CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 131/18

In the matter between:

NATIONAL ENERGY REGULATOR OF SOUTH AFRICA	First Applicant
SASOL GAS (PTY) LIMITED	Second Applicant

and

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

Neutral citation: *National Energy Regulator of South Africa and Another v PG Group (Pty) Limited and Others* 2019 ZACC 28

Coram: Cameron J, Froneman J, Jafta J, Khampepe J, Ledwaba AJ, Madlanga J, Mhlantla J, Nicholls AJ and Theron J

Judgments: Khampepe J (unanimous): [1] to [93]
Jafta J (concurring): [94] to [128]

Heard on: 26 February 2019

Decided on: 15 July 2019

Summary: Gas Act 48 of 2001 — Monopoly — maximum pricing decision — tariff decision — pricing regulation

Promotion of Administrative Justice Act 3 of 2000 — administrative decision — rationality

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ORDER

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

1. The application for leave to appeal is granted.
2. The appeal is upheld in part, insofar as it relates to the Supreme Court of Appeal's setting aside of the decision of the first applicant of 26 March 2013 to approve the transmission tariffs for the period of 26 March 2014 to 30 June 2015.
3. The remainder of the appeal is dismissed.
4. Paragraph 2(a) of the order of the Supreme Court of Appeal is set aside and substituted with the following:

   "(a) The first applicant's decision of 26 March 2013 to approve the application by the second applicant for maximum gas prices and for a trading margin for the period 26 March 2014 to 30 June 2017 is reviewed and set aside."

5. The applicants must pay the respondents' costs in this Court, including the costs of two counsel.

JUDGMENT

KHAMPEPE J (Cameron J, Froneman J, Jafta J, Ledwaba AJ, Madlanga J, Mhlantla J, Nicholls AJ and Theron J concurring):

Introduction

[1] In terms of the Gas Act,[1] the statutory functions of the first applicant, the National Energy Regulator of South Africa (NERSA), include regulating gas prices in the prescribed manner; monitoring and approving, and if necessary regulating tariffs for the transmission of gas; and promoting competition in the gas industry.[2] Where NERSA has determined that there is inadequate competition in the gas market, it is mandated by the Gas Act to approve maximum gas prices that a regulated entity may charge through the imposition of a condition in the licence of that entity.[3]

[2] The first and second applicants, NERSA and Sasol Gas (Pty) Limited (Sasol), seek leave to appeal against a judgment of the Supreme Court of Appeal[4] reversing a decision of the High Court of South Africa, Gauteng Division, Pretoria,[5] (High Court) and reviewing and setting aside the decisions of NERSA to approve Sasol's maximum gas price and transmission tariff applications on the dual bases of irrationality and unreasonableness.

[1] 48 of 2001 (Gas Act).

[2] Sections 2(h) and 4(g)-(h) of the Gas Act.

[3] Section 21(p) of the Gas Act.

[4] *PG Group (Pty) Ltd v National Energy Regulator of South Africa* [2018] ZASCA 56; 2018 (5) SA 150 (SCA) (Supreme Court of Appeal judgment).

[5] *PG Group (Pty) Ltd v National Energy Regulator of South Africa* [2016] ZAGPPHC 1119 (High Court judgment).

[3] The respondents are all large-scale consumers of piped gas who were aggrieved by NERSA's decision to approve Sasol's applications as the approval resulted in a substantial increase in the prices they had been paying.

Legislative and factual background

[4] In the late 1990s and early 2000s, Sasol and a Mozambican partner developed natural gas fields in Mozambique and built a pipeline to pump gas to South Africa. In consideration for this investment, the South African government and Sasol concluded the "Mozambican Gas Pipeline Agreement" (Pipeline Agreement) on 26 September 2001. The Pipeline Agreement incorporated a "Regulation Agreement" that allowed Sasol to determine its gas prices with reference to "market value pricing". Under market value pricing, the price for each customer is generally set just below their individual and particular cost of switching to an alternative fuel. This was done in order to compensate Sasol for its investment in the Mozambican gas field development.

[5] The Pipeline Agreement was conditional upon the inclusion of a provision in the Gas Act (which at the relevant time was in the process of being drafted) that made the agreement binding on NERSA for ten years. The market value pricing regime came to an end on 25 March 2014, following which Sasol's gas prices were subject to regulation by NERSA.

[6] The Gas Act came into force on 1 November 2005 and NERSA is the gas regulator referred to in the Gas Act.[6] In terms of section 4(g) of the Gas Act, NERSA is required to regulate maximum prices, in terms of section 21(1)(p), in "the prescribed manner". Section 21 sets out the framework and requirements that NERSA

[6] Section 4(1)(a) of the National Energy Regulator Act 40 of 2004 provides that NERSA is the gas regulator referred to in the Gas Act.

must consider when imposing licence conditions on a regulated entity. More specifically, where NERSA has determined that there is