SASOL to choose either the basket of alternatives or the pass-through methodology, is simply unfounded.

[55] CB Vol 5: page 456, paras 174 and 175.

[56] Supreme Court judgement supra para 45 and 46.

[57] CB Vol. 1: pages 54 to 78.

[58] CB Vol. 1: pages 79 to 96.

60. From paragraph 3 of the reasons document, NERSA explains the legislative basis for its decision.[59] Then in paragraph 25 it explains the basis of the formula for basket of alternative fuel types as follows -

> "*The formula recognizes the fact that no single fuel is a perfect substitute for gas. Furthermore, the formula allows regulated prices to be determined at a level that reflects the balance between encouraging new entry and equitable sharing of any economic surplus between consumers and producers.*"[60]

61. The above reasons reflect a balanced approach which is called for in section 2(e) of the Gas Act. It also does not detract from the analysis of the *pros* and *cons* of different methodologies that NERSA previously identified and considered in the Consultation Document. Therefore, Nersa did also consider the cost-plus methodology preferred by the Respondents, and detailed its reasons why it did not prefer that methodology, in the draft methodology published.

62. In paragraph 37 NERSA identifies the concern raised by or on behalf of new entrants in the piped gas market.[61] It then indicated that it heeded that concern

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[59] CB Vol. 1: pages 80 to 84, paras 3 to 23.

[60] CB Vol. 1: page 84, para 25.

[61] CB Vol 1: pages 87 to 88, paras 37 to 39.

and decided to accommodate it through the option extended to them to adopt the pass-through method.[62]

63. From paragraph 43, NERSA explains the representations it received for the determination of weights to be allocated to fuel alternatives in the basket.[63]

64. From paragraph 33, NERSA explains the basis of the Methodology, having regard to the provisions of Regulation 4(4). Then, in paragraph 39, NERSA explains why it allocated different weights to each fuel type in the basket, based on information obtained from the Digest of Energy Statistic.[64]

65. From paragraphs 40 to 42, NERSA indicates that various stakeholders requested that it should undertake a further thorough competition analysis. It then recorded that it resolved to do so.[65]

66. We therefore submit that the Supreme Court's criticism of NERSA that it did not justify the application of the Methodology, or the option for a pass-through method therein contained is clearly mistaken.[66]

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[62] CB Vol 1: pages 87 to 88, para 39.

[63] CB Vol 1: pages 89 to 91, paras 43 to 48.

[64] CB Vol 1: page 91, para 49.

[65] CB Vol 1: pages 88 to 89, paras 40 to 42.

67. The Supreme Court accepted the contention that NERSA impermissibly seeks to justify its decisions with reference to the Acacia Economics Report.[67] We submit that is not the case. The report was filed by NERSA in response to the economic propositions advanced on behalf of the Respondents by its economist, Mr R Murgatryod. Before the Supreme Court, the Respondents heavily relied on the additional economic report of Mr Smith, of RBB Economics,[68] and a further economic report filed on its behalf by the Brattle Group in the replying affidavit,[69] in support of their contentions of irrationality and unreasonableness. We therefore submit that the Supreme Court ought to have had regard to all economists' reports in the assessment of the Respondents' contentions. To that extent, we canvass the controverting economic aspects of the Acacia Economics Report.

68. We now turn to consider the further competition analysis undertaken by NERSA at the request of some of the stakeholders.

69. In September 2011 NERSA published a discussion document on inadequate competition in the piped gas document for public comment and response.[70] In

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[66] Supreme Court judgment supra at para 51.

[67] Supreme Court judgment supra at para 41 page 1046 to 1047.

[68]The respondents' SCA heads: page 17, paras 48 and 49.

[69] The respondents' SCA heads: pages 18 and 19, paras 51 and 52.

[70] CB Vol 1: pages 44 to 53.

paragraph 2.7 of the discussion document NERSA identified the scope of the analysis it intended to engage in, namely – the structure of the piped gas market, uncompetitive and discriminatory pricing and barriers to entry in the market.[71]

70. We confine our submissions to NERSA's analysis insofar as it deals with gas prices, because the Supreme Court heavily criticized NERSA for the maximum price decision. NERSA dealt with uncompetitive and discriminatory prices from paragraph 2.10 of the Discussion Document.[72] The Supreme Court relies on the following passage of NERSA's analysis in order to launch a trenchant criticism against it,

> "*The monopolist has market power, and as evidenced by current pricing practices and previous complaints concerning discriminatory and high prices as well as challenges in accessing and or sourcing gas supply; it is our submission that market power has been exercised and misused; and that "… gas prices are higher than those charged in a situation of perfect competition or in a competitive market*." [73]

71. The above conclusion has a context to it. The context is the range (or "*the envelope*") of competitive prices which NERSA had already identified in the

[71] CB Vol 1: pages 47 to 48, paras 2.7(a) to (c).

[72] CB Vol 1: pages 48 to 49, paras 2.10 to 2.13.

[73] CB Vol 2: page 148; Supreme Court Judgment supra page 1039 para 21.

previous Consultation Document.[74] NERSA did not indicate at all that that range has changed and no longer reflects competitive prices it has previously identified. The other context is the effect of discriminatory pricing flowing from the Market Value Pricing methodology ("the MVP") which SASOL previously applied. The last context is the barriers to entry in the gas market, which it sought to address through a balanced approach, allowing a measure of "*headroom*" to attract new entrants into the gas market.

72. It is common cause that SASOL submitted its applications for approval of maximum gas prices and gas transmission tariffs on 24 December 2012.[75] NERSA initiated a further consultation process after it published the non-confidential version of the applications.[76] Having received written representations on the applications,[77] and after conducting public hearings,[78] NERSA resolved to approve the applications on 26 March 2013.[79] It thereafter published reasons for its decision to approve SASOL's applications.[80]

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[74] CB Vol 1: page 25, line 30.

[75] CB Vol 4 page 306, para 96; CB Vol 7: page 615, para 40.

[76] CB Vol 7: page 616, para 41.

[77] CB Vol 7: page 616, para 42 to page 619, para 52.

[78] CB Vol 7: page 619, para 53 to page 620, para 54.

[79] CB Vol 3: pages 207 to 209.

[80] CB Vol 3: pages 210 to 266.

73. In its reasons NERSA tabulated the maximum gas prices approved by it and transmission tariffs for different classes of customers.[81] It also dealt with several concerns raised by interested parties during consultations on SASOL's applications. Again, we confine our submissions to the question of gas prices, as was dealt with in the reasons document:

69.1 In paragraphs 7.8 and 7.9 NERSA indicated that maximum gas prices and transmission tariffs approved will impact upon different classes of SASOL's

[81] CB Volume 3, page 235.

Table 12: Maximum Gas Charge calculation excluding tariffs as at 26 March 2014 for customer classes

Class	Maximum GE Price (before reductions) R/GJ	Reductions as applied for %	Maximum GE Price (cum reductions) R/GJ	Trading Margin R/GJ	NERSA Levy R/GJ	Maximum Gas Charge excl tariffs R/GJ
1.	117.69	7.5%	108.86	8.21	0.30	117.37
2.	117.69	7.5%	108.86	8.21	0.30	117.37
3.	117.69	15.0%	100.04	8.21	0.30	108.54
4.	117.69	22.5%	91.21	8.21	0.30	99.72
5.	117.69	30.0%	82.38	8.21	0.30	90.89
6.	117.69	37.5%	73.56	8.21	0.30	82.06

Table 13: Maximum Gas Charge calculation excluding tariffs as at 26 March 2014 for traders (including Distributors and Reticulators)

Class	Maximum GE Price (before reductions) R/GJ	Reductions as applied for %	Maximum GE Price (cum reductions) R/GJ	Trading Margin R/GJ – 50% discount	NERSA Levy R/GJ	Maximum Gas Charge excl tariffs R/GJ
1.	117.69	7.5%	108.86	4.11	0.30	113.26
2.	117.69	7.5%	108.86	4.11	0.30	113.26
3.	117.69	15.0%	100.04	4.11	0.30	104.43
4.	117.69	22.5%	91.21	4.11	0.30	95.61
5.	117.69	30.0%	82.38	4.11	0.30	86.78
6.	117.69	37.5%	73.56	4.11	0.30	77.95

customers differently. In some classes there will be deceases of gas prices, and in others there will be increases in gas prices.[82]

69.2 In respect of classes where customers would experience increases, NERSA directed that SASOL should demonstrate "revenue neutrality" during the transitional period to cushion the impact of such increases.[83]

69.3 We submit that NERSA's decision reflects the balanced approach referred to in section 2(e) of the Gas Act. We now turn to consider the four main findings by the Supreme Court, against the above background.

F. ILLOGICAL SEQUENCE

70. The Supreme Court found that as the approval of maximum prices is conditional upon a finding of inadequate competition in the industry, logic demanded that NERSA investigate the state of competition as a necessary preliminary issue. The Court further found that NERSA, instead, proceeded in reverse order, and first set out to determine a methodology to be applied in setting maximum prices.[84]

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[82] CB Vol 3: page 237, para 7.8 and 7.9.

[83] CB Vol 3: page 237, para 7.10 to page 239, para 7.12.

[84] Supreme Court Judgement supra page 1035 para 13.

71. This is not factually correct. The examination of inadequate competition began at least in October 2010 when NERSA published a consultation document on the matter and that is not in dispute.

72. In any event, and as submitted in the Acacia Economics Report[85]; it was quite sensible in the circumstances for NERSA to engage in an inter-related process of examining whether there were grounds for the exercise of regulatory power and the different approaches to be used in the case of such an exercise.

73. The fact that NERSA finally made the determination of inadequate competition on 8 February 2012 does not mean that it failed to evaluate the market earlier.

74. In *Democratic Alliance v President of South Africa and Others*[86], this Court held that rationality does not mean that every step in a process must be independently found to be rational, but that, taken as a whole, all the steps leading up to a decision illustrate a link to a legislative purpose.

75. In the circumstances, it was sensible for NERSA to set out its proposed approach to determining maximum prices given that it was considering the need for it to exercise regulatory powers.

G. IRRATIONALITY

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[85] CB Vol 7 page 682 lines 25 to 40

[86] 2013 (1) SA 248 (CC) at para 37

76. The jurisprudence of the Constitutional Court since the days of *Pharmaceutical 1*[87] to *Simelane*[88] dealing with the parameters of rationality as a yardstick of review has now been settled. What is required is a decision which is based on reason, and not arbitrary; it must be rationally related to the purpose of the power that is exercised.[89]

77. It is common cause that before 25 March 2014, SASOL utilized the MVP for the sale of gas to its customers.[90]

78. The MVP enjoyed statutory protection for a period of 10 years, with effect from 24 March 2004. NERSA was bound to recognize the MVP as a permissible methodology for the charges levied by SASOL to its customers.[91]

79. The Supreme Court held that gas prices were higher than what would have been charged in a competitive market, and that the abuses by SASOL of its market power were therefore the evils NERSA had set out to address.[92]

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[87] *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC), para 85.

[88] *Democratic Alliance v The President of the Republic of South Africa and Others, supra*, para 36.

[89] *Minister of Home Affairs and Others v Scalabrini Centre and Others* 2013(6) SA 421 (SCA), para 65.

[90] CB Vol. 3: page 283, paras 29.4 to 29.6.

[91] Section 36(2) of the Gas Act.

[92] Supreme Court judgment supra page 1048 para 45.

80. It further held that one would have thought that in these circumstances, to stop the abuse of market power and to avoid overly high prices, NERSA would have sought a methodology designed to lower maximum prices to those which would have prevailed in a competitive environment – and it would have adopted a methodology different to that used by SASOL.[93]

81. It concluded that instead, NERSA irrationally did the very opposite and proceeded to determine a methodology which referenced to more expensive alternative sources of fuel, and which had the effect of permitting an increase rather than reducing SASOL's monopolistic prices; which NERSA had already concluded were too high. By employing the cost of a basket of alternative fuels as a proxy for a maximum price of gas, NERSA set a benchmark which established a price that a monopolist would have charged. This was hardly a reasonable or rational decision taken to mimic a competitive price. The price it set ought to have been designed to compensate for the lack of a competitive market but the method it employed did not, and could not, achieve that end.

82. The Court rejected the argument by the Applicants that a comparison between the actual prices SASOL had charged its customers during its decade of grace and its prices thereafter, showed that there had not been a significant increase across the board and that many of its customers were being charged less than they had been before. It held that this argument loses sight of the fact that the court was not concerned with a comparative analysis of prices actually charged and that NERSA had not attempted to prescribe what prices

[93] Supreme Court judgment supra page 1048 para 45.

SASOL should charge. Instead it determined what prices could be charged as a competitive maximum.[94]

83. The finding reflects a running theme in the impugned judgment; to the effect that NERSA could only have properly exercised its regulatory powers in this matter if the outcome of its regulation was to drive down prices actually charged by SASOL to its customers.

84. The Respondents allege that the weighted average of the actual gas price charged by SASOL to all of its customers during the financial year preceding the end of the MVP was R51.56/GJ. That price is an extrapolation based on the annual turnover of SASOL for that year divided by the total volume of sales of 160.1 million GJ of gas sold.[95] That extrapolation forms the basis of the finding of irrationality by the Supreme Court, because the court perceived that any rational and reasonable maximum gas price approved by NERSA ought to have driven down those prices.[96]

85. SASOL disputes that the average piped gas prices it charged under the MVP was R51.56/GJ. It points out the average price it charged under the MVP was R75.40 GJ during the financial year 2013.[97] SASOL's figure was analyzed and

[94]Supreme Court judgment supra page 1048 para 45.

[95] CB Vol 3: page 285, para 29.9.

[96] Supreme Court judgment supra page 1048 para 45 to page 1050 para 47.

[97] CB Vol 5: page 420 to 421, para 98.

verified by Acacia Economics.[98] Upon the application of the *Plascon-Evans* discipline,[99] we ask the Court to conclude that the Applicants' version is decisive, and rely on the average figure of R75.40/GJ, for the financial year preceding the application of maximum piped gas prices.

86. It is important to note that the average price of R75.40/GJ represents the actual price which SASOL charges to its external customers, after it had allowed discounts to them. It is less than the maximum gas prices it would have charged for those customers, absent the discounts. Without the discount the maximum gas prices would have been R149/GJ.[100]

87. The above maximum gas price SASOL would have been entitled to charge under the MVP (without discounts) is higher than the maximum piped gas prices ultimately approved by NERSA. For illustrative purposes we refer to table 2 on page 21 of the Acacia Economics Report which indicates the maximum gas prices approved by NERSA across different classes, excluding the approved transmission tariff of R8.21/GJ.[101]

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[98] CB Vol 7: pages 686 to 687, para 7.1.

[99] *Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 620 (A), at 634H-I, approved recently by the Court in *Minister of Justice and Correctional Services v Walus* (777/2016) [2017] ZASCA 99 (18 August 2017).

[100] CB Vol 5: page 420, para 98.

[101] CB Vol 7: page 669.

Table 2: Gas energy prices per customer class (excluding transmission and distribution tariffs)

	ass 1	ass 2	Class 3	lass 4	ass 5	Class 6
	) GJ p.a	,000 GJ .a	– 40,000 GJ p.a	- 400,000 GJ p.a	-4,000,000 GJ p.a	> 00,000 GJ p.a
gy price	7.69	7.69	17.69	17.69	17.69	117.69
t per customer class	50%	50%	15%	2.50%	30%	37.50%
m Gas Energy Prices	8.86	8.86	00.04	91.21	2.38	73.56

88. Even after the addition of the transmission tariffs, the maximum gas prices approved by NERSA are still less than maximum gas prices under the MVP, as is illustrated by table 3 on page 22 of the Acacia Economics Report.[102]

Table 3: Final prices to transmission customers: Including gas energy, trading margin, ROMPCO tariff, transmission tariff, Transnet tariffs and NERSA levy (R/GJ)

	ass 1	ass 2	Class 3	lass 4	ass 5	Class 6
	) GJ p.a	,000 GJ .a	– 40,000 GJ p.a	- 400,000 GJ p.a	-4,000,000 GJ p.a	> 00,000 GJ p.a
/Middelburg/Witbank	1.65	1.65	22.83	14.0	05.17	96.35
	5.13	5.13	26.31	17.48	08.65	99.83
	1.95	1.96	23.14	14.31	05.48	96.66

89. We respectfully submit that the above is a fair comparison of the maximum gas prices under the MVP and those approved by NERSA, upon the application of the Methodology. The outcome yielded by the application of the Methodology to approve SASOL's application indicates a downward pressure flowing from NERSA' decisions.

90. We also refer to other benchmarking price indicators, to assess whether the maximum gas prices are way off the mark, and represent a "*maverick*" outcome contended for by the Respondents. The benchmarking exercise was

[102] CB Vol 7: page 670.

done by both Acacia Economics for NERSA and Dr Coppi for SASOL. The former concluded that the maximum prices compare reasonably well with several countries in the European Union,[103] and higher compared to the United States gas market, because of the highly developed gas market of that country.[104] The latter concluded that the maximum prices are below the European spot prices and Japan's Natural Liquified Gas (LNG).[105]

91. We therefore submit that the factual basis of the Supreme Court's finding for irrationality is simply mistaken. We also submit that the decision to approve SASOL's application for maximum gas prices is rationally related to the purposes of NERSA's functions, having regard to the statutory objects of those functions.[106]

92. As we have previously indicated, the rationality of NERSA's decision has to be assessed in the light of the manner in which the decision sought to promote

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[103] CB Vol 7: page 671, line 21 to page 672, line 25.

[104] CB Vol 7: page 673 to 674, para 4.2.2.

[105] CB Vol 6: page 562: para 37, and Figure 2.

[106] *Medirite (Pty) Ltd v South African Pharmacy Council and the Minister of Health* (197/2014) [2015] ZASCA 27 (20 March 2015, paras 9 and 10.

the statutory objectives referred to in section 2(b), (e) and (j). It is a decision which is not arbitrary, but founded upon reason.[107]

93. To this end, this Court stated in *Democratic Alliance v President of South Africa and Others* 2013 (1) SA 248 (CC) at para 32 that rationality review is really concerned with the evaluation of a relationship between means and ends: the relationship, connection or link (as it is variously referred to) between the means employed to achieve a particular purpose on the one hand and the purpose or end itself. The aim of the evaluation of the relationship is not to determine whether some means will achieve the purpose better than others but only whether the means employed are rationally related to the purpose for which the power was conferred.

H. UNREASONABLENESS

94. The Respondents do not jurisprudentially address the ground of review based on their contention of unreasonableness separately from their contention of irrationality. They lumped the two together, despite the caution by the Court, in *Scalabrini*[108] the two grounds of review are different, and have in fact been differently articulated in PAJA.[109]

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[107] *Minister of Home Affairs and Others v Scalabrini Centre and Others* 2013 (6) SA 421 (SCA), para 65.

[108] Para 65, where the Court explain the difference as follows -

95. To that end, and in light of the defective pleading; the Supreme Court erred in finding that NERSA acted unreasonably.

96. Nonetheless, we deal with the unreasonableness ground of review based on the jurisprudence of the Constitutional Court in *Bato Star*,[110] taking into account the deference which this Court emphasized in the same case, on appeal to it, when it held,

> "*Judicial deference is particularly appropriate where the subject-matter of an administrative action is very technical or of a kind a Court has no particular proficiency. We cannot even pretend to have the skills and access to knowledge that is available to the Chief Director. It is not our task to*

> *"But an enquiry into rationality can be a slippery path that might easily take one inadvertently into assessing whether the decision was one the court considers to be reasonable. As appears from the passage above, rationality entails that the decision is founded upon reason – in contra-distinction to one that is arbitrary – which is different to whether it was reasonably made. All that is required is a rational connection between the power being exercised and the decision, and a finding of objective irrationality will be rare."*

[109] Section 6(2)(f)(ii) deal with rationality review under PAJA, and 6(2)(h) deals with review ground based on unreasonableness.

[110] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Other* 2004 (4) SA 490 (CC).

better his allocation, unless we should conclude that his decision cannot be sustained on rational grounds. That I cannot say ..."[111]

97. It is beyond question that the subject-matter of NERSA's decisions involved some degree of expertise and proficiency in the piped gas market, the analysis of the existence of inadequate competition in that market, the determination of the range of competitive prices in the gas market, the balancing of different statutory objectives and competing interests, and ultimately the choice of which method it will apply to make a decision.

98. The Methodology falls within the range of regulatory options that were reasonably open to NERSA in order to determine the maximum piped gas prices applied for by SASOL. We reiterate that the Consultation Document shows that NERSA considered and consulted on various options for approval of maximum gas prices and associated tariffs, assessed the merits of each, and explained why it preferred the option ultimately adopted in the Methodology.

99. The Respondents did not quibble with the decision-making process pursued by NERSA over a long period of time to bring about the choice NERSA made to apply the Methodology. They at all material times were aware of the

[111] *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407 (SCA), para 53.

decision-making process, and participated in each or most steps along the way. They now quibble with the results because they do not like them.

100. We submit that the decisions by NERSA are reflective of choices reasonably available to it for the following reasons:

99.1 They have ensured that the maximum gas prices which SASOL would have been entitled to charge in terms of the MVP are reduced.

99.2 They have ensured that the gas prices SASOL previously charged for some of the gas users, particularly those who were the victims of price discrimination under the MVP, are reduced.

99.3 They have removed discriminatory pricing in respect of gas users who are similarly situated, consistent with the requirements of section 22 of the Gas Act.

99.4 They incorporate the revenue neutrality transitional mechanism which cushions the impact of price increases in respect of classes of customers who may face price increases.

99.5 They encourage investment in the gas industry by encouraging new entrants in that market.

101. We therefore submit that the Court erred in finding against NERSA on this score, as NERSA's decision was reasonable, within the meaning of section 6(2)(h) of PAJA.

I. FAILURE TO REVIEW THE METHODOLOGY

102. It is common cause that the Respondents' review was initiated well after 180 days after the Methodology was adopted and reasons thereof were published by NERSA. The only debate is whether the Methodology was reviewable on its own because it constituted administrative action within the meaning of section 1 of PAJA.

103. The Supreme Court found that the determination of the methodology did not in itself constitute administrative action subject to review. It found that the decision which had a direct, external legal effect was not the decision in regard to the methodology; but the determination of the maximum gas prices; and as there is no suggestion of the review of that decision not being timeous; the court *a quo* reached the wrong decision.[112]

[112] Supreme Court Judgment page 1043 para 32 and 33.

104. The Court further found that determination of the methodology cannot be regarded as administrative action, as no finality had actually been reached on how prices would be assessed; and in any event, NERSA did not apply the methodology it had decided upon in March 2011.[113]

105. It held that NERSA extended a choice to a licensee applying for a maximum price determination to opt for either the basket of alternatives method or the pass-through approach. It was only when SASOL made its choice that the method it had chosen would become the systematic methodology to be consistently applied through (its) licence period.[114]

106. It further held that the revenue neutrality requirement is proof that NERSA did not apply the methodology it had earlier decided upon but instead, altered it in order to achieve what it felt was a more equitable result. Put differently, the final maximum price determination was achieved not by consistently following its methodology but by using a revised method in order to ensure that Sasol Gas suffered no financial loss.

107. Based on the above, the Court found that there was no final decision having a direct external effect until such time as a decision was announced on SASOL's maximum price application; and consequently that the court *a quo* erred in not recognising that the administrative action that fell to be reviewed was NERSA's decision on SASOL's application.[115]

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[113] Supreme Court Judgment page 1044 to 1045 para 36.

[114] Supreme Court Judgment page 1045 para 37.

[115] Supreme Court Judgment page 1046 para 39.

108. As stated above, the Court erred on this score. The Maximum Price Methodology states on several occasions that it will be applied to any application for the approval of maximum prices by any licensee. It states that in the case of long term contracts the initial base price will be determined as prescribed in the methodology.

109. The Supreme Court's finding is based on a misreading of the requirements of Regulation 4(3). Paragraph (a) of that Regulation imposed the obligation on NERSA to be objective. It described the form of that objectivity, namely – to ensure that its decision is "*based on a systematic methodology applicable on a consistent and comparable basis*".

110. The reason for that requirement is not hard to find. It is the fact that the methodology is not case specific to a particular licensee. It must apply across the board, and in equal measure, to all licensees in the gas trading and transmission markets. To do otherwise would not be objective and would not bring about consistency.

111. Secondly, the Supreme Court's finding brings about absurdity of a serious kind. It is common cause that NERSA engaged in an extensive consultative process to bring about the Methodology. On 21 October 2010, NERSA published a Consultation Document to provide a basis for discussion on the issue. After having received representations, this was followed in June 2011 by it publishing a draft methodology. Thereafter, on 28 October 2011, it approved its methodology in what it said was its final form and on 24 November 2011, gave its reasons for doing so.

112. A detailed public participation process was held before the maximum price methodology was made. No purpose would have been served in holding such a process if the methodology were a mere guideline. If that were the case input from stakeholders could have simply been obtained at the time when NERSA had to consider whether or not to apply the methodology.

113. The methodology also applied to gas traders such as Spring Lights Gas (Pty) Ltd, Novo Energy (Pty) Ltd and Virtual Gas Network (Pty) Ltd when they sought and obtained approval from NERSA for their maximum prices.

114. On the Supreme Court's finding[116], NERSA would be free to abandon the Methodology when it considered SASOL's applications and engage in another consultative process to choose a different methodology. That would not be fair, as is required in terms of Regulation 4(3)(b); it would not be transparent, as required by Regulation 4(3)(d); and would not be predictable, as is required by Regulation 4(3)(e).

115. This is a case where the prior step which led to the subsequent decision that is sought to be reviewed is vitally important as to stand on its own, and capable of being reviewed because it represents an effective decision on a regulatory choice that indicates how regulatory functions will be exercised, going forward.

116. The revenue neutrality criticism is misplaced as that requirement applied to actual prices charged by SASOL. There was no revenue neutrality

[116] Supreme Court Judgment page 1043 para 32.

requirement on the maximum prices and the methodology only applied to maximum prices.

117. In any event, the requirement of revenue neutrality was not unilaterally imposed by NERSA. It was part of the concerns raised by interested parties during the hearing of SASOL's applications.

118. The requirement has a beneficial effect on those who would experience price increases. That beneficial effect was not rejected by the Respondents as being irrational or unreasonable.

119. We submit that the revenue neutrality requirement adds rather than detracts from the balanced approach manifest from decisions NERSA made.

120. Critically, this case in distinguishable from *Minister of Health and Another v New Clicks*[117] where the recommendation of the Pricing Committee had no force unless and until it were to be approved by the Minister. Chaskalson CJ said in that case; "*the making of a regulation involves a two stage process. First a recommendation by the Pricing Committee, and second, a decision by the Minister as to whether or not to accept the recommendations*."

121. The Supreme Court misconstrued the objective of Regulation 4(3); with the result that it failed to correctly determine the point at which NERSA's determination of a methodology constitutes administrative action.

122. The misdirection by the Supreme Court on this issue had the result that the Court wrongly relied on the discussion of the meaning of 'direct, external

[117] 2006 (2) SA 311 CC.

legal effect', by Professor Hoexter, in her seminal work *Administrative Law in South Africa* (2 ed) at 227-228; wherein she states that,

> " *where a decision requires several steps to be taken by different authorities, only the last of which is directed at the citizen, all previous steps taken within the sphere of public administration lack direct effect, and only the last decision may be taken to court for review*."

123. After the maximum price methodology was adopted in its final form, no other step followed afterwards as envisaged by Professor Hoexter. To the contrary, the process followed by NERSA; involving consultation with interested parties before the decision was taken; and giving reasons after the decision was taken; bears all the hallmarks of administrative action.

124. There was no such twofold process in the adoption of the methodology. Once NERSA made a decision in October 2011, the basket of alternatives remained the methodology for approving the maximum prices of piped gas.

125. The Respondents did not bring a substantive application for condonation or extension of the 180 days prescribed time period. In the absence of that application the Supreme Court erred in considering the review on the merits, and not dismissing it on the grounds of undue delay.[118]

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[118] *Asla Construction (Pty) Ltd v Buffalo City Metropolitan Municipality and Another* [2017] 2 All SA 6707 (SCA), para 12.

126. We therefore ask the Court to overturn the Supreme Court's judgment on this ground.

J. UNCERTAINITY AS A RESULT OF THE SUPREME COURT JUDGMENT

127. It is a long standing rule of practice that the Court should not decide issues of academic interest which would have no practical effect and the Applicants argued to this effect before the Supreme Court as the life span of the impugned decisions has expired.

128. The Court rejected that argument and found that in the present matter; there was still a live issue between the parties in that in the amended notice of motion, the Respondents sought an order that should the approval of SASOL's prices be set aside, any maximum prices for that period would apply retrospectively; with effect from 26 March 2014 until the date of termination of such approval.[119]

129. We submit that this finding is presumptuous; the order can only have practical effect if the new maximum price fixed by NERSA is lower than the price that SASOL has in fact charged its customers during the period 26 March 2014 to 30 June 2017.

130. If the new maximum price set by NERSA exceeds the actual price charged by SASOL ; then no repayments would be due to the Respondents; and the exercise would merely be academic.

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[119] Supreme Court Judgment page 1041 para 28.

131. Importantly, the Supreme Court further found that there is considerable public interest in resolving whether the basic methodology NERSA adopted, and which it presumably intends to utilise again in the future, is valid.

132. This finding comes at the backdrop of the Court having refused to accept the proposition that the methodology was a binding rule book which NERSA intended to use consistently for the next 5 years, thus constituting administrative action on its own.

133. The methodology itself has not been set aside as the Respondents abandoned that relief. In the circumstances, there is no statute, judgment or regulation that prohibits NERSA from relying on this methodology; and NERSA retains the discretion to decide on a methodology.

134. In the circumstances, it seems the Court gave this judgment to deter NERSA from using the Methodology in determining maximum gas prices. However, determination of a methodology is NERSA's function and unless the Methodology is set aside, the Court cannot and should not dictate to NERSA which methodology to use.

135. The criticism by the Supreme Court directed at the Methodology places both NERSA and industry participants in an untenable and entirely uncertain position regarding existing and future maximum price applications.

K. CONCLUSION

136. We submit in conclusion that the regulation of maximum prices, including determination of the appropriate Methodology, is an exclusive function of NERSA.

137. The matter of *Minister of Environmental Affairs and Tourism and others v Phambili Fisheries (Pty) Ltd and Another*[120] is instructive in matters which call for judicial deference. In explaining deference, the Court cited with approval Professor Hoexter's account as:

> "*A judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretations of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinize administration action, but by a careful weighing up of the need for and the consequences of judicial intervention. Above all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies; not to cross over from review to appeal*".

138. In this matter, the Court overstepped the limits of its decision making power, attributing to itself superior wisdom in relation to matters entrusted to NERSA.

139. It failed to give due weight to findings of fact and policy decisions made by NERSA as the body with special expertise and experience in the field of maximum price regulation.

[120] (2003) 2 All SA 616 (SCA) para 47.

140. As demonstrated above, determination of maximum prices by NERSA required an equilibrium to be struck between a range of competing interests and considerations. As NERSA has specific expertise in that area, the Supreme Court must defer to it in so far as determination of a methodology that allows it to best discharge its statutory mandate is concerned.

141. The statutory provisions that empower NERSA for its mandate, identify the goal to be achieved, but do not dictate which route should be followed to achieve that goal. In the circumstances, the Supreme Court should have paid due respect to the methodology selected by NERSA as the decision-maker.

142. We by no means contend that where a decision is not rationally connected to the purpose for which it was taken; or is not reasonable in light of the reasons given for it, a Court may not review that decision. A Court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker.

143. However as demonstrated above, the decision by NERSA was neither irrational nor unreasonable; and to the extent that the Supreme Court found that the decision by NERSA was irrational and unreasonable; such finding is marred by erroneous factual considerations.

144. In the premises, NERSA respectfully asks that the appeal be upheld with costs; including the costs of two counsel.

MALEKA I V SC

H MUTENGA

CHAMBERS, SANDTON

28 NOVEMBER 2018

IN THE CONSTITUTIONAL COURT

CCT 131/18

SCA CASE NO: 150/2017

In the matter between:

NATIONAL ENERGY REGULATOR OF SOUTH AFRICA	First applicant
SASOL GAS (PTY) LTD	Second applicant

and

PG GROUP (PTY) LTD	First respondent
SOUTH AFRICAN BREWERIES (PTY) LTD	Second respondent
CONSOL GLASS (PTY) LTD	Third respondent
NAMPAK LTD	Fourth respondent
MONDI LTD	Fifth respondent
DISTRIBUTION & WAREHOUSING NETWORK LTD	Sixth respondent
ILLOVO SUGAR SOUTH AFRICA LTD	Seventh respondent

SECOND APPLICANT'S HEADS OF ARGUMENT

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INTRODUCTION

The decisions of NERSA

1 On 1 May 2009, the first applicant ("NERSA") published Guidelines for Monitoring and Approving Piped-Gas Transmission and Storage Tariffs ("the Tariff Guidelines").[1] The Tariff Guidelines were made pursuant to section 4(h) of the Gas Act 48 of 2001 ("the Gas Act").

2 In October 2011, NERSA published a Methodology to Approve Maximum Prices of Piped-Gas in South Africa ("the Maximum Price Methodology").[2] The Maximum Price Methodology was made pursuant to section 4(g) of the Gas Act and in terms of Regulation 4(3)(a) of the Piped Gas Regulations ("the Regulations").

3 On 24 December 2012, the second applicant ("Sasol Gas") submitted an application to NERSA to approve its transmission tariffs for the period 25 March 2014 to 30 June 2015.[3] On 26 March 2013, NERSA approved the transmission tariffs ("the Tariff Decision").[4]

4 On 24 December 2012, Sasol Gas submitted an application to NERSA in which it sought approval of maximum gas prices for the period 25 March 2014 to

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1 Annexure RAD7 CB volume 2 page 97 to 135. [CB refers to the Core Bundle, being volumes 1 to 10.]

2 Annexure RAD5 CB volume 1 page 54 to 78.

3 Annexure RAD11 CB volume 2 page177 to 204.

4 Annexure RAD29 CB volume 3 page 248 to 266.

30 June 2017; approval of two distinguishing features;[5] and approval of a trading margin for the period 25 March 2014 to 30 June 2015.[6]

5 On 26 March 2013, NERSA made a decision that had three components ("the Maximum Price Decision"):[7]

5.1 NERSA approved an overall maximum Gas Energy price of R117.69/GJ as at 23 March 2013, and maximum Gas Energy prices for each of the six classes of customers referred to in the Regulations.

5.2 NERSA approved a trading margin of R8.21/GJ for the period 25 March 2014 to 30 June 2014 and R10.40/GJ for the period 1 July 2014 to 30 June 2015.

5.3 NERSA gave approval for certain distinguishing features in terms of section 22 of the Gas Act.

The judgment of the High Court

6 The respondents applied to the High Court to review and set aside the Tariff Decision, the Maximum Price Decision and the Maximum Price Methodology.

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5 Section 22 of the Gas Act prohibits licensees from discriminating "between customers or classes of customers regarding access, tariffs, prices, conditions or service except for objectively justifiable and identifiable differences regarding such matters as quantity, transmission distance, length of contract, load profile, interruptible supply or other distinguishing feature approved by" NERSA.

6 Annexure RAD10 CB volume 2 page 152 to 176.

7 Annexure RAD28 CB volume 3 page 207 to 247.

7 The High Court dismissed the review application. It found that "the review should not be entertained because of the unreasonable delay".[8]

The judgment of the SCA

8 The SCA set aside the order of the High Court. It found that the respondents had not delayed unreasonably since the clock started to run when the Maximum Price Decision was made and not when the Maximum Price Methodology was published. On the merits, the SCA found that the Maximum Price Decision was "wholly irrational and unreasonable".[9]

9 The SCA accordingly substituted the High Court's order with an order setting aside the Maximum Price Decision and the Tariff Decision. The SCA did not set aside the Maximum Price Methodology since it found that it did not constitute a discrete administrative act.

The structure of our argument

10 NERSA and Sasol Gas have applied for leave to appeal against the SCA judgment.

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8 High Court Judgment CB volume 10 page 991 para 29.

9 Supreme Court of Appeal Judgment Annexure FA1 volume 11 page 1055 para 56.

11 Our heads of argument will be organised as follows:

11.1 We begin by dealing with the threshold issue of unreasonable delay. We submit that the High Court correctly found that the review application was out of time.

11.2 We then address the merits of the review. We submit that the Tariff Decision should not have been set aside by the SCA since the respondents had not persisted with their review of the Tariff Decision. Moreover, the SCA erred in finding that the Maximum Price Decision was irrational and unreasonable.

11.3 We conclude by summarising the relief sought. We submit that Sasol Gas should be granted leave to appeal and that the appeal should be upheld.

A THRESHOLD ISSUE: DELAY

12 We begin by addressing the issue of unreasonable delay.

The Maximum Price Methodology is binding

13 The Piped Gas Regulations ("the Regulations") were made in terms of section 34 of the Gas Act.

14 Regulation 4(3)(a) provides that, when NERSA sets maximum prices, it must be "objective" by having regard to a "systematic methodology applicable on a consistent and comparable basis". Regulation 4(3)(e) requires NERSA to be "predictable" when setting maximum prices.

15 Regulations 4(3)(a) and 4(3)(e) enjoin the making of a methodology of general application that will be applied in <u>all</u> cases in which NERSA approves maximum gas prices. The only way in which NERSA could comply with this obligation is by giving notice in advance of the methodology that it will apply when it approves maximum gas prices. This is what NERSA did when it published the Maximum Price Methodology pursuant to Regulation 4(3) of the Regulations.[10]

16 The Maximum Price Methodology states on several occasions that it will be applied to any application for the approval of a maximum price by any licensee (not just applications by Sasol Gas). It provides that, in the case of long-term

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10 Annexure RAD5 para 2.3 CB volume 1 page 80.

contracts, "the initial base price will be determined as prescribed in this Methodology".[11] There are other indications to the same effect.[12]

17 The concluding section on the "review and modification of the Methodology"[13] provides that NERSA will invite feedback from regulated entities "on aspects of the Methodology that are either working well or that need amendment". The Methodology provides for a review of its content within five years but anticipates that special circumstances might arise requiring changes more frequently than envisaged by the five-year review cycle. None of these statements would have been necessary if the Maximum Price Methodology were a guideline that could simply be disregarded by NERSA. The Maximum Price Methodology provides guidance to gas traders and gas customers on the maximum gas prices in the South African gas market.

18 A detailed public-participation process was held before the Maximum Price Methodology was made.[14] No purpose would have been served in holding such a process if the Methodology were a mere guideline. If that were the case, then input from stakeholders could simply have been obtained at the time when NERSA had to consider whether or not to apply the Methodology in any particular case.

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11 Annexure RAD5 CB volume 1 page 65 para 3.4, our underlining.

12 Annexure RAD5 CB volume 1 page 63 / 65. See the introductory sentence of paragraph 3.2 on page 63. See also the peremptory language on page 63 to the effect that the proposed maximum price submitted by the applicant "shall be reviewed for purposes of approval by [NERSA] based on the following formula...". Page 65 states that "the initial base price will be determined as prescribed in the Methodology" (our emphasis).

13 Annexure RAD5 CB volume 1 pages 77 to 78 para 6.

14 Sasol Gas answering affidavit para 166 volume 5 page 451.

19 For all of these reasons, we submit that the Maximum Price Methodology contains a set of rules that binds NERSA and all persons applying for approval of maximum prices.[15] It is quite different to the internal policies that were at issue in cases such as *Kemp*[16] and *National Lotteries Board*.[17]

20 We emphasise that the Maximum Price Methodology applied not only to Sasol Gas, but also to gas traders such as Spring Lights Gas (Pty) Ltd, Novo Energy (Pty) Ltd and Virtual Gas Network (Pty) Ltd when they sought approval from NERSA for their maximum prices.[18] The Maximum Price Methodology determines the basis for the approval by NERSA of maximum gas prices for the entire gas market in South Africa.

The respondents' first problem: Oudekraal

21 Since the Maximum Price Methodology is a binding document, it imposes obligations on NERSA until such time as it is set aside by a court. This follows from *Oudekraal,*[19] which held that administrative action must be regarded as valid unless and until it is set aside.

22 The *Oudekraal* principle presents the first problem for the respondents, since it means that they have to set aside the Maximum Price Methodology if they wish

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15 As the High Court held, "when the [Maximum Price Decision] was made NERSA was not free to jettison the methodology" (High Court Judgment volume 10 page 990 para 25).

16 Kemp v Van Wyk 2005 6 SA 519 (SCA).

17 National Lotteries Board v SA Education and Environment Project 2012 4 SA 504 (SCA).

18 Sasol Gas answering affidavit para 157 CB volume 5 page 445.

19 Oudekraal Estates v City of Cape Town 2004 6 SA 222 (SCA). The principle was confirmed by this Court in MEC for Health, EC v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute 2014 (3) SA 481 (CC).

to impugn the Maximum Price Decision. If the Maximum Price Methodology is valid (which must be assumed to be the case until a court says otherwise by setting it aside), then NERSA was bound to follow it when making the Maximum Price Decision. In other words, *Oudekraal* erects a notional barrier that prevents the applicants from impugning the Maximum Price Decision for so long as the Maximum Price Methodology continues to be valid.

The respondents' second problem: unreasonable delay

23 In order to deal with the *Oudekraal* problem, the respondents applied to review the Maximum Price Methodology "if it is found to constitute a reviewable decision".[20] But this gave rise to a further problem because their review of the Maximum Price Methodology was well out of time:

23.1 If NERSA's decision to make the Maximum Price Methodology falls within the reach of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"), then the 180-day period in section 7(1) of PAJA expired a year-and-a-half before the application was launched. NERSA made the Maximum Price Methodology on 28 October 2011 and the review was launched on 18 October 2013. Significantly, the respondents did not ask the Court to extend the 180-day period in terms of section 9(1) of PAJA.

23.2 If NERSA's decision to make the Maximum Price Methodology does not fall within the reach of PAJA, then the unreasonable delay rule would

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20 Amended notice of motion Annexure SA1 CB volume 4 page 370 prayer 2.

apply.[21] This is a common-law rule that applies to reviews falling outside of PAJA.[22] The respondents waited almost two years after the Maximum Price Methodology was made before they launched their review. During this two-year period, Sasol Gas and other parties who are stakeholders in the gas market relied on the Maximum Price Methodology by arranging their affairs on the basis that it would determine the pricing caps.[23] They would be prejudiced if the Maximum Price Methodology were to be set aside. Although this point was taken in the answering affidavit,[24] the respondents did not deal with it in reply[25] and "set out no facts which prevented them from taking the methodology decision on review timeously".[26]

24 We therefore submit that the review of the Maximum Price Methodology was out of time irrespective of whether PAJA does or does not apply.

The SCA judgment is incorrect

25 The SCA side-stepped both of these problems by finding that "there was no final decision having a direct external effect until such time as a decision was announced on Sasol Gas's maximum price application".[27] In other words, the

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21 Associated Institutions Pension Fund v Van Zyl 2005 2 SA 302 (SCA) para 46.

22 Ibid para 46.

23 Sasol Gas answering affidavit CB volume 5 page 454 para 172.

24 Sasol Gas answering affidavit CB volume 5 page 454 para 172.

25 Replying affidavit CB volume 8 page 800 to 801 paras 379 to 381.

26 High Court Judgment CB volume 10 page 991 para 27.

27 Supreme Court of Appeal Judgment Annexure FA1 volume 11 page1046 para 39.

SCA held that it was unnecessary for the respondents to review the Maximum Price Methodology since it did not constitute administrative action until NERSA "determined what Sasol Gas's maximum prices should be".[28]

26 For the reasons that follow, we respectfully submit that the SCA's reasoning was incorrect.

27 The SCA held that what was involved was a multi-staged process for the determination of maximum gas prices,[29] similar to the multi-staged process for making regulations in *New Clicks*.[30] But the process in *New Clicks* was entirely different because section 22G(2) of the Medicines and Related Substances Act required the Minister to make regulations "on the recommendation of the pricing committee". In *New Clicks*, the recommendation of the pricing committee had no effect unless and until it was accepted by the Minister, and the Minister was at liberty to reject the recommendation.[31] In the present case, however, NERSA made both the Maximum Price Decision and the Maximum Price Methodology. There was no need for NERSA to "accept" the Maximum Price Methodology in order to give it force; it applied from the moment of publication for the reasons given above. The comparison with *New Clicks* is accordingly inapposite.

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28 Supreme Court of Appeal Judgment Annexure FA1 volume 11 page 1044 para 35.

29 Supreme Court of Appeal Judgment Annexure FA1 volume 11 page 1044 para 35.

30 Minister of Health v New Clicks South Africa (Pty) Ltd 2006 2 SA 311 (CC).

31 See New Clicks paras 136, 137 and 141.

28 The SCA held that the Maximum Price Methodology did not provide for any "finality ... on how prices would be assessed";[32] finality would only occur once a licensee elected to opt for the basket-of-alternatives approach or the pass-through of costs approach.[33] It is correct that the Maximum Price Methodology allows a licensee to elect to use either the "basket of alternatives" or the "pass through of costs" when it applies for approval of a maximum price. But this does not mean that there was "no finality on how prices would be assessed"; on the contrary, there was finality that these are the only permissible methods of determining maximum gas prices. The SCA was therefore wrong to say that that, before a licensee applied for approval of a maximum price, "the terms of the methodology were purely theoretical and had no effect".[34] The effect of the Maximum Price Methodology was to take all other possible methods of determining a maximum price off the table, and to require a licensee to apply for a maximum price on the basis of one of two options. Since the Maximum Price Methodology meant that NERSA had made a final decision not to apply "cost plus a reasonable return" when approving maximum gas prices, it could hardly be described as being "purely theoretical".

29 The SCA held that, by imposing a requirement of revenue neutrality, "NERSA did not apply the methodology it had earlier decided upon but, instead, altered it in order to achieve what it felt was a more equitable result".[35] We respectfully submit

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32 Supreme Court of Appeal Judgment Annexure FA1 volume 11 page 1044 to 1045 para 36.

33 Supreme Court of Appeal Judgment Annexure FA1 volume 11 page 1045 para 37.

34 Supreme Court of Appeal Judgment Annexure FA1 volume 11 page 1045 para 37.

35 Supreme Court of Appeal Judgment Annexure FA1 volume 11 page 1046 para 38.

that this was incorrect because the Maximum Price Methodology dealt with maximum prices while the requirement of revenue neutrality dealt with actual prices. NERSA's decision to impose limits on the actual prices that could be charged by Sasol Gas did not mean that it had altered its Methodology to determine the maximum prices that could be charged by Sasol Gas.

30 The difficulties in the SCA's reasoning become particularly apparent when one steps backs and considers the outcome: the SCA set aside the Maximum Price Decision but did not set aside the Maximum Price Methodology that was applied by NERSA when it made the Maximum Price Decision. This means that, in terms of *Oudekraal*, the Maximum Price Methodology continues to exist in law and in fact. What implications does this have for other licensees and for NERSA when applications are made in the future for approval of maximum gas prices – must the Maximum Price Methodology be complied with or not? The answer to that question is obscure because the SCA judgment leaves the Maximum Price Methodology stranded in a twilight zone where it has been criticised as being "wholly irrational and unreasonable" but has not been set aside. In particular, it is not clear whether the SCA's reasoning renders the Maximum Price Methodology unenforceable for other participants in the gas industry (such as Egoli Gas).

Conclusion

31 For the reasons set out above, we submit that the High Court correctly dismissed the review application on the basis of the respondents' unreasonable delay and that the SCA erred in setting aside the High Court's order.

THE SETTING ASIDE OF THE TARIFF DECISION

32 In their founding affidavit, the respondents impugned the Tariff Decision on a series of self-standing grounds unrelated to their attack on the Maximum Price Decision:

32.1 The respondents contended that there is "an apparent inconsistency between the asset base reported by Sasol Gas in its application for a transmission tariff (annexure RAD11) and the total assets reported in the analyst book for the year ended 30 June 2013 (annexure RAD2)".[36]

32.2 The respondents contended that "in addition" the Tariff Guidelines "stipulate the use of the replacement value of assets when calculating the asset base to be regulated" and that this has "the effect of inflating that asset base relative to the book valuations of those same assets".[37]

33 In argument before the High Court and the SCA, the respondents did not persist with any of these challenges to the Tariff Decision. They adopted a different position that was at odds with their pleaded case, namely that the attack on the Maximum Price Decision would also determine the fate of the Tariff Decision.

34 The SCA agreed with the respondents, and set aside the Tariff Decision even though it had not made any finding that the Tariff Decision was irregular.

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36 Founding affidavit CB volume 4 page 352 para 223.

37 Founding affidavit CB volume 4 page 353 para 225.

35 For the reasons that follow, we respectfully submit that the SCA erred in setting aside the Tariff Decision.

Tariffs and prices are different things

36 Sections 4(g) and 4(h) of the Gas Act provide that NERSA must:

> "(g) regulate prices in terms of section 21(1)(p) in the prescribed manner;
>
> (h) monitor and approve, and if necessary regulate, transmission and storage tariffs and take appropriate action when necessary to ensure that they are applied in a non-discriminatory manner as contemplated in section 22" (our underlining).

37 The essence of the distinction is that prices amount to payment for gas as a commodity (i.e. payment for the molecules), while tariffs amount to payment for services provided in relation to gas (i.e. payment for transportation of the molecules):[38]

37.1 A "price" is defined as "the charge for gas to a distributor, reticulator or final customer".[39]

37.2 A "tariff" is defined as "the charge for gas services to any customer".[40] A "service", in turn, is defined as "any service relating to the transmission, distribution, storage, trading, liquefaction or re-gasification of gas".[41]

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38 Answering affidavit CB volume 5 page para 22.

39 Section 1 of the Gas Act.

40 Section 1 of the Gas Act.

41 Section 1 of the Gas Act.

38 Under section 21(1)(p) of the Gas Act, NERSA has the power to approve maximum prices. In contrast, NERSA has the power to regulate actual tariffs in terms of section 4(h) of the Gas Act. That is a very significant difference.

39 The methodologies used by NERSA to approve transmission tariffs and maximum prices are also different. Tariffs are linked to the underlying capital asset base utilized to render the service, while prices are, at the election of the licensee, linked to either the basket of alternatives or the pass-through of costs.

40 For all of these reasons, prices and tariffs mean very different things in the context of the Gas Act.

The SCA judgment is incorrect

41 The SCA failed to appreciate these differences. It stated that it "did not understand" Sasol Gas to disagree with the respondents' contention that "if they succeed in respect of the price of gas, the composite maximum fee must also fail".[42] This was manifestly incorrect. Sasol Gas had argued against this proposition in its heads of argument and in oral argument.

42 The SCA's error did not end there. The SCA went on to state that insofar as the order sought by the respondents "refers to the determination of maximum transmission tariffs, which has not been impugned, it must be remembered that ultimately there was a composite maximum price which cannot be allowed to stand".[43] The order of the SCA then proceeded to set aside not only the Maximum

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42 Supreme Court of Appeal Judgment Annexure FA1 volume 11 page1040 para 25.

43 Supreme Court of Appeal Judgment Annexure FA1 volume 11 page 1056 para 58.

Price Decision, but also NERSA's decision to approve applications by Sasol Gas "for transmission tariffs for the period 26 March 2014 to 30 June 2015" (i.e. the Tariff Decision).[44]

43 The SCA appeared to labour under the impression that, when NERSA approved an overall maximum Gas Energy price of R117.69/GJ, this was "a composite price" consisting of both the gas price (i.e. the price for the molecule) and the tariff (i.e. the cost of moving the molecule).[45] But this was manifestly incorrect. The documents in the record make it plain that the Maximum Price Decision fixed a ceiling price that could be charged for the molecule, and that the price for transporting the molecule would then be added in order to determine the total price paid by a customer:

43.1 The Maximum Price Decision explains this clearly:[46]

> "1.7 According to section 4(h) of the Gas Act, the Energy Regulator has a duty to 'monitor and approve, and if necessary regulate, transmission and storage tariffs and take appropriate actions when necessary to ensure that they are applied in a non-discriminatory manner.
>
> 1.8 In order to implement this mandate, NERSA developed the Guidelines for Monitoring and Approving Piped-gas Transmission and Storage Tariffs in South Africa, 2009 ('the Tariff Guidelines')
>
> 1.9 Hence, the Tariff Guidelines give guidance on tariff-related activities, which are charges for gas services and which must be added to the piped-gas energy price(s)" (our underlining).

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44 Supreme Court of Appeal Judgment Annexure FA1 volume 11 page 1056 para 59.2(a).

45 Supreme Court of Appeal Judgment Annexure FA1 volume 11 page 1040 para 24.

46 Annexure RAD28 CB volume 3 page 212 paras 1.7 to 1.9 (non-confidential decision).

43.2 Similarly, the Methodology makes it clear that TX (i.e. "pass-through of monitored and approved or regulated Transmission tariffs") must be added to GE (i.e. "maximum for gas energy") in order to arrive at the Total Price.[47]

44 But in any event, the SCA did not set aside NERSA's decision to approve a composite price; it set aside NERSA's decision on 26 March 2013 to approve an application by Sasol Gas "for transmission tariffs for the period 26 March 2014 to 30 June 2015". It is, with respect, difficult to understand how the SCA could have set aside the Tariff Decision in circumstances where it had heard no argument on the legality of that decision and had not found the decision to be irregular.

Conclusion

45 For the reasons set out above, we submit that the SCA erred in setting aside the Tariff Decision.

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47 See, for example, CB volume 1 page 74 para 4.3.

THE SETTING ASIDE OF THE MAXIMUM PRICE DECISION

46 The founding affidavit impugned the Maximum Price Decision on a battery of grounds. However, in argument before the High Court and the SCA the respondents persisted with only two review grounds: unreasonableness and irrationality. The SCA agreed with the respondents that the Maximum Price Decision was "wholly irrational and unreasonable".[48] For the reasons that follow, we respectfully submit that the SCA erred in making this finding.

NERSA was vested with a discretion

47 Section 21(1)(p) of the Gas Act obliges NERSA to set maximum prices in circumstances of inadequate competition. However, it does not oblige NERSA to do so on the basis of any particular pricing methodology. On the contrary, it leaves NERSA with a discretion to determine on what basis it will set maximum prices.

48 The Acacia report explains that there are a wide variety of pricing methodologies that are used by regulators around the world. They include: price-cap regulation, rate of return regulation, yardstick competition and competitive bidding.[49] The Acacia report says that the respondents' attempt to suggest that NERSA was obliged to apply "cost plus a reasonable return" amounts to "an oversimplified portrayal of price regulation".[50] In particular, "it is not the case that effective competition necessarily realises a cost-plus price and certainly not unless we are

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48 Supreme Court of Appeal Judgment Annexure FA1 volume 11 page para 56.

49 Annexure PN1 CB volume 7 pages 662 to 665.

50 Annexure PN1 CB volume 7 page 682 (line 10).

in a long-run competitive equilibrium which, to be determined, involves a set of assumptions to be made".[51] Moreover, it is "not clear how cost-plus would give rise to prices close to marginal costs".[52]

49 There is nothing in the Gas Act or the Regulations that compels NERSA to adopt a particular regulatory methodology.[53] On the contrary, "it is well understood that there are different approaches which involve choices about the balancing of different considerations such as between lower prices and rewarding investment and incentivising efficiency".[54] The legislature established NERSA as a specialist regulator and conferred on it a discretion when it comes to performing the balancing exercise envisaged by Regulation 4(3).

50 In the exercise of its discretion, NERSA might conceivably choose to regulate maximum prices by having regard to "cost plus a reasonable profit". However, NERSA is not obliged to do so and would not act *ultra vires* if it decided not to do so. If NERSA were to regulate maximum prices on the basis of some principle other than "costs plus a reasonable profit", it would not exceed its powers and the only question would be whether its exercise of discretion was rational and reasonable.

51 Significantly, the respondents do not dispute this. It is no part of their argument that NERSA exceeded its powers (i.e. acted *ultra vires*) in the manner in which it

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51 Annexure PN1 CB volume 7 page 682 (line16-19).

52 Annexure PN1 CB volume 7 page 695 (line 15).

53 Annexure PN1 CB volume 7 page 702 (line 28 to 31).

54 Annexure PN1 CB volume 7 page 702 to 703 para 8.

set the maximum price. On the contrary, the respondents make it plain that their only contention is that NERSA acted irrationally and unreasonably. They therefore accept that NERSA was operating in a zone of discretion when it made the Maximum Price Decision.

52 It follows that the relevant question is whether NERSA exercised its discretion in an irrational or unreasonable manner when it made the Maximum Price Decision. That is the question we address below.

Legal principles regarding review of the exercise of discretion

53 It is well-established that an administrator has a margin of appreciation when it comes to the exercise of discretion. A reviewing court will only interfere if the administrator acted irrationally or unreasonably in the exercise of its discretion.

54 When assessing the rationality of an administrative decision, the Court is not concerned with whether the same purpose could have been achieved by less restrictive means. It is only concerned with whether there is a rational relationship between the means chosen and the end sought to be achieved.[55] If the decision furthers the administrator's purpose, then it is a rational one and it matters not that the same purpose might have been achieved by less restrictive means.

55 When it comes to reasonableness, this Court has held that section 6(2)(h) of PAJA imports "a simple test, namely that an administrative decision will be

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[55] Affordable Medicines Trust v Minister of Health 2006 3 SA 247 (CC) at para 78; Albutt v Centre for the Study of Violence and Reconciliation, and Others 2010 3 SA 293 (CC) at para 51; Democratic Alliance v President of the Republic of South Africa 2013 1 SA 248 (CC) at para 32.

reviewable if ... it is one that a reasonable decision-maker could not reach".[56] The SCA has glossed this test as follows:

> "there is considerable scope for two people acting reasonably to arrive at different decisions. I am not sure whether it is possible to devise a more exact test for whether a decision falls within the prohibited category than to ask, as Lord Cooke did in *R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd* [1999] 1 All ER 129 (HL) at 157 - cited with approval in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* (supra) - whether in making the decision the functionary concerned 'has struck a balance fairly and reasonably open to him [or her]'."[57]

56 The present case concerns the decision of a specialist regulator that was created by statute to exercise control over a highly technical sector of the economy. This requires a court to exercise deference in the exercise of its review powers:

56.1 Deference has been described as "a judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretation of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate."[58]

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56 Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs 2004 4 SA 490 (CC) para 44.

57 Calibre Clinical Consultants (Pty) Ltd v National Bargaining Council for the Road Freight Industry 2010 5 SA 457 (SCA) para 59.

58 Logbro Properties CC v Bedderson NO and others 2003 4 SA 460 (SCA) at paras 21-22.

56.2 This Court explained the principle in *Bato Star*:[59]

> "In treating the decisions of administrative agencies with the appropriate respect, a court is recognising the proper role of the executive within the Constitution. In doing so a court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a court should pay due respect to the route selected by the decision-maker."

How NERSA exercised its discretion

57 Against the background of these principles, we turn to consider how NERSA exercised its discretion.

58 This analysis must commence with the Consultation Document in respect of a Maximum Price Methodology ("the Consultation Document").[60] Although it is the most important document in the record and formed the basis of extensive argument before the SCA, it did not receive a single mention in the SCA judgment:

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59 Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs 2004 4 SA 490 (CC) para 48.

60 Annexure RAD3 CB volume 1 page 16 to 36 and volume 15 page 1429 to 1449.

58.1 The Consultation Document dealt with the determination of the "Maximum Price of Gas Energy" in section 6.[61] It stated that "the spot price for gas in a market environment would trend towards its marginal cost (i.e. supply and demand are optimally satisfied where Marginal Revenue = Marginal Cost)".[62] It adopted the position that "the best regulatory option is to seek to replicate market outcomes and set the maximum price for gas energy as closely as possible to the marginal cost of supply".[63]

58.2 The Consultation Document then went on to consider, under separate headings, four ways in which this might be done. It described them as "marginal costs of supply", "price of alternatives", "international benchmarking" and "pass-through of imported gas prices".

58.3 The Consultation Document accepted that "the marginal cost approach ..., if appropriately applied, will give the most economically efficient pricing outcome as it simulates a market outcome".[64] However, the Consultation Document drew attention to various drawbacks of the long-run marginal cost approach. For example, it was "questionable" whether the long-run marginal cost approach "will encourage competition" since "generally competition requires some 'head room' above the efficient price to

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61 Annexure RAD3 CB volume 1 page 25.

62 Annexure RAD3 CB volume 1 page 25.

63 Annexure RAD3 CB volume 1 page 27.

64 Annexure RAD3 CB volume 1 page 30.

generate competitive activity and the higher the price the more opportunity for competition".[65]

58.4 The Consultation Document took the view that the "price of alternatives" approach did not have the drawbacks attaching to the other approaches. The "price of alternatives" approach involves having regard to a "basket of alternative fuels" that would "be used as a proxy for the market price for gas energy".[66] Using a basket of alternative fuels would allow "regulated prices to be determined at a level that reflects the balance between encouraging new entry and sharing economic surplus between consumers and producers".[67] The Consultation Document stated that coal, heavy fuel oil, crude oil, distillate, LPG and electricity "may be appropriate for determining a maximum price for gas energy".[68]

58.5 The Consultation Document concluded that "it is less subjective, and arguably more appropriate to determine the price of gas energy (the molecules) on the basis of alternative supply options".[69] It therefore recommended that the price of gas energy should be determined by a formula that reflected a basket of heavy fuel oils and crude oil.[70]

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65 Annexure RAD3 CB volume 1 page 30.

66 Annexure RAD3 CB volume 1 page 29.

67 Annexure RAD3 CB volume 1 page 29.

68 Annexure RAD3 CB volume 1 page 29.

69 Annexure RAD3 CB volume 1 page 31.

70 Annexure RAD3 CB volume 1 page 33.

59 All interested parties were invited to submit comments on the Consultation Document. The respondents did not do so.[71]

60 When it published the Maximum Price Methodology in its final form, NERSA continued to prefer the "price of alternatives" approach that had been recommended in the Consultation Document:

60.1 The Maximum Price Methodology stated that the maximum price for gas would be referenced to "price indicators of certain relevant energy sources".[72] The "price indicators" formula gave effect to the "price of alternatives approach" that had been discussed at length in the Consultation Document.

60.2 The Maximum Price Methodology went on to state that NERSA would allow a licensee to opt for use of the "pass-through of costs approach" if the licensee regarded the price indicators approach as inappropriate.[73] In its Reasons for Decision to make the Maximum Price Methodology, NERSA explained that it had provided for the possibility of using the pass-through of costs approach in order to meet concerns that the price indicators approach may not provide for new entrants into the market.[74]

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71 Sasol Gas answering affidavit CB volume 5 page 451 para 166.2 read with replying affidavit CB volume 8 page 798 para 376.

72 Annexure RAD5 CB volume 1 page 63 para 3.1.

73 Annexure RAD5 CB volume 1 page 66 para 3.5.

74 Annexure RAD6 volume 1 page 87 para 39. See also paras 53 to 59 page 92.

61 When NERSA made the Maximum Price Decision, it applied the price indicators formula contained in the Maximum Price Methodology. In its Reasons for making the Maximum Price Decision, NERSA recorded that "some stakeholders submitted that NERSA should abandon the Methodology and pursue cost plus pricing".[75] NERSA responded to this as follows:[76]

> "The Methodology was developed in accordance with the Gas Act and the Regulations. Cost plus pricing is not used in gas regulation as it would underestimate the value of the gas molecule and lead to perverse outcomes. The Methodology provides for two approaches to maximum prices that an appellant may utilise, being the Price Indicators approach and the Pass-Through approach. Sasol Gas opted for the Price Indicators Approach and applied for maximum prices in line with the prescripts of the Methodology. The Methodology will be reviewed five years after implementation as indicated in the Reasons for the Decision concerning the Methodology."

62 It is therefore clear that NERSA applied its mind carefully to the choice between several regulatory methodologies and opted for the "price of alternatives" approach. NERSA did so by balancing the considerations listed in Regulation 4(3) in the exercise of its discretion. The reasons for NERSA's choice are set out in the Consultation Document, which considered the pros and cons of competing approaches at considerable length. NERSA's decision to use the "price of alternatives" approach was fully reasoned, entirely rational and eminently reasonable.

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75 Reasons for Decision – Annexure RAD28 CB volume 3 page 246 para 8.30.

76 Reasons for Decision – Annexure RAD28 volume 3 page 246 para 8.31.

NERSA's rejection of a "cost-plus approach" was rational and reasonable

63 The respondents dispute this. They complain that NERSA misdirected itself by failing to determine the maximum price of gas on the basis of their preferred approach involving "cost plus a reasonable return".

What costs?

64 The respondents' reference to "cost plus a reasonable return" begs the question as to what is meant by "costs". The answer to this question is by no means obvious. In economic terms, the following possibilities exist:

64.1 The "costs" may be the costs of the regulated supplier or the costs of an efficient marginal supplier (whether real or hypothetical).

64.2 The "costs" may be the actual costs of a regulated supplier, or the estimated costs of a hypothetical efficient operator.

64.3 The "costs" may be the total costs or the marginal costs (i.e. the cost involved in producing one additional unit).

65 These distinctions are important in economics for several reasons. For example, a regulated supplier may have high costs because it is inefficient, in which case a regulated maximum price that provides for actual costs plus a reasonable profit would reward inefficiency. A supplier may have low costs because it entered the market first, in which case a regulated maximum price based on the actual costs of that supplier plus a reasonable profit would make it economically unattractive or even impossible for new entrants to enter the market.

NERSA's decision

66 It is not apparent whether the respondents have in mind the actual total costs of Sasol Gas, the actual marginal costs of Sasol Gas or the estimated marginal costs of a hypothetical new entrant when they refer to a "cost-plus approach".

67 If the "cost-plus approach" refers to marginal costs (whether of Sasol Gas or of a hypothetical new entrant), then the respondents' review grounds do not get out of the starting blocks. That is because the Consultation Document explained in detail why NERSA rejected the long-run marginal cost approach, and the respondents do not contend that NERSA misdirected itself in this regard.

68 If the respondents have in mind the actual total costs of Sasol Gas when they advocate the "cost-plus approach",[77] then their complaint is equally misdirected. The expert reports of Dr Roberts and Dr Coppi explain in detail why NERSA was justified in rejecting an approach that would have required it to have regard to Sasol Gas' actual total costs as a starting point. There are at least five reasons for this:

68.1 *First*: a "cost-plus approach" that has regard to Sasol Gas' actual total costs would not result in the competitive price. The price in a competitive market is determined by the intersection of supply and demand, and accordingly by the marginal cost of the marginal producer (which forms

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77 See replying affidavit CB volume 8 page 732 para 111; RBB reply CB volume 9 page 900 para 150; RBB surrejoinder CB volume 10 page 970 para 16.3.

the basis of the supply curve).[78] The actual total costs of Sasol Gas tell us nothing about the competitive price. In order to incentivise investment and the development of the gas industry, NERSA would have to set a maximum price for gas that covers the costs of marginal sources of supply rather than the costs of current sources of supply.[79] The Regulations require NERSA to "include efficiency incentives" when it approves maximum prices for gas.

68.2 *Second*: the actual costs of Sasol Gas are likely to be much lower than the costs of a new entrant into the piped gas market. If a maximum price were to be set for the industry on the basis of Sasol Gas' actual total costs, the maximum price would be below the competitive price and would discourage efficient entry. Whilst a low price would benefit current customers, the low price would make it uneconomic for further entrants to produce or import gas into South Africa – even if their cost of production is below the amount that customers are willing to pay – because the maximum price would be below their cost of production. Such further entry would benefit customers by increasing the amount of piped gas available in the South African market.[80] If NERSA were to set a maximum gas price based on Sasol Gas' actual total costs, "this would mean that higher cost sources of supply available for incremental volumes would not be

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78 Coppi CB volume 6 page 566 para 49; Coppi rejoinder CB volume 10 page 956 paras 5.23 to 5.26.

79 Acacia Annexure PN1 CB volume 7 page 696 paragraph 7.11.1.

80 Coppi CB volume 6 page 566 para 50; Coppi rejoinder volume 10 page 956 para 5.23 to 5.26.

supplied, which would be contrary to the objects of the Gas Act, which includes the promotion of investment into and development of the gas sector".[81]

68.3 *Third*: a "cost-plus approach" allows a firm to earn a set return on the costs incurred in production. The only way that prices can increase under this type of regulation is by increasing the firm's costs. With potential earnings tied to costs alone, firms are perversely incentivised to increase costs beyond optimal levels in order to permit higher revenues.[82] A "cost-plus approach" may therefore result in prices that are higher than competitive levels owing to the lack of any incentives for the regulated firm to reduce its costs.[83]

68.4 *Fourth:* cost-plus regulation is difficult to apply in the context of a finite, depletable resource. The value of natural resources such as oil, gas and minerals derives in large part from the fact they are relatively scarce. This implies that, in assessing the cost of natural resource extraction, one must include the cost of using up a scarce, non-renewable resource. Thus the economic value of natural gas should include a "depletion allowance", which a standard cost-based regulation typically fails to consider.[84]

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81 Acacia Annexure PN1 CB volume 7 page 699 para 7.16.1.

82 Coppi CB volume 6 page 567 para 51

83 Acacia Annexure PN1 CB volume 7 page 695 para 7.9.2.

84 Coppi CB volume 6 page 567 para 52; Coppi rejoinder CB volume 10 page 955 paras 5.19 to 5.22.

68.5 *Fifth*: a "cost-plus approach" may perhaps be feasible where the upstream purchase of gas occurs in a freely-traded market, since this provides a market-related price to which a profit element can be added to arrive at a regulated price. However, Sasol Gas purchases its gas upstream from a Joint Venture in which it is a participant.[85] The respondents' expert economist (Mr Murgratroyd) accepted that this gave rise to legitimate concerns when it came to applying the "cost-plus approach".[86]

69 For all of these reasons, NERSA did not act irrationally or unreasonably in deciding not to adopt a "cost-plus approach" that has regard to Sasol Gas' actual total costs.

Summation

70 In the light of what is set out above, we submit that the respondents' review grounds based on rationality and reasonableness are without merit:

70.1 The Consultation Document explained in detail why NERSA adopted the "price of alternatives approach" in preference to rival approaches (including the "long-run marginal cost approach" and the "pass-through of imported gas prices approach").

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85 Coppi rejoinder CB volume 10 page 953 para 5.13.

86 Transcript of NERSA Public Hearing dated 20 March 2013 – Annexure MG7 CB volume 3 page 205 to 206.

70.2 NERSA gave careful consideration to the long-run marginal cost approach, but explained in the Consultation Document why it regarded the "price of alternatives approach" as preferable.

70.3 NERSA's decision to opt for the "price of alternatives approach" was rationally connected to the purpose NERSA set out to achieve.

70.4 When it decided to opt for the "price of alternatives approach", NERSA acted reasonably and "struck a balance fairly and reasonably open to [it]".[87] Dr Roberts and Dr Coppi have explained that NERSA's decision was consistent with economic principles.

The SCA judgment is incorrect

71 The SCA rejected all of the preceding submissions and held that the Maximum Price Decision was "wholly irrational and unreasonable".[88] For the reasons that follow, we respectfully submit that the SCA erred.

<u>The SCA's reliance on "elementary and undisputed principles of economics"</u>

72 The SCA stated that the reasonableness of the Maximum Price Decision "fell to be decided on certain elementary and undisputed principles of economics".[89] But the principles of economics were neither "elementary" nor "undisputed": on the contrary, they formed the subject matter of a vigorous and nuanced debate

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87 Calibre Clinical Consultants (supra) at para 59, quoting from R v Chief Constable of Sussex, ex parte International Traders' Ferry Ltd [1999] 1 All ER 129 (HL) at 157.

88 Supreme Court of Appeal Judgment Annexure FA1 volume 11 page 1055 para 56.

89 Supreme Court of Appeal Judgment Annexure FA1 volume 11 page 1047 para 41.

between RBB, Dr Roberts and Dr Coppi. Since the SCA chose to ignore all of this evidence on the basis that it was "irrelevant to the task at hand",[90] it is not apparent from where the SCA sourced the principles of economics that it regarded as being "elementary" and "undisputed".

73 The SCA was wrong to say that the expert economic evidence amounted to *ex post facto* reasoning[91] and had "precious little to do with the considerations that actually motivated the decision".[92] The expert evidence explained the economic principles that informed the Maximum Price Decision. Those economic principles had been articulated by NERSA itself in the Consultation Document. The expert evidence did not seek to retro-fit reasons for NERSA's decision, but sought rather to tease out the principles of economics that had underpinned NERSA's decision and that had been articulated by NERSA itself.

74 Dr Roberts and Dr Coppi gave evidence that NERSA's decision was consistent with economic principles. The SCA found that NERSA's decision was irrational and unreasonable without having regard to the evidence of Dr Roberts and Dr Coppi. It is, with respect, difficult to understand how the SCA could ignore the evidence of the expert economists but could nevertheless find that NERSA's decision was inconsistent with "elementary and undisputed principles of economics".[93] In making this finding, the SCA failed to accord appropriate

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90 Supreme Court of Appeal Judgment Annexure FA1 volume 11 page 1047 para 41.

91 Supreme Court of Appeal Judgment Annexure FA1 volume 11 page 1047 para 41.

92 Supreme Court of Appeal Judgment Annexure FA1 volume 11 page 1047 para 41.

93 Supreme Court of Appeal Judgment Annexure FA1 volume 11 page 1047 para 41.

deference towards the position of NERSA as a specialist regulator dealing with matters of the utmost complexity.

The SCA's reasoning regarding the meaning of a competitive price

75 The SCA held that NERSA's reliance on a basket of alternative fuels was irrational because "it truly does not, and cannot be used to mimic a competitive market and determine a competitive price".[94] But this ignores the detailed discussion of the issue by NERSA in the Consultation Document. It is revealing that the Consultation Document did not receive a single mention in the SCA judgment.

76 The SCA held that "what [NERSA] was obliged to do was to think away the monopoly price Sasol Gas enjoyed and determine the maximum price which would have been charged in a hypothetical competitive market in which suppliers competing with each other would have sought to under-cut each other's prices in order to take business from each other".[95] No such "obligation" was imposed on NERSA by the Act or the Regulations; on the contrary, NERSA was vested with a discretion to determine an appropriate methodology. In any event, the thought experiment suggested by the SCA is wholly unworkable: it reformulates the question as regards what is meant by a competitive price but does not answer it.

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94 Supreme Court of Appeal Judgment Annexure FA1 volume 11 page 1052 para 51.

95 Supreme Court of Appeal Judgment Annexure FA1 volume 11 page 1051 para 49, our underlining.

The SCA's reliance on prices before and after the special dispensation period

77 The SCA found that "the adoption of the methodology NERSA used resulted in the maximum price being determined in an amount arguably some 300% higher than what the appellants had previously been paying".[96] For the reasons that follow, we respectfully submit that this finding was incorrect.

78 During the special dispensation period, the maximum price that Sasol Gas could charge was governed by the Regulatory Agreement.[97] The Regulatory Agreement allowed Sasol Gas to charge a different price to each customer based on Market Value Pricing ("MVP").[98] However, Sasol Gas did not charge customers the MVP maximum.[99] On the contrary, it is common cause on the papers that the weighted average price actually charged by Sasol Gas was substantially below the MVP maximum price that Sasol Gas could have charged.[100]

79 It follows that, prior to 25 March 2014, there was a massive difference between the actual price and the maximum price of gas (MVP). The actual price was about half of the maximum price (on a weighted average basis).

80 The difference between actual prices and maximum prices continues to be a feature of the regulatory regime after 25 March 2014. It is common cause that, in the new regulatory regime, Sasol Gas charges customers less than the NERSA-

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96 Supreme Court of Appeal Judgment Annexure FA1 volume 11 page 1048-9 para 46.

97 Annexure RAD1 CB volume 1 pages 1 to15.

98 Sasol Gas answering affidavit CB volume 5 page 416 para 87.

99 Sasol Gas answering affidavit CB volume 5 page 420 para 97.

100 Sasol Gas answering affidavit CB volume 5 page 420-1 para 98.

approved maximum prices. Annexure MG11 to the answering affidavit shows the difference between maximum prices and actual prices in the new regulatory regime.[101]

81 In order to compare apples with apples, it would be necessary (*a*) to compare maximum prices under the old regulation with maximum prices under the new regulation or (*b*) to compare actual prices under the old regulation with actual prices under the new regulation. But the SCA did neither of these exercises. Instead the SCA compared the actual prices charged by Sasol Gas under the old regulation with the maximum prices set by NERSA under the new regulation by stating that "the adoption of the methodology NERSA used resulted in the maximum price being determined in an amount arguably some 300% higher than what the appellants had previously been paying".[102] This amounted to comparing apples with oranges.

82 The comparison between actual prices under the old regulation and actual prices under the new regulation has been done by Dr Coppi. It shows that the average total charge paid by customers after 25 March 2014 is less than the average total charge paid by customers before 25 March 2014, [103] and that most customers pay less after 25 March 2014 than they paid under the old regulatory regime.[104]

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101 Annexure MG11 CB volume 6 page 579.

102 Supreme Court of Appeal Judgment Annexure FA1 volume 11 page 1049 para 46, our underlining.

103 Sasol Gas answering affidavit CB volume 6 page 510 para 291.4.

104 Sasol Gas answering affidavit CB volume 6 page 511-14 para 292.4 and 292.5

83 As regards the comparison between maximum prices under the old regulation and maximum prices under the new regulation: the Maximum Price Methodology provides for a series of variables that must be plugged into a formula in order to determine the maximum gas price at any point in time. Those variables are not immutable since the prices of fuel fluctuate on a daily basis. The SCA misunderstood this when it described alternative sources of fuel as being "more expensive":[105] the correct position is that it would be necessary to have regard to pricing at a particular point in time in order to determine whether alternative fuels are "more expensive" or "less expensive". For the same reason, the SCA was wrong to say that NERSA misdirected itself by not implementing "a methodology designed to lower maximum prices".[106] The maximum price that would apply at any point in time in terms of the basket of alternatives depends on the price of fuels at that time. The extent to which the maximum price is higher or lower than previous prices is a contingent fact, not an axiomatic truth.

The SCA's finding that Sasol Gas has previously charged monopoly prices

84 The SCA stated that, during the special dispensation period, Sasol Gas had charged a "monopoly price".[107]

85 There was no basis for this finding on the papers:

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105 Supreme Court of Appeal Judgment Annexure FA1 volume 11 page 1048-9 para 46.

106 Supreme Court of Appeal Judgment Annexure FA1 volume 11 page 1048 para 45.

107 Supreme Court of Appeal Judgment Annexure FA1 volume 11 page 1047 para 42 and page 1040 para 24.

85.1 The deponent to the founding affidavit (who did not qualify himself to express an expert opinion) made the bald allegation that "MVP ... permitted Sasol Gas ... to charge monopoly prices for piped-gas in South Africa".[108] When RBB was roped in to provide an expert report as part of the supplementary founding papers, RBB adduced no evidence to show that under the old regulation Sasol Gas had charged monopoly prices.

85.2 In his answering affidavit, Dr Coppi pointed out that the RBB report assumed that average gas prices should be reduced from those prevailing under the old regulation, but offered no evidence in support of this assumption.[109] Dr Coppi showed why the assumption was incorrect by reference to several indicators which established that "Sasol Gas' prices are consistent with plausible ranges for competitive prices".[110]

85.3 When RBB filed its replying report, it impermissibly made out a new case in reply in several respects. However, RBB still made no attempt to offer any evidence in support of its contention that under the old regulation Sasol Gas had charged monopoly prices.

85.4 Dr Coppi's affidavit in rejoinder reiterated that the RBB reports assumed, but did not show, that under the old regulatory regime Sasol Gas had priced as an unconstrained monopolist.[111] Dr Coppi pointed to several

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108 Founding affidavit CB volume 3 page 284 para 29.7.

109 Coppi CB volume 6 page 558 para 26.

110 Coppi CB volume 6 page 568 para 55.5.

111 Coppi rejoinder CB volume 10 page 934 para 4.11.

factors that had constrained Sasol Gas' ability to charge to the monopoly level.[112] Dr Coppi also pointed to the common-cause fact (not disputed by RBB) that Sasol Gas had charged prices that were on average only half the price that would have been charged by an unconstrained monopolist.[113] Moreover, Dr Coppi testified that Sasol Gas' actual prices under the new regulatory regime (and therefore its prices under the old regulatory regime as well) were within a range of plausible competitive prices (including international benchmarking).[114]

85.5 Acacia made the same point. It stated that that the previous regulatory regime "is monopolistic, but it does not mean that prices for all customers were set at supra-competitive levels".[115] Acacia pointed out that Sasol Gas "offered relative low prices for those customers that are able to use cheaper alternative fuels and it offered lower prices to those customers that needed to be compensated for higher switching costs incurred to use natural gas".[116] It is therefore "not clear that it is the MVP that permitted Sasol to charge, on average, supra-competitive prices".[117] In other words, "it is not clear that MVP prices resulted in prices set on average at monopoly levels".[118] Acacia estimated that in 2012 and 2013, Sasol Gas'

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112 Coppi rejoinder CB volume 10 page 935 to 939 para 4.16 to 4.29.

113 Coppi rejoinder CB volume 10 page 940 para 4.33.

114 Coppi volume CB 6 page 562 to 564 paras 37 to 41; Coppi rejoinder CB volume 10 page 941 paras 4.34 to 4.48

115 Acacia report CB volume 7 page 667 (line 1-3).

116 Acacia report CB volume 7 page 667 (line 3-6).

117 Acacia report CB volume 7 page 683 (line 5-6).

118 Acacia report CB volume 7 page 687 (line 29-30).

mark-up over (marginal) costs was as low as 22% and 32% respectively.[119]

85.6 In its report annexed to the replying affidavit, RBB accepted "the theoretical possibility that some customers might have obtained prices close to or at competitive levels" in circumstances "where those customers' alternatives were substantially similar to competitively priced gas".[120]

85.7 The SCA referred to NERSA's statement in 2012 that "gas prices are higher than those charged in a situation of perfect competition or in a competitive market".[121] But Dr Coppi has explained that this statement does not indicate whether Sasol Gas' prices were above or below the costs of the marginal supplier, which represents the level of competitive prices.[122]

86 It is common cause on the papers that, prior to 25 March 2014, Sasol Gas priced at less than half of the MVP maximum. Applying the *Plascon-Evans* rule, we submit that it cannot be said that Sasol Gas was charging monopoly prices during this period.

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119 Acacia report CB volume 7 page 683 (line 10) read with Table 6 on page 689.

120 RBB replying affidavit report volume 9 page 883 para 68.

121 Determination of inadequate competition – Annexure RAD8 CB volume 2 page 146 para 4.2 (b)(iv).

122 Coppi rejoinder CB volume 10 page 945 to 946 paras 4.49 to 4.53.

The SCA's criticisms of revenue neutrality

87 The SCA found that NERSA's reference to revenue neutrality "is in itself irrational".[123]

88 There was no basis for this finding. The requirement of revenue neutrality is directed at the revenue that is in fact earned by Sasol Gas, and is therefore directed at the prices that are in fact charged for gas. However, the review is not directed at the actual prices that Sasol Gas charges; it is directed at the maximum prices that Sasol Gas is entitled to charge in terms of the Maximum Price Decision.

Conclusion

89 For the reasons set out above, we submit that the SCA erred in finding that the Maximum Price Decision was irrational and unreasonable.

90 If the Court were take a different view of the matter, then we make the following submissions regarding remedy:

90.1 Prayer 1.1 of the amended notice of motion[124] seeks to set aside the Maximum Price Decision. However, the Maximum Price Decision applied during the period up until 30 June 2017.[125] Since the Maximum Price

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123 Supreme Court of Appeal Judgment Annexure FA1 volume 11 page 1054 para 54.

124 Annexure SA1 CB volume 4 page 370.

125 Annexure RAD28 CB volume 3 page 207.

Decision no longer applies, an order setting it aside would have no practical effect in the future.

90.2 The respondents ask the Court to set aside NERSA's decision and to order that, when NERSA makes a fresh decision, the maximum prices approved by NERSA must be taken to have been applicable from 26 March 2014.[126] In other words, NERSA would be required to make a fresh decision for the sole purpose of regulating maximum prices with retrospective effect during the period from 26 March 2014 to 30 June 2017.

90.3 In its answering affidavit, Sasol Gas explained that it has arranged its affairs in terms of the Maximum Price Decision and has concluded contracts with its customers in terms of which it charges less than the maximum price. If NERSA were to approve a maximum price that is less than what Sasol Gas has charged its customers during the period from 26 March 2014 to 30 June 2017, there is no reason why Sasol Gas should be required to repay a portion of the agreed price to its customers.[127] The respondents did not address these contentions in reply.[128]

90.4 The SCA ordered that "any maximum gas prices subsequently approved by [NERSA] for [Sasol Gas] shall apply retrospectively with effect from 26 March 2014 until the date of termination of such approval". This means

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126 Supplementary founding affidavit CB volume 4 page 367 paras 24 and 25

127 Sasol Gas answering affidavit CB volume 6 page 548 para 373.2.

128 Replying affidavit CB volume 9 page 832 para 504.

that NERSA will be required to determine a new maximum price that would serve no purpose other than to apply with retrospective effect during the period from 26 March 2014 to 30 June 2017. If the new maximum price were to be set at a level that exceeds the price that Sasol Gas has in fact charged its customers during the period form 26 March 2014 to 30 June 2017, then the entire exercise would be academic. We respectfully submit that it would be a wasteful use of public resources to require NERSA to engage in an exercise that may prove futile.

THE APPLICATION FOR LEAVE TO APPEAL

91 The application for leave to appeal raises a "constitutional matter" within the meaning of section 167(3)(b)(i) of the Constitution.[129]

92 The application for leave to appeal also raises arguable points of law of general public importance that ought to be considered by this Court in terms of section 167(3)(b)(ii) of the Constitution. Given the subject matter of this case, the "impacts and consequences are substantial, broad-based, transcending the litigation interests of the parties, and bearing upon the public interest".[130]

93 We respectfully submit that Sasol Gas has reasonable prospects of success based on the argument advanced above.

94 We accordingly submit that it is in the interests of justice to grant Sasol Gas leave to appeal.

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129 As this Court held in Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism 2004 (4) SA 490 (CC) para 25, "matters relating to the interpretation and application of PAJA will of course be constitutional matters."

130 SAJ v AOG & 2 Others Supreme Court of Kenya Petition No. 1 of 2013; [2013] KLR, para 31 (available online at http://kenyalaw.org/caselaw/cases/view/84298/), quoted with approval in Paulsen v Slip Knot Investments 777 (Pty) Ltd (3) SA 479 (CC) para 25 and Mokone v Tassos Properties CC 2017 (5) SA 456 (CC) para 17.

RELIEF SOUGHT

95 Sasol Gas asks for an order in the following terms:

(a) The second applicant is granted leave to appeal.

(b) The appeal is upheld and the order of the Supreme Court of Appeal is replaced with an order as follows:

> *The appeal against the judgment and order of the High Court is dismissed with costs (including the costs of two counsel), which costs are to be paid on a joint and several basis.*

(c) *The respondents are directed to pay the costs of the application for leave to appeal and the costs of the appeal (including the costs of two counsel) on a joint and several basis.*

ALFRED COCKRELL S.C.

MKHULULI STUBBS

Counsel for the second applicant

Chambers
Sandton
27 November 2018

IN THE CONSTITUTIONAL COURT

CCT 131/18

SCA CASE NO: 150/2017

In the matter between:

NATIONAL ENERGY REGULATOR OF SOUTH AFRICA	First applicant
SASOL GAS (PTY) LTD	Second applicant

and

PG GROUP (PTY) LTD	First respondent
SOUTH AFRICAN BREWERIES (PTY) LTD	Second respondent
CONSOL GLASS (PTY) LTD	Third respondent
NAMPAK LTD	Fourth respondent
MONDI LTD	Fifth respondent
DISTRIBUTION & WAREHOUSING NETWORK LTD	Sixth respondent
ILLOVO SUGAR SOUTH AFRICA LTD	Seventh respondent

SECOND APPLICANT'S LIST OF AUTHORITIES

South African Judgments:

1 Affordable Medicines Trust and others v Minister of Health and others 2006 3 SA 247 (CC)

2 Albutt v Centre for the Study of Violence and Reconciliation, and Others 2010 3 SA 293 (CC)

3 Associated Institutions Pension Fund v Van Zyl 2005 2 SA 302 (SCA) para 46

4 Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs 2004 4 SA 490 (CC)

5 Calibre Clinical Consultants (Pty) Ltd v National Bargaining Council for the Road Freight Industry 2010 5 SA 457 (SCA)

6 Democratic Alliance v President of the Republic of South Africa 2013 1 SA 248 (CC)

7 Kemp v Van Wyk 2005 6 SA 519 (SCA)

8 Logbro Properties CC v Bedderson NO and others 2003 4 SA 460 (SCA)

9 MEC for Health, EC v Kirland Inv (Pty) Ltd t/a Eye & Lazer Institute 2014 (3) SA 481 (CC)

10 Minister of Health v New Clicks South Africa (Pty) Ltd 2006 2 SA 311 (CC)

11 Mokone v Tassos Properties CC 2017 (5) SA 456 (CC)

12 National Lotteries Board v SA Education and Environment Project 2012 4 SA 504 (SCA)

13 Oudekraal Estates v City of Cape Town 2004 6 SA 222 (SCA)

14 Paulsen v Slip Knot Investments 777 (Pty) Ltd (3) SA 479 (CC)

Foreign judgments:

15 R v Chief Constable of Sussex, ex parte International Traders' Ferry Ltd [1999]1 All ER 129 (HL)
(available online at https://www.bailii.org/uk/cases/UKHL/1998/40.html)

16 SAJ v AOG & 2 Others Supreme Court of Kenya Petition No. 1 of 2013; [2013] eKLR (available online at http://kenyalaw.org/caselaw/cases/view/84298/)

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Counsel for the second applicant

Chambers
Sandton
27 November 2018

THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE CCT 131/18

In the matter between:

NATIONAL ENERGY REGULATOR OF SA	First applicant
SASOL GAS LIMITED	Second applicant
and	
PG GROUP (PTY) LTD	First respondent
THE SOUTH AFRICAN BREWERIES (PTY) LTD	Second respondent
CONSOL GLASS (PTY) LTD	Third respondent
NAMPAK LIMITED	Fourth respondent
MONDI LIMITED	Fifth respondent
DISTRIBUTION & WAREHOUSING NETWORK LTD	Sixth respondent
ILLOVO SUGAR SOUTH AFRICA LTD	Seventh respondent

RESPONDENTS' SUBMISSIONS

CONTENTS

THE ESSENCE OF THIS CASE

1. Sasol Gas Limited has a monopoly in the supply of piped gas in South Africa.[1] It manufactures methane gas locally and imports natural gas from Mozambique. For a decade, the government allowed it to charge monopoly prices for its gas to compensate it for its investment in the development of the Mozambican gas fields.[2] That dispensation ended on 25 March 2014.

2. When Sasol's special dispensation ended, its gas prices became subject to regulation by NERSA under sections 4(g) and 21(1)(p) of the Gas Act 45 of 2001, and regulation 4 of the Piped-Gas Regulations. NERSA had to determine the maximum prices Sasol could charge. It correctly understood that it had to determine competitive market prices for Sasol's gas. NERSA says that it sought "*to mimic a competitive market in order to achieve competitive outcomes*".[3]

3. On 26 March 2013, NERSA determined Sasol's maximum gas prices.[4] However, its determination was wholly irrational and failed in its statutory purpose as it did not constrain Sasol's monopoly prices at all. It allowed Sasol to charge over 50% more than it had done as a monopolist under the special dispensation.[5]

4. The respondents are large industrial users of Sasol's gas. They suffer under Sasol's inflated gas prices. They applied to the High Court to have NERSA's maximum prices reviewed and set aside. Their main grounds of review were that NERSA's determination had been irrational and unreasonable.

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1 We refer to it as Sasol. All the page references are to the pagination of the record that serves before this Court.
2 Mozambican Gas Pipeline Agreement 26 September 2001: vol 1 pp 1–13; an extract of the annexures to Gas Pipeline Agreement: vol 1 pp 14 and 15; s 36 of the Gas Act, 2001.
3 NERSA's answering affidavit: vol 6 p 594 para 5.28.
4 Final Gas Price Determination 26 March 2013: vol 3 pp 207–247.
5 Smith: vol 6 p 880 para 57 (the actual percentage is mentioned in the confidential version of this paragraph vol 31 p 3002).

5. The High Court did not decide the merits of the review.[6] It dismissed the respondents' application by upholding Sasol's special plea of undue delay.[7] It did so only because it held that the time for bringing an application for review under section 7(1) of PAJA ran against the respondents from the date of the first of three steps in NERSA's determination of Sasol's gas prices.[8]

6. The Supreme Court of Appeal held[9] that the High Court had erred by upholding Sasol's special plea of undue delay.[10] The SCA found that the three steps by which NERSA had determined Sasol's gas prices formed part of the same composite administrative action which was finalised only upon completion of the third of those steps, when NERSA determined Sasol's gas prices. It held that "*there was no final decision having a direct external effect until such time as a decision was announced on Sasol Gas's maximum price application*."[11] Only then did time begin to run against the respondents. They launched the review application within 180 days thereafter.

BACKGROUND

Sasol's special dispensation

7. Sasol and a Mozambican partner developed natural gas fields in Mozambique and built a pipeline to South Africa. On 26 September 2001, the government and Sasol concluded a Mozambican Gas Pipeline Agreement.[12] It incorporated a Regulatory Agreement that allowed Sasol to determine its gas prices by "*market value pricing*".[13] This method allowed

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6 High Court Judgment: vol 10 pp 981–991 paras 19–29; see the Supreme Court of Appeal (SCA) Judgment: vol 11 pp 1031–1057 paras 3 and 26–39.
7 Vol 10 pp 988–991 paras 19–29.
8 Vol 10 pp 990–991 paras 25 and 26.
9 Henceforth, we refer to it as the SCA.
10 The reasoning is found at SCA Judgment vol 11 pp 1042–1046 paras 29–39.
11 SCA Judgment vol 11 p 1046 para 39.
12 Mozambican Gas Pipeline Agreement 26 September 2001: vol 1 pp 1–13; an extract of the annexures to Gas Pipeline Agreement: vol 1 pp 14 and 15.
13 Regulatory Agreement 26 September 2001: vol 1 p 15 at clause 8.3.

Sasol to charge its customers prices based on the cost to them of switching from gas to an alternative fuel.[14]

8. It is common cause that only a monopolist – unconstrained by competition – is able to price on this basis, exacting the highest possible price from every individual customer.[15]

9. The Gas Act was passed on 12 February 2002. Section 36(2) provided that the Pipeline Agreement was binding on NERSA for ten years after natural gas was first received from Mozambique. This special dispensation ended on 25 March 2014. Then, for the first time, Sasol's gas prices became subject to NERSA's regulation.

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

11. 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 (f) include efficiency incentives.*"

12. Regulation 4(4) provides that the maximum prices NERSA sets must enable the licensee to "*recover all efficient and prudently incurred investment and operational costs; and … make a profit commensurate with its risk*".

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[14] Regulatory Agreement 26 September 2001: vol 1 p 14 at clause 1.16.
[15] See NERSA's description of it in the Final Inadequate Competition Determination: vol 1 pp 136–151 at p 144 para 4.2(a)(ii).

NERSA's three steps

13. NERSA took three interrelated steps to determine Sasol's maximum gas prices.

14. The first step was to determine the methodology by which to set the maximum prices under section 21(1)(p). It ran from October 2010 to October 2011. Its milestones were:

    14.1 On 21 October 2010, NERSA published a first draft of its Methodology for public comment.[16]

    14.2 In June 2011, NERSA published a second draft of its Methodology.[17]

    14.3 It finally approved its Methodology on 28 October 2011.[18]

    14.4 NERSA gave its reasons for adopting the Methodology on 24 November 2011.[19]

15. NERSA's second step was to determine whether there was inadequate competition in the gas market within the meaning of section 21(1)(p). This process ran from September 2011 to February 2012, with these milestones:

    15.1 In September 2011, NERSA published a draft of its "*inadequate competition*" determination.[20]

    15.2 NERSA made its final "*inadequate competition*" determination on 29 February 2012.[21]

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16 Draft Methodology (1) 21 October 2010: vol 1 pp 16–36.
17 Draft Methodology (2) June 2011: vol 1 pp 37–43.
18 Final Methodology 28 October 2011: vol 1 pp 54–78; its appendices appear at pp 240– 256.
19 Methodology Reasons 24 November 2011: vol 1 pp 79–96.
20 Draft Inadequate Competition Determination September 2011: vol 1 pp 44–53.
21 Final Inadequate Competition Determination 29 February 2012: vol 2 pp 136–151.

16. The third step was NERSA's determination of Sasol's maximum gas prices. It started in December 2012 and was completed in April 2013, with these milestones:

16.1 On 24 December 2012, Sasol made two applications, the one for determination of its maximum gas prices[22] and the other for the determination of its transmission tariffs.[23]

16.2 After initial public comment, NERSA published drafts of its determination of Sasol's two applications on 11 February 2013.[24]

16.3 After public hearings and further submissions, NERSA finally determined both Sasol's applications on 26 March 2013.[25]

16.4 On 24 April 2013, NERSA published reasons for its determinations of Sasol's maximum gas prices and transmission tariffs.[26]

OVERVIEW OF THE CORE ISSUES

How market prices are set

17. Mr Smith, one of the respondents' expert economists, explained how prices are set in competitive and monopolistic markets respectively.[27] He used as an example the prices of motor cycles. We shall follow his example.

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22 Sasol Gas Price Application 24 December 2012: vol 2 pp 152–176; its annexures appear at pp 365–373.
23 Sasol Transmission Tariff Application 24 December 2012: vol 2 pp 177–204; its annexure is at p 402.
24 Draft Price Determination 11 February 2013: vol 16 pp 1489–1510; Draft Transmission Tariffs Determination 11 February 2013: vol 16 pp 1511–1524.
25 Final Gas Price Determination 26 March 2013: vol 3 pp 207–247; Final Transmission Tariffs Determination 26 March 2013: vol 3 pp 248–266.
26 Reasons for Gas Price Determination 24 April 2013: vol 3 pp 210–247; Reasons for Transmission Tariffs Determination 24 April 2013: vol 3 p 249–266; see vol 2 p 312 para 120.
27 Smith: vol 9 p 876 paras 34–37.

In a competitive market

18. In a competitive market, there are several suppliers of motor cycles that compete with one another. They lower their prices as much as they can to compete more effectively with one another. But, in the long run, they cannot reduce their prices lower than a price that covers their cost and gives them a reasonable return. If the price drops lower than that, they would exit the market because it no longer allows them to recover their cost and a reasonable return.

19. Thus, in a competitive market, the price of motor cycles is competed down to their cost of production plus a reasonable return. Say this price is R25.

In a monopoly

20. In a monopoly, there is only one supplier of motor cycles. She is not constrained by competition in the motor-cycle market at all. She can, up to a point, charge as much as she likes because the buyers of motor cycles are at her mercy.

21. Although the monopoly supplier has no competition in the motor-cycle market, she is ultimately constrained by the availability of other means of transport. Assume, for example, that the cheapest motor car on the market is a Golf that sells for R100. As the price of the monopolist's motor cycles approaches R100, more and more of her buyers jump ship and buy Golfs instead. So, the monopolist's price tends towards the price of the cheapest available alternative, in this case, the price of a Golf of R100.

22. Assume the monopolist sells motor cycles in three provinces. In each province, there is only one motor car available on the market. In province A, the only available motor car is a Golf that sells for R100. In province B, it is a Toyota that sells for R200. In province C, it is a BMW that sells for R300. Our monopoly supplier of motor cycles would again exploit

her monopoly to the hilt by charging up to the price of the cheapest available alternative, that is, up to R100 in province A, up to R200 in province B and up to R300 in province C.

Sasol's decade of grace

23. During Sasol's decade of grace, it was allowed to charge monopoly prices. Its Regulatory Agreement with the Minister of Minerals and Energy[28] made that clear:

    23.1 Clause 8.3 said that, subject to the constraint of an international price cap, the basis of Sasol's pricing was "*Market Value Pricing*".[29]

    23.2 Clause 1.16 defined "*Market Value Pricing*" as a price based on the cost to the customer of switching to an alternative fuel.[30]

24. Sasol was thus allowed to charge monopoly prices. It was permitted to exploit its monopoly to the hilt by charging each customer a tailor-made price based on the customer's cost of switching to an alternative fuel.

25. Sasol's pricing thus resembled that of our motor-cycle monopolist exploiting her monopoly to the hilt by charging each customer a different price depending on the cost of switching to the alternative means of transport available to them.

How NERSA approved Sasol's prices

26. NERSA was bound to determine a competitive market price for Sasol's gas. That was indeed what it set out to do. What is more, it appreciated that a competitive market price is one based on cost plus a reasonable return.

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[28] Regulatory Agreement 26 September 2001: vol 1 pp 2–14.
[29] Vol 1 p 15 clause 8.3.
[30] Vol 1 p 14 clause 1.16.

27. However, its determination took an inexplicable turn. NERSA decided to let Sasol choose between two methods for the determination of its gas prices:

27.1 The one was, what NERSA called "*the pass-through of costs*" approach.[31] It was in essence a price based upon Sasol's cost plus a reasonable return. It would in principle have yielded a competitive market price.

27.2 The other option was a price based on a "*basket of alternatives*". It based the price of Sasol's gas on the weighted average price of a basket of alternative fuels, namely coal, diesel, electricity, heavy fuel oil and liquefied petroleum gas.[32] This was quintessentially a monopoly price, based on the prices of the alternative fuels available to Sasol's customers.

28. This choice that NERSA offered to Sasol was in effect like allowing our motor-cycle monopolist to choose whether to charge,

- her cost plus a reasonable return of R25; or
- the average price of a Golf, a Toyota and a BMW of R200.

29. Sasol naturally opted for the basket of alternatives. NERSA accordingly determined its gas price on that basis. It did not bring down Sasol's old monopoly prices at all. Despite the fact that those old prices had been exorbitant,[33] NERSA's maximum prices allowed Sasol to increase its old prices even further – by more than 50%.[34] NERSA's prices allowed Sasol to charge profit mark-ups of up to 400%.[35]

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31 Final Methodology 28 October 2011: vol 1 pp 65–66 para 3.5.
32 Final Methodology 28 October 2011: vol 1 pp 62–63 para 3.1.
33 Founding Affidavit (FA): vol 4 p 355 para 231.2.
34 Smith: vol 6 p 880 para 57 (the actual percentage is mentioned in the confidential version of this paragraph vol 31 p 3002).
35 FA: vol 4 p 355 para 231.3.

30. Not only does NERSA's basket of alternatives allow Sasol to charge monopoly prices, but it is also uniquely eccentric. The SCA noted that no other regulator in the world has ever determined energy prices on this basis.[36]

31. The SCA held that NERSA's determination of Sasol's prices was unlawful and fell to be reviewed and set aside because it was "*wholly irrational and unreasonable*".[37] We respectfully submit that these findings are unassailable.

THE ESSENCE OF THE REVIEW

The decisions on review

32. The respondents asked in the first place that the High Court review and set aside NERSA's determination of Sasol's maximum gas prices and transmission tariffs on 26 March 2013.[38] We shall focus on NERSA's determination of Sasol's gas prices. Despite Sasol's submissions to the contrary,[39] the flaws in the maximum gas-price determinations inevitably also contaminated NERSA's determination of Sasol's transmission tariffs because it was incidental to NERSA's determination of Sasol's gas prices.

33. NERSA's final determination[40] subjected Sasol's gas prices to the following rules:

    33.1 The maximum gas price is R117.69. This price is subject to six categories of volume discount. The discounted prices range from R73.56 to R108.86. They are subject to escalation from 26 March 2013 (clauses 1–3).

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36 SCA Judgment vol 11 p 1052 para 51.
37 SCA Judgment vol 11 p 1055 para 56.
38 Amended notice of motion: vol 4 p 370 prayer 1.
39 Sasol's heads of argument (HOA), paras 32–45.
40 Final Gas Price Determination 26 March 2013: vol 3 p 207.

33.2 Sasol may add a "*trading margin*" of R8.21 to those prices for the first three months, and R10.40 thereafter (clause 7).

33.3 These prices are subject to an overall "*revenue neutrality*" restriction for one year (clause 8(v)). The meaning of this restriction is unclear, but its object is apparently to ensure that Sasol does not earn more revenue overall in the first year of the new dispensation than it had in the final year of the old dispensation.

The grounds of review

34. We focus on the SCA's findings that NERSA's determination of Sasol's prices had failed to comply with the following requirements:

34.1 The first is the requirement of rationality. It is a requirement of the rule of law entrenched in section 1(c) of the Constitution. It is also a fundamental requirement of administrative law. Section 6(2)(f)(ii) of PAJA says that administrative action is reviewable if it "*is not rationally connected to* –

> *(aa) the purpose for which it was taken;*
> *(bb) the purpose of the empowering provision;*
> *(cc) the information before the administrator; or*
> *(dd) the reasons given for it by the administrator …*"

34.2 The second is the requirement of reasonableness. Section 6(2)(h) of PAJA provides that administrative action is subject to review if it is "*so unreasonable that no reasonable person could have so exercised the power or performed the function*".

35. The SCA found that NERSA's determination of Sasol's gas prices was both irrational and unreasonable.[41] This finding, we respectfully submit, is unassailable.

36. In the *DA* case,[42] this court considered the law on the requirement of rationality. It held that that requirement is concerned with the evaluation of the relationship between the means used to achieve a particular purpose and the purpose itself. The object of this enquiry is not to determine whether some means will achieve the purpose better than others, but only to determine whether the means in fact employed are rationally related to the purpose for which the power was conferred. Once there is a rational relationship between means and purpose, the decision is rational.[43]

37. In *Bato Star*,[44] this court held that an administrative decision is reviewable under s 6(2)(h) of PAJA if "*it is one that a reasonable decision-maker could not reach*".[45] The reasonableness of a decision depends upon the circumstances of every case, but the relevant factors that determine reasonableness include: (i) the nature of the decision; (ii) the identity and expertise of the decision-maker; (iii) the range of factors relevant to the decision; (iv) the reasons provided for the decision; (v) the nature of the competing interests involved; and (vi) the impact of the decision upon the lives and well-being of those affected by it.[46]

The real reasons for NERSA's decisions

38. In *National Lotteries Board*,[47] the SCA held that an administrative decision must be judged on review on the basis of the real reasons given for it when it was taken and not on the basis of new reasons advanced after the event.[48]

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41 SCA Judgment vol 11 p 1055 para 56.
42 *Democratic Alliance v President of the RSA* 2013 (1) SA 248 (CC) paras 27–45.
43 See *DA* at para 32.
44 *Bato Star Fishing v Minister of Environmental Affairs* 2004 (4) SA 490 (CC).
45 At para 44.
46 At para 45.
47 *National Lotteries Board v SA Education and Environment Project* 2012 (4) SA 504 (SCA).

39. We submit that an administrative decision must be judged on its true reasons, that is, the considerations that actually motivated the decision-maker. It is plain that a decision that was unlawful, because it was taken for flawed reasons, cannot later be rendered lawful by raising new reasons for it different from those that actually motivated the decision-maker.

40. This principle accords with the rule – confirmed by the SCA in *Rustenburg Platinum Mines*[49] – that, if one of the material reasons for an administrative decision was bad, the decision is unlawful, even if there were also other good reasons for the decision. It also means that a decision tainted by bad reasons when it was taken cannot be saved by good reasons that are later found for it.

41. This is an important principle in the adjudication of this review. NERSA employed Acacia[50] and Sasol employed Dr Coppi[51] to justify NERSA's determination of Sasol's gas prices after the event. Their expansive attempts to do so range far and wide but have precious little to do with the considerations that actually motivated NERSA at the time. Neither Acacia nor Dr Coppi makes any attempt to determine and evaluate NERSA's actual reasons for its decisions on review.

42. Sasol suggests that NERSA's Consultation Document of 21 October 2010[52] is "*the most important document in the record*" and criticizes the SCA for not having mentioned it in its judgment.[53] But this is a sleight of hand. The Consultation Document was the start of NERSA's process to determine Sasol's maximum prices. The irrationality of NERSA's determination lies in its outcome and not in its starting point.

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48 At paras 26 and 27.
49 *Rustenburg Platinum Mines v CCMA* 2007 (1) SA 576 (SCA) para 34.
50 Acacia: vol 7 pp 648–705.
51 Coppi (1): vol 6 pp 551–569; Coppi (2) vol 17 pp 821–839.
52 Vol 15 p 1413.
53 Sasol's HOA para 58.

NERSA'S DECISIONS WERE IRRATIONAL AND UNREASONABLE

NERSA determined that Sasol has "*inadequate competition*"

43. On 29 February 2012, NERSA concluded that there was "*inadequate competition*" in the piped-gas market within the meaning of section 21(1)(p) of the Gas Act.[54] It reached this conclusion as follows:

43.1 It said that the important first step was to identify the relevant market in which Sasol operated.[55] It concluded that the relevant market was "*the supply of piped-gas in South Africa*".[56]

43.2 It noted that Sasol was the only supplier of natural gas in South Africa.[57] Sasol had a monopoly in the market for the supply of piped gas.

43.3 Sasol also exercised the market power of a monopolist by basing its prices on "*the cost of an alternative energy source available to an individual customer*".[58]

43.4 NERSA described thus the lack of competition in the market and Sasol's exploiting it:[59]

> "*In the piped-gas market, there is a single supplier participating in all the levels of the supply chain, and it owns the gas supplied in the South African piped-gas market. The monopolist has market power, and as evidenced by current pricing practices and previous complaints concerning discriminatory and high prices as well as challenges in accessing and/or sourcing gas supply, it is our submission that market power has been exercised and misused. The Market Value Pricing mechanism practised by the monopolist*

54 Final Inadequate Competition Determination 29 February 2012: vol 2 p 136.
55 Vol 2 pp 138 para 2.6.
56 Vol 2 p 141 para 2.6.2.
57 Vol 2 pp 139–140 para 2.6.1. (This is apart from Petro SA, which produced for own use only.)
58 Vol 2 pp 144–145 para 4.2(a)(ii).
59 Vol 2 p 148 para 4.2(c).

> *over a period of seven years without losing sales or big customers and without entry at transmission, distribution or wholesale levels, is the evidence of market power and weak competition.*"

43.5 NERSA concluded that "*competition in the piped-gas market is inadequate*".[60]

44. These findings formed the basis of NERSA's later determination of Sasol's gas prices.

NERSA sought to determine a competitive market price

45. NERSA understood that its benchmark for the determination of Sasol's maximum gas price was a competitive market price for gas, that is, the price at which gas would have traded in the pipe-gas market had Sasol competed with other suppliers:

45.1 In the first draft of its Methodology, NERSA described its mandate under the Gas Act and Regulations as follows:[61]

> "*NERSA's mandate is to apply regulation in the absence of a competitive market. This implies NERSA should encourage competition and seek to replicate competitive market outcomes in approving maximum prices.*"

45.2 In its answering affidavit, NERSA again confirmed that it sought "*to mimic a competitive market in order to achieve competitive outcomes*".[62]

NERSA was bound to determine a competitive market price

46. NERSA's understanding was indeed correct. On a proper construction of the Gas Act and Regulations, the purpose of NERSA's determination of maximum prices is to compensate for the lack of competition by simulating competitive market prices:

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60 Vol 2 p 150 para 4.3.
61 Draft Methodology (1) 21 October 2010: vol 1 p 16.
62 NERSA AA: vol 6 pp 594–595 para 5.28.

46.1 Section 4(g) of the Gas Act requires NERSA to regulate prices, "*in terms of section 21(1)(p)*" and "*in the prescribed manner*".

46.2 Section 21(1)(p) requires NERSA to intervene by setting maximum prices "*where there is inadequate competition*". If there is adequate competition in the market, NERSA may not interfere. Only when there is inadequate competition must it set maximum prices. The purpose of NERSA's intervention is to make up for the inadequate competition in the market. It can achieve this only by simulating a competitive market, by setting a maximum price at the level it would have been in a competitive market.

46.3 Regulation 4(4) reinforces this understanding. It says NERSA's maximum price must allow the licensee to recover its reasonable costs plus a profit commensurate with its risk. This is the same as a competitive market price. In a competitive market, the price of a commodity is typically competed down to cost plus a reasonable profit. Thus, regulation 4(4) implies that the benchmark NERSA must use, to set a maximum price, is the competitive market price.

47. NERSA's understanding also accords with the normal purpose of price regulation:

47.1 The respondents explain that:

> "*[t]he typical economic motivation for price regulation is that, in a market where effective competition is absent, firms are likely to possess market power, and* thus *are able to raise prices above competitive levels, to the detriment of customers. In other words, the purpose of the intervention is to impose maximum prices that prevent the charging of prices that are in excess of competitive levels.*"[63]
>
> [emphasis added]

[63] FA: vol 4 p 324 para 151; emphasis added.

47.2 The respondents' expert witness Mr Murgatroyd confirmed this.[64]

47.3 Their other expert witness Mr Smith also said:

> "*It is trite that price regulation exists to regulate the pricing of firms that are insufficiently constrained by competition. Such firms will increase their prices up to the next available constraint, which might include other products and outside options, which are not normally, under conditions of adequate competition, considered as substitutes.*"[65]
>
> [emphasis added]

48. Accordingly, NERSA was bound to approve Sasol's gas price on the basis of its competitive market price. This was what the Gas Act and Regulations require and what NERSA, in fact, set out to do.

NERSA's understanding of a competitive market price

49. NERSA understood that a competitive market price is one that covers the supplier's cost plus a reasonable profit.

49.1 In the draft of its Methodology of 21 October 2010, NERSA said that "*the spot price for gas in a market environment would tend toward its marginal cost*" and that "*the regulated maximum price for the gas energy component of the maximum price should shadow the* hypothetical *price that would occur if competition were not limited*".[66]

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64 Murgatroyd: vol 2 pp 375–376 paras 2.2–2.5; emphasis added.
65 Smith: vol 9 p 872–873 para 8; emphasis added.
66 Draft Methodology (1) 21 October 2010: vol 1 p 25 para 6.

49.2 In its draft Inadequate Competition Determination of September 2011, it repeated that "*[i]n competitive market conditions, a firm prices its products at the level where the price equals the marginal cost.*"[67]

49.3 In its Final Inadequate Competition Determination of 29 February 2012, it elaborated on this understanding, saying that "*[i]n competitive market conditions, a firm prices its products at the level where the price equals the marginal cost. If the price is above marginal cost, the economics theory concludes that such a firm has market power to influence prices without losing business to competitors.*"[68]

50. NERSA's understanding was correct and uncontroversial. It accords with Mr Smith's explanation that in a competitive market the rival suppliers compete the market price down to cost plus a reasonable return.[69] The Brattle Group agrees with Mr Smith.[70] They also confirm that the benchmark for the regulation of gas prices internationally is cost plus a profit margin.[71] Professor Coppi does not challenge them on this score.

51. Thus, NERSA set out to determine the competitive market price for gas, as it was bound to do. It knew that "*the ABC of economics*", the Gas Regulations and international best practice required it to determine the competitive market price on the basis of cost plus a reasonable profit. Up to this point, NERSA got it right.

NERSA's irrational and unreasonable deviation

52. The SCA held that – having set out to determine a competitive market price and being aware that such a price is normally equal to the cost plus a reasonable profit – NERSA

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67 Draft Inadequate Competition Determination September 2011: vol 1 p 49 para 2.13.
68 Final Inadequate Competition Determination 29 February 2012: vol 2 p 146 para 4.2(b)(iv).
69 Smith: vol 9 p 876–877 paras 34–39.
70 Brattle: vol 9 p 839 paras 8–9.
71 Brattle: vol 9 p 841 paras 19–20.

took an irrational turn by basing Sasol's gas price on the weighted average price of a "*basket of alternatives*", comprising coal, diesel, electricity, heavy fuel oil and liquefied petroleum gas. It adopted this formula in its Methodology of 28 October 2011[72] and applied it in its determination of Sasol's gas prices on 26 March 2013.[73] The SCA held that NERSA's "*fundamental error*" was to use "*a basket of alternative fuels as a reference point to determine a competitive price for piped-gas*"[74] such that it resulted "*in an even higher monopoly price than that which Sasol Gas was already charging – and which NERSA itself regarded as too high and a misuse of market power – rather than a price in a hypothetical competitive market*".[75]

53. NERSA adopted this formula without explaining how the competitive market price of Sasol's gas could ever be equal to the weighted average price of those alternative fuels. The SCA held that this approach was "*simply illogical*".[76] NERSA's reasons for its Methodology invoked the formula without explanation.[77] In its reasons for its Final Gas Price Determination, NERSA said no more than that it had applied the formula in the Methodology.[78]

54. It is obviously irrational to suggest that, in a market where Sasol competes with other suppliers of piped gas, their price would equal the weighted average price of coal, diesel, electricity, heavy fuel oil and liquefied petroleum gas. NERSA offered no rational explanation for this equation. There is none.

55. The respondents describe the irrationality of NERSA's formula.[79] So does Mr Smith.[80]

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72 Final Methodology 28 October 2011: vol 1 p 62–63 para 3.1.
73 Final Gas Price Determination 26 March 2013: vol 3 p 208 para 1; Reasons for Gas Price Determination 24 April 2013: vol 2 pp 254–262 para 4.
74 SCA Judgment vol 11 p 1050 para 48.
75 SCA Judgment vol 11 p 1051 para 49.
76 SCA Judgment vol 11 p 1050 para 48.
77 Methodology Reasons 24 November 2011: vol 1 pp 83–84 paras 19–26.
78 Reasons for Gas Price Determination 24 April 2013: vol 3 p 220–225 para 4.
79 Replying affidavit ("RA"): vol 8 pp 718–723 paras 51–68.
80 Smith (1): vol 9 p 893 paras 118–120.

56. The Brattle Group confirms that NERSA's methodology "*has no connection with the price that would result from a competitive market*".[81] Their undisputed evidence is that, while cost-based regulation of gas prices is the norm internationally and "*has for over a decade routinely been applied in Europe and the US*", "*we have not seen the basket of alternatives methodology implemented in any other jurisdiction*".[82] NERSA's formula is truly maverick: no other regulator in the world has ever used it. The SCA thus concluded that no other regulator has used the basket of alternatives since it "*truly does not, and cannot, be used to mimic a competitive market and determine a competitive price*".[83]

57. NERSA's maverick price was exacerbated by its addition of a "*trading margin*", to the base price determined on the basis of the weighted average of the basket of alternative fuels.[84] The addition of the trading margin is irrational for the simple reason that the prices of the other fuels in the basket already include the trading margins of their suppliers. Accordingly, NERSA's addition of a further trading margin on top of those prices amounts to a double profit markup. When the respondents made this point in their founding affidavit,[85] NERSA responded with a bare denial.[86]

58. NERSA compounded the irrationality of its determination by allowing Sasol to choose between the price based on a basket of alternatives[87] and one based on a "*pass-through of costs*", that is, one based on Sasol's cost plus a reasonable return.[88] It was no surprise that Sasol chose the basket of alternatives: it yielded a much higher monopoly price. Accordingly, NERSA ultimately based Sasol's prices on the weighted average price of the basket of alternatives.

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81 Brattle: vol 9 p 839 para 8.
82 Brattle: vol 9 pp 841–842 paras 19, 20 and 23.
83 SCA Judgment vol 11 p 1052 para 51.
84 Final Gas Price Determination 26 March 2013: vol 3 p 208 para 7; Reasons for Gas Price Determination 24 April 2013 vol 3 pp 225–234 para 5.
85 FA: vol 4 pp 351–352 paras 219–221.
86 NERSA AA: vol 7 p 641 para 99.
87 Final Methodology 28 October 2011: vol 1 p 54 at pp 62–63 para 3.1.
88 Final Methodology 28 October 2011: vol 1 p 54 at p 65–66 para 3.5.

The proof is in the prices

59. The SCA found that the proof is in the pudding: the irrationality and unreasonableness of NERSA's maximum prices are borne out by how far they exceed the prices Sasol once charged as a monopolist. It held that "*the fact that its new methodology permitted such a huge increase above what NERSA had already determined were excessively high prices, speaks volumes in respect of the irrationality of using a methodology which produces such an absurd and unreasonable result*".[89]

60. NERSA itself described Sasol's pricing practices at that time as "*an example of perfect price discrimination by a dominant supplier*" and as the pricing practices of a monopolist with market power which it exercised and abused.[90] In spite of those damning findings, NERSA's prices allowed Sasol to charge significantly more.

61. In their founding affidavit, the respondents calculated, as best they could on the available information, that, while Sasol's average gas price under its special dispensation had been R51.56, NERSA's average price was R102.79 – almost double the price Sasol had charged as a monopolist.[91] The respondents observed:

> "*The fundamental irrationality of the impugned decisions is evident from the above comparisons. Whereas the objective of the powers exercised by NERSA in making its decisions is to reduce Sasol's current monopoly prices to competitive levels, those decisions would have the opposite effect – the maximum prices approved by NERSA would entitle Sasol Gas to charge effectively double the average price that it currently does, and even Sasol Gas's initial proposed pricing is almost certain to result in higher revenues than those it enjoyed under the MVP pricing model of the special dispensation.*"[92]
>
> [emphasis added]

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89 SCA Judgment vol 11 p 1049 para 47.
90 Final Inadequate Competition Determination 29 February 2012: vol 2 pp 144–145 para 4.2(a)(ii) and p 148 para 4.2(c).
91 FA: vol 4 p 312–315 paras 121–128; p 318 para 136; p 340–344 paras 196–205.
92 FA: vol 4 p 318 para 136.

62. NERSA's answer suggests that it had no idea whether its prices allowed Sasol to charge higher prices than before. Its deponent makes no more than a bald denial,[93] which is meaningless since NERSA fails entirely to deal with the comparison between Sasol's old prices and NERSA's prices.

63. NERSA referred to the Acacia Report.[94] It quibbled with the respondents' figures. Yet, on its own figures, Acacia also said that NERSA's prices allow Sasol to charge 28% more than before.[95]

64. Sasol's failure to respond to the respondents' complaint, that NERSA's prices allow it to charge higher prices than it had as a monopolist, is revealing. Sasol is best placed to make the comparison. Yet, it avoids the issue. Its excuse is that the respondents fail to compare apples with apples: they compare Sasol's former actual prices with the maximum prices NERSA now permits it to charge.[96] But this excuse is disingenuous. The respondents' attack is directed at NERSA's maximum prices because they do not constrain the monopoly prices Sasol charged before. It thus makes perfectly good sense to compare the prices Sasol actually charged as a monopolist with the maximum prices NERSA now permits it to charge. The relevance of the comparison is clear. Sasol avoids it only because it is utterly damning, as the SCA emphatically found. It shows that NERSA's maximum prices serve neither their statutory purpose nor the purpose NERSA itself sought to achieve.

65. The respondents' expert witness Mr Smith again made the comparison in reply but now with better information at his disposal than before. He demonstrated that NERSA's determination allows Sasol to charge over 50% more than it had done as a monopolist.[97]

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93 NERSA AA: vol 7 p 633 para 89.1.
94 NERSA AA: vol 7 p 634 para 89.2.
95 Acacia: vol 7 pp 668–687 para 7.1.
96 Sasol AA: vol 6 p 505–515 paras 285–292; pp 526–528 paras 328–331; p 530 para 339.
97 Smith: vol 6 p 880 para 57 (the actual percentage is mentioned in the confidential version of this paragraph: vol 31 p 3002).

While Sasol filed further affidavits to rebut the respondents' reply, it did not challenge the accuracy of Mr Smith's comparison. One must, accordingly, accept – as the SCA did – that NERSA's maximum prices allow Sasol to charge over 50% more than the prices it had charged as a monopolist. NERSA fails to provide any coherent justification for this bizarre outcome.

66. Sasol advances yet another remarkable argument in an attempt to escape the difficulty of its inherently illogical position.[98] It says that the "*cost plus*" basis for the determination of maximum prices is flawed because there is scope for legitimate debate over the variant of costs to use in the calculation. But this argument is to no avail:

66.1 First, NERSA adopted Sasol's "*pass through*" costs as one of the bases for the determination of Sasol's maximum gas prices. It is just another name for a cost plus price. The theoretical debate about the precise variant of costs to use for such a determination, is, accordingly, not an insurmountable problem.

66.2 The Brattle Group's undisputed evidence is that cost-based regulation of gas prices is the norm internationally and has for over a decade routinely been applied in Europe and the US.[99]

66.3 The debate about the most appropriate measure of costs in the determination of a cost plus price thus does not pose an insurmountable problem. The debate in any event does not justify NERSA's approval of the "*basket of alternatives*", which allows Sasol to charge prices significantly higher than those it had charged as a monopolist. That is the root of the irrationality of what NERSA did.

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98 Sasol's HOA, paras 64–68.
99 Brattle vol 9 pp 841–842 paras 19, 20 and 23

NERSA's "*revenue neutrality*" restriction

67. Late in the day, it apparently dawned on NERSA that, far from curtailing Sasol's monopoly prices, its maximum prices would allow Sasol to charge even higher prices than before. NERSA must have realised that it would be a perverse outcome if its attempt at price regulation did not constrain Sasol's monopoly prices but allowed it to charge higher prices than before. It accordingly imposed what it called the requirement of "*revenue neutrality*". Its meaning is unclear, but it seems to be that Sasol may not earn more revenue in the first year of the new regime than it had done in the last year of the old regime.

68. The "*revenue neutrality*" restriction was obviously an afterthought. There were no traces of it in: (i) the Methodology NERSA adopted on 28 October 2011;[100] (ii) the reasons it gave for its Methodology on 24 November 2011;[101] (iii) its final determination of "*inadequate competition*" on 29 February 2012;[102] or (iv) in its its draft determination of Sasol's Gas Price Application of 11 February 2013.[103] This is also borne out by the record of NERSA's decision-making process disclosed under rule 53. There is no sign of any consideration by NERSA of the "*revenue neutrality*" constraint.[104] NERSA also offers no real explanation in reply.[105]

69. NERSA unilaterally imposed the "*revenue neutrality*" restriction as part of the "*transitional mechanism*" in paragraph 7 of its Final Gas Price Determination.[106] It said that "*Sasol Gas must demonstrate revenue neutrality between annual revenues based on prevailing prices between 26 March 2013 to 25 March 2014 and the forecasted revenues for the period 26 March 2014 to 25 March 2015 based on the approved Maximum Prices as at*

[100] Final Methodology 28 October 2011: vol 1 pp 54–78.
[101] Methodology Reasons 24 November 2011: vol 1 p 79–96.
[102] Final Inadequate Competition Determination 29 February 2012: vol 1 p 136–151.
[103] Draft Gas Price Determination 11 February 2013: vol 5 p 403–424.
[104] Supplementary FA: vol 4p 366 para 20.
[105] NERSA AA: vol 7 p 645 para 111.
[106] Final Gas Price Determination 26 March 2013: vol 3 p 235–239 para 7.

26 March 2014, less any revenue foregone due to the transitional mechanism." It thus seemed to say that Sasol must demonstrate that its overall revenue for the first year of the new regime will be no greater than its overall revenue for the last year of the old regime.

70. NERSA gave the most extraordinary explanation for this restriction in its reasons for its determination of Sasol's gas prices.[107]

70.1 It said in paragraph 7.8 that it imposed "*revenue neutrality*" because it realised that its prices would let Sasol charge even more than before.

70.2 It acknowledged in paragraph 7.9 that it did not have the power to impose "*revenue neutrality*" but nevertheless imposed it to avoid "*industry-wide price increases*".

70.3 It said in paragraph 7.11 that it imposed the restriction because Sasol Gas "*indicated at the public hearing of 20 March 2013 that revenue neutrality was an intended outcome of the price restructuring required in terms of the Gas Act*". This statement is remarkable for two reasons. First, NERSA seems simply to have followed Sasol's dictate. Second, it was a clear error of law. The Gas Act does not suggest that NERSA should allow a monopolist to earn the same revenue as before.

70.4 NERSA concluded in paragraph 7.12 that the implementation of its prices "*must leave Sasol Gas neither better off nor worse off in terms of revenue earned and profitability*". That was a perverse benchmark for NERSA's control of Sasol's gas prices. Under the special dispensation, Sasol had enjoyed a monopoly. The

[107] Reasons for Gas Price Determination 24 April 2013: vol 3 p 237–239 paras 7.8, 7.9, 7.11 and 7.12.

purpose of NERSA's price control was to curtail Sasol's prices to those in a competitive market. To say that its revenue should not be diminished, is to pervert the statutory purpose of NERSA's price control.

71. Later correspondence between the respondents' attorneys and NERSA made it clear that it did not understand its own "*revenue neutrality*" restriction. On 15 August 2013, the respondents' attorneys asked NERSA to clarify what "*revenue neutrality*" meant and how it would be applied.[108] NERSA's response of 16 September 2013 made it clear that it had no idea what the restriction meant and that it had decided to ask Sasol how to implement it.[109] This correspondence demonstrates that NERSA did not understand its own price determination and blandly took its lead from Sasol.

72. Sasol now suggests that the belated addition of the revenue neutrality requirement was not a departure from NERSA's Methodology because the Methodology dealt with maximum prices while the requirement of revenue neutrality dealt with actual revenue.[110] But it does not withstand scrutiny. The requirement of revenue neutrality imposed an overall maximum cap on the prices Sasol was permitted to charge for its gas. It qualified the maximum prices NERSA had determined.

73. The SCA thus held that NERSA "*decided to apply a criterion which it could not define and did not understand*", and which "*is both irrational and unreasonable*".[111]

Conclusion

74. NERSA's determination of Sasol's maximum prices was irrational and unreasonable. The SCA's findings in this regard cannot be criticized. It is beyond dispute that no other

[108] Norton Rose Fulbright South Africa letter 15 August 2013: vol 3 p 267 at p 268 paras 7–8.
[109] NERSA letter 16 September 2013: vol 3 pp 269–270.
[110] Sasol's HOA para 29.
[111] SCA Judgment vol 11 p 1055 para 55.

regulator has ever employed its maverick "*basket of alternatives*" price formula. This eccentricity is exacerbated by the addition of a trading margin purportedly capped by an ineffectual temporary "*revenue neutrality*" restriction.

THE TARIFF DECISION

75. The SCA treated correctly NERSA's determination of Sasol's maximum gas prices and distribution tariffs as interrelated decisions that stand or fall together.

76. The close interrelation between the maximum gas price and further tariffs or levies (like distribution or transmission tariffs) is clear from regulation 4 of the Piped-gas Regulations, which in relevant part provides:

> "*Price regulation principles and procedures*
> *4.*
> …
> *(6) When gas is sold, the accompanying sales invoice must itemise the constituent elements of the total price reflected on the invoice, including at least the cost of gas, any transport tariffs and any other charges.*
> …
> *(13) When the ownership of gas changes, the price of gas in the new owner's hands refers to the price of gas from the seller plus any tariffs charged by that seller.*"

77. Thus, regulation 4 envisages a composite total price that – while comprised of "*constituent elements*" – is a single price for a single, undifferentiated product, namely gas as received by the customer, which is naturally enough invoiced at one and the same time.

78. What is more, in line with this notion underpinning regulation 4, at all times NERSA understood that it was entrusted with the task of determining the maximum total price that a customer would pay for receipt of gas at its premises.

79. This is clear from the Consultation Document of 21 October 2010, which Sasol considers – erroneously, we respectfully submit – the most important document in the record.[112] The following is a good example:

> "*It is important to note that the maximum price of piped-gas, is a composite of different charges and tariffs accruing up to the point of sale. To this end, NERSA is mandated in terms of section 4(h) of the Gas Act to 'monitor and approve, and if necessary regulate, transmission and storage tariffs and … ensure that they are applied in a non-discriminatory manner.*"[113]

80. It is equally clearly apparent from the terms and structure of the Methodology itself, from the terms of Sasol's "suite of applications" and from the manner in which NERSA considered that suite. That this was so is borne out by a range of contemporaneous documents.

81. In the first place, NERSA's final Methodology of 28 October 2011 bears out how inextricable the subject-matter of the maximum gas price and transmission tariff decisions are.

81.1 In paragraph 2.2, under the heading "Relationship between the tariff guidelines (2009) and the methodology to approve maximum prices for piped-gas (2011)", *inter alia* the following is said:

> "*Therefore the Gas Act differentiates between the methodology that NERSA can use to monitor and approve, and if necessary regulate tariffs and to approve maximum piped-gas prices. The tariff guidelines thus give guidance on all transmission and storage tariff activities which are considered a pass-through in this maximum prices methodology. Hence, the Maximum Pricing Methodology has references the determination of the trading margins to the Tariff Guideline to ensure that there is consistency in the decisions taken by the Energy Regulator.*"[114]

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[112] Vol 1 pp 1416–1419; 1423–1448 *passim*. See also the Consultation documents "RAD12" (vol 16 pp 1489–1510; see pp 1507–1509 para 7) and "RAD13" (vol 16 pp 1511–1524)
[113] Vol 16 p 1419.
[114] Vol 1, pp 59–60.

81.2 The structure of the Methodology further demonstrates this interconnectedness.

81.2.1 Paragraph 3 is headed “Determining the maximum prices of piped-gas”.[115] Paragraph 3.1 is entitled “Formula for calculation of the maximum price of gas” and contains the equation representing the basket of alternatives, by which GE, the maximum price for gas energy (ZAR/GJ) at the point of its first entry into the piped-gas transmission/distribution system is calculated.[116]

81.2.2 Having dealt with the manner of determination of the piped-gas trading margins (in paragraph 3.6),[117] in paragraph 4, which is headed “Total prices/charges for piped-gas by transmission, distribution, and trading licensees”, the Methodology presents a series of further equations, by means of which the total price of gas is determined.[118]

81.2.3 In paragraph 4.1, headed “Total piped-gas prices by transmission traders inclusive of approved maximum price, margins and applicable tariffs”, the total maximum price that might be charged by transmission traders is calculated.[119] In paragraph 4.2, the equation is set out by which to determine the total maximum price that distribution traders may charge[120] and, in paragraph 4.3, the equation is posited governing the equivalent maximum price that trading

[115] Vol 1 p 62.
[116] Vol 1 pp 62 and 63.
[117] Vol 1 p 67–72.
[118] Vol 1 pp 72–77.
[119] Vol 1 pp 72 and 73.
[120] Vol 1 pp 73 and 74.

licensees may charge[121] and, in paragraph 4.4, the equation for trading storage licences.[122]

81.2.4 Each of those equations thus calculates the various maximum total prices that may be charged, of which GE is the first component. In each case, one of the further components is the pass-through of distribution (network) tariffs.

81.2.5 In paragraph 5, which is headed "Utilisation of maximum gas prices in defining prices per customer class", *inter alia* the following is said:

> "*NERSA will in terms of this methodology approve a single maximum price per licensee, based on which customer category maximum prices will be approved.*"[123]

81.3 The Methodology, read as a whole, demonstrates that it records the process by which NERSA would determine maximum total gas prices. As we say above, the basket of alternatives formula, by which the GE price is determined, is framed in paragraph 3.1. It is but the first stage by which the Methodology ultimately achieves its object, that is, to calculate the maximum total price of gas, per category of consumer (which includes the GE price and the distribution tariff).

81.4 The Methodology clearly encapsulates NERSA's understanding that the process is wholly interwoven.

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[121] Vol 1 pp 74 and 75.
[122] Vol 1 pp 75–77.
[123] Vol 1 p 77.

82. Not surprisingly, the very same understanding on NERSA's part is evinced in its reasons for the final Methodology of 24 November 2011. This is encapsulated in the following observations:

> "*The formula above [sc. the basket of alternatives formula] is used exclusively for the maximum price of gas energy and does not include trade margins, distribution tariffs, transmission tariffs, storage tariffs and levies.*
>
> *Once the maximum price of gas is arrived at, all other charges (tariffs and levies) mentioned above shall be included to arrive at the 'total gas charges' to be invoiced by a licensee.*"[124]

83. Accordingly, while, in light of the stakeholder input mentioned in paragraph 33,[125] the final Methodology keeps the process of determining the GE price distinct from the subsequent addition of tariffs and levies, the entire process is geared to the determination of the "*resultant sum*", which "*will be the total 'charges for gas'*".[126]

84. In line with this approach, the two applications that Sasol filed together on 24 December 2012, that is, its application for the determination of its maximum price[127] and for the determination of its distribution tariffs,[128] in their own terms inevitably fall to be construed together. Sasol's understanding in this regard was the same as that of NERSA.

84.1 Paragraphs 7.4 and 7.5 of the former application read:

> "*The maximum price application, the application for the approval of distinguishing features, and the application for the approval of a trading margin ('the Application') is one of two applications namely, (i) the Application; and (ii) the Tariff Application.*
>
> *In preparing these applications Sasol Gas has sought to balance price and customer retention on the one hand and shareholder value on the other. The suite of applications achieves this balance. The proposed class maximum prices were determined in terms of an international benchmarking process and mechanism are being proposed for approval to ensure that as*

[124] Vol 1 pp 83 and 84 paras 22 and 23.
[125] Vol 1 p 86.
[126] Vol 1 pp 86 and 87 paras 34 and 35.
[127] Vol 1 p 152.
[128] Vol 2 p 177.

> *many customers and possible are able to continue buying gas in terms of the proposed pricing mechanism.*"[129]

84.2 In Sasol's view, this "*suite of applications*" has a single unified goal, that is, to determine maximum total prices per category of customers that would balance price and customer retention with shareholder value. Such maximum total prices, which were made up of the GE price and tariffs and levies, was what Sasol had in its gaze throughout the application process.

84.3 These sentiments are echoed in paragraphs 7.5 and 7.6 of the latter application, for distribution tariffs.[130]

85. There were two consolidated public hearings held in respect of both applications, on 19 February and 20 March 2013.[131]

86. NERSA released its decisions and reasons in respect of both applications on the same day, 26 March 2013.[132] Again, the decisions and reasons document in respect of the maximum price application turns its attention first to the determination of the GE price,[133] then the trading margin,[134] whereupon the total gas prices (inclusive of tariffs) is deal with.

87. We submit that from a *conspectus* of all the documents in the record that NERSA was at all times engaged in the process of determining a maximum total gas price and that the suite of applications Sasol made served the single unitary purpose of determining that composite total price.

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[129] Vol 2 p 158.
[130] Vol 2 p 183.
[131] Vol 3 p 240 para 8.3; p 264 para 6.1.
[132] Vol 3 p 207 and p 248 respectively.
[133] Vol 3 pp 216–225 paras 3 and 4.
[134] Vol 3 pp 225–234 para 5.

88. There is simply no basis upon which to disaggregate the two decisions, which would be to ignore the way in which NERSA, the decision-maker in question, took them.

THE SPECIAL PLEA OF UNDUE DELAY

Introduction

89. The High Court upheld Sasol's special plea of undue delay. Its *ratio*[135] may be summarised as follows:

89.1 Regulation 4(3) obliged NERSA to determine its Methodology.

89.2 It follows that NERSA was bound by its Methodology once determined.

89.3 NERSA determined Sasol's gas prices in accordance with its Methodology. Because it was bound to do so, it is not open to the respondents to attack the gas prices unless the Methodology is reviewed and set aside.

89.4 The respondents applied for NERSA's Methodology to be reviewed and set aside, but their application was fatally out of time since they launched it only about two years after NERSA had determined its Methodology.

90. We submit with respect that the SCA was correct in finding that the High Court had erred in upholding Sasol's special plea of undue delay.

90.1 In the first place, while regulation 4(3)(a) required NERSA to be objective, that is, to apply a systematic methodology on a consistent and comparable basis, it did

[135] High Court Judgment: vol 11 pp 990–991 paras 25–29.

not oblige NERSA to make a freestanding upfront determination of its Methodology before doing so.[136]

90.2 NERSA chose to make an upfront determination of its Methodology but made it clear that it was not final. It gave Sasol a choice between the basket of alternatives and the pass-through approach. It meant that, until Sasol's choice was made, the Methodology was in its own terms hypothetical and subject to change.[137]

90.3 The Methodology was, in any event, not binding on NERSA in its determination of Sasol's gas prices. NERSA's determination of its Methodology and its determination of Sasol's gas prices formed part of a composite process under section 21(1)(p) of the Gas Act. Each step in the process did not stand on its own. Each was merely an interim step towards NERSA's determination of Sasol's maximum prices. They were not final and binding until NERSA completed the composite process by determining Sasol's gas prices.[138]

90.4 NERSA in any event did not determine Sasol's gas prices in accordance with its own Methodology. At the eleventh hour, it added the overriding requirement of "*revenue neutrality*", as the SCA characterised it, "*to achieve what it felt was a more equitable result*".[139] It rendered NERSA's determination of Sasol's gas prices unlawful even if it was bound by its Methodology.

[136] SCA Judgment vol 11 p 1043 para 32.
[137] SCA Judgment vol 11 pp 1044 and 1045 paras 36 and 37.
[138] SCA Judgment vol 11 p 1044 para 35.
[139] SCA Judgment vol 11 pp 1045 and 1046 para 38.

Regulation 4(3) does not require a freestanding upfront Methodology

91. The language of regulation 4(3)(a) does not oblige NERSA to adopt a freestanding upfront Methodology.[140] It merely requires of NERSA, when it determines maximum gas prices, to "*be objective i.e. based on a systematic methodology applicable on a consistent and comparable basis*"*.* It does not require NERSA to make an upfront determination of the methodology by which it will determine Sasol's gas prices. It merely requires NERSA to be objective and precludes it from determining gas prices on an *ad hoc* basis.

92. NERSA's determination of the Methodology and its determination of the maximum gas prices are parts of the same composite process under s 21(1)(p) of the Gas Act. NERSA chose to implement the process step by step, but it did not have to do so. Sasol's argument that NERSA's determination of its Methodology was separate and freestanding administrative action is indeed premised upon this misconception: since NERSA implemented the process step by step, it seeks for that reason alone to accord to each step an independent, self-standing status.[141]

93. Plainly, NERSA was not required by law to implement the process in steps or to determine its Methodology before it determined Sasol's gas prices. The fact that it did so does not make the Methodology separate administrative action on its own.

The Methodology was not final

94. The SCA held that the Methodology was not final.[142] We submit with respect that it was correct.

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[140] SCA Judgment vol 11 p 1043 para 32.
[141] Sasol's HOA paras 15–20.
[142] SCA Judgment vol 11 pp 1044 and 1045 paras 36 and 37.

95. NERSA itself did not purport to make a final determination of its Methodology. In its own terms, the Methodology made it plain that it was not final but was subject to change:

95.1 NERSA adopted its Methodology on 28 October 2011. It provided for Sasol's gas prices to be determined on the basis of the weighted average of a "*basket of alternatives*".[143] However, it went on to say that it would allow Sasol to choose whether its prices should be based on the "*basket of alternatives*" or on Sasol's own on costs, which it called the "*pass-through*" approach.[144] Accordingly, the Methodology left it open to Sasol to choose the method. It added that, once Sasol had made its choice,

> "*[t]his approach will then become the systematic methodology to be consistently applied through the licence period for such a licensee electing to use this 'pass-through' approach.*"[145]

95.2 NERSA also made it clear that the Methodology was subject to change as and when required.[146]

95.3 It must be borne in mind that, when NERSA determined the Methodology, in October 2011, it had not yet determined that there was inadequate competition in the market. It follows that NERSA had not yet decided whether to determine Sasol's gas prices at all.

96. Accordingly, NERSA did not make a final determination of its Methodology, whether or not it was obliged to do so. The High Court was mistaken in assuming that it had done so. The SCA was correct in finding that, until Sasol applied for the determination of its

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[143] Methodology: vol 1 pp 62–63 para 3.1.
[144] Methodology: vol 1 p 66.
[145] Methodology: vol 1 p 69.
[146] Methodology: vol 1 p 78.

maximum prices, "*the terms of the methodology were purely theoretical, and had no effect*".[147]

The Methodology was not binding

97. The SCA found that the Methodology was not binding. This finding, we respectfully submit, was also correct.[148]

98. Even if NERSA was obliged to make an upfront freestanding determination of its Methodology, it was not then bound by it, that is, bound to determine Sasol's gas prices in accordance with it. At least until it had finally determined Sasol's gas prices, NERSA could adapt the methodology by which it did so. Its Methodology was a mere policy that NERSA adopted as a preliminary step towards its determination of Sasol's gas prices.

99. Regulation 4(3) does not say that, once NERSA had determined a methodology, it is bound by it. It says merely that NERSA must be objective "*when approving maximum prices*". This means that NERSA was obliged to employ a systematic methodology in the determination of Sasol's gas prices. It was allowed to adapt it at least until it had finally determined Sasol's gas prices. Only once it had done so, was it obliged, in its determination of other gas prices thereafter, to act "*on a consistent and comparable basis*" and not *ad hoc*.

100. Sasol contends that NERSA's determination of its Methodology constituted administrative action within the meaning of PAJA and, for that reason, was valid and binding until set aside on review in accordance with the *Oudekraal* line of cases.[149] However, we submit

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147 SCA Judgment vol 11 p 1045 para 37.
148 SCA Judgment vol 11 p 1044 para 35.
149 See Sasol's HOA paras 21 and 22. *Oudekraal Estates v City of Cape Town* 2004 (6) SA 222 (SCA) paras 31 and 40; *Camps Bay Ratepayers' and Residents' Association v Harrison* 2011 (4) SA (CC) para 62; *Judicial Service Commission v Cape Bar Council* 2013 (1) SA 170 (SCA); *MEC for Health, Eastern Cape v Kirland Investments* 2014 (3) SA 481 (CC). We cite all these cases since in various respects they develop the principle first enunciated in *Oudekraal*.

that Sasol's analysis is obviously mistaken. NERSA's determination of its Methodology did not constitute separate and freestanding administrative action. As the SCA found, it was part and parcel of a composite process by which NERSA determined Sasol's gas prices. The process as a whole constituted administrative action and became final and binding only when it had been completed.[150] It is only if one construes NERSA's determination of its Methodology as separate freestanding administrative action that *Oudekraal* or the common-law rules on unreasonable delay might apply.[151]

101. This court's analysis in *New Clicks* provides a useful analogy.[152] It was a review of regulations the Minister of Health had promulgated under s 22G of the Medicines and Related Substances Act, 1965. It provides that the Minister may make regulations on the recommendation of a Pricing Committee. This court recognised that the regulations were made by a two-stage process: first, a recommendation by the Pricing Committee and, second, a decision by the Minister to accept the recommendation. Justices Chaskalson, Ngcobo and Moseneke characterised the two decisions by two different organs of state as part of a single composite process that jointly constituted administrative action.[153] Chief Justice Chaskalson, for instance, put it as follows:[154]

> "*In the circumstances of the present case, to view the two stages of the process as unrelated, separate and independent decisions, each on its own having to be subject to PAJA, would be to put form above substance.*
>
> *The Minister was not obliged to act on the Pricing Committee's recommendations. She had a discretion whether to do so. But ultimately there had to be one decision to which both the Pricing Committee and the Minister agreed. Neither had the power to take a binding decision without the concurrence of the other. It was only if and when agreement was reached that regulations could be made.*"

102. The same analysis applies *a fortiori* to NERSA's determination of maximum gas prices under s21(1)(p) of the Gas Act. It is made by a single process that constitutes

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150 SCA Judgment vol 11 pp 1043 and 1044 paras 32–35.
151 Sasol's HOA, paras 21–23.
152 *Minister of Health v New Clicks* SA 2006 (2) SA 311 (CC).
153 *New Clicks* paras 136, 137, 138, 441, 442 and 672.
154 *New Clicks* paras 137–138.

administrative action. It becomes binding only on its completion. NERSA may implement the process step by step, as it did here, but that does render each step a distinct administrative action. Each step is part of a composite process and thus part of the same administrative action.

103. Sasol's attempt to distinguish *New Clicks* from these facts on the basis that the composite decision in *New Clicks* was taken by two distinct decision-makers does not make sense.[155] On the contrary, if the decisions of two different decision-makers together constituted a single composite administrative action in *New Clicks*, then the three inter-related decisions by the same decision-maker in this case are *a fortiori* susceptible of being so construed.

104. The SCA's analysis not only accords with that of this court in *New Clicks*, but it is also the only analysis compatible with PAJA. On its own, NERSA's determination of the Methodology does not qualify as "*administrative action*" under PAJA:

104.1 Under the definition of "administrative action" in s 1 of PAJA, a decision qualifies as administrative action only if it "*adversely affects the rights of any person and … has a direct, external legal effect*". The SCA interpreted this requirement in *Grey's Marine*.[156] Nugent JA held that it suffices if the decision "*has the capacity to affect legal rights*". He held, however, that those requirements "*emphasize that administrative action impacts directly and immediately on individuals*".[157] He went on to say that administrative action is limited to conduct "*with direct and immediate consequences for individuals or groups of individuals*".[158] This court endorsed this view, most recently in *Viking Pony*.[159]

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[155] Sasol's HOA, paras 27 and 28.
[156] *Grey's Marine Houtbay v Minister of Public Works* 2005 (6) SA 313 (SCA) at paras 23–24.
[157] *Ibid.* para 23.
[158] *Ibid.* para 24.
[159] *Viking Pony Africa Pumps v Hidro-Tech Systems* 2011 (1) SA 327 (CC) para 37.

104.2 NERSA's determination of its Methodology did not and could not have any "*direct and immediate consequences for individuals or groups of individuals*". It would have such an impact only if and when NERSA determined that there was inadequate competition in the market and determined Sasol's maximum gas prices. Until then, NERSA's determination of its Methodology did not, on its own, constitute administrative action and was thus not binding on anybody.

105. NERSA's Methodology was thus not binding on it in its determination of Sasol's gas prices. The High Court was mistaken on this score.

NERSA did not adhere to its Methodology

106. As the SCA found, NERSA's determination of Sasol's gas prices was fatally flawed even if it was entitled and obliged to make the determination in accordance with its Methodology.[160] That was so since NERSA did not adhere to its own Methodology. NERSA materially departed from its Methodology by its last-minute introduction of an overriding requirement of "*revenue neutrality*". Its determination of Sasol's gas prices was, accordingly, unlawful even if NERSA was bound by its Methodology.

Sasol's characterisation leads to absurdity

107. Sasol's interpretation gives rise to a fundamental absurdity. Were it to be carried to its logical conclusion, it would mean that every customer of Sasol would have been obliged to take NERSA's Methodology on review within 180 days of its publication to avoid being bound by it forever. At that juncture, the customers had no idea whether the Methodology would ever affect them and, if so, what that effect would be:

[160] SCA Judgment vol 11 pp 1045 and 1046 para 38.

107.1 At that early stage, customers did now know whether NERSA will find that there is inadequate competition in the market.

107.2 They did not know whether Sasol will choose the "*basket of alternatives*" or the "*pass through*" basis for the determination of its maximum prices.

107.3 They moreover did not know what those prices will be because they had no access to the underlying information by which those prices will be determined.

108. Accordingly, Sasol's interpretation would require all its customers to take NERSA's Methodology on review without knowing whether it would ever affect them and, if so, what that effect might be.

109. While Sasol's interpretation is based upon regulation 4(3), it is not supported by its language. There is nothing in the language of that sub-regulation to suggest that Sasol is enjoined to adopt a three-step process. It is perfectly entitled to implement a single composite process. On the other hand, it is also entitled to adopt a four-, five- or six-stage process to address each of the requirements of regulation 4(3) step by step. That, too, would be obviously absurd. When distilled to its essence, Sasol's position leads to an illogical and absurd outcome.

CONCLUSION

110. We respectfully submit that the applicants have not established any reason to interfere with the SCA's judgment. The respondents, accordingly, ask for an order that the application for leave to appeal is dismissed *alternatively*, if leave is granted, the appeal is dismissed, in both instances with costs including the costs of two counsel.

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JJ Meiring

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Chambers, Sandton

12 December 2018

AUTHORITIES

1. *Allpay Consolidated Investment Holdings v CEO, SASSA* 2014 (4) SA 179 (CC)
2. *Bato Star Fishing v Minister of Environmental Affairs* 2004 (4) SA 490 (CC)
3. *Camps Bay Ratepayers' and Residents' Association v Harrison* 2011 (4) SA (CC)
4. *Democratic Alliance v President of the RSA* 2013 (1) SA 248 (CC)
5. *Grey's Marine Houtbay v Minister of Public Works* 2005 (6) SA 313 (SCA)
6. *Judicial Service Commission v Cape Bar Council* 2013 (1) SA 170 (SCA)
7. *Kemp NO v Van Wyk* 2005 (6) SA 519 (SCA)
8. *MEC for Health, Eastern Cape v Kirland Investments* 2014 (3) SA 481 (CC)
9. *Minister of Health v New Clicks* SA 2006 (2) SA 311 (CC)
10. *National Lotteries Board v SA Education and Environment Project* 2012 (4) SA 504 (SCA)
11. *Oudekraal Estates v City of Cape Town* 2004 (6) SA 222 (SCA)
12. *Rustenburg Platinum Mines v CCMA* 2007 (1) SA 576 (SCA)
13. *Viking Pony Africa Pumps v Hidro-Tech Systems* 2011 (1) SA 327 (CC)
14. Hoexter *Administrative Law in SA* 2nd edition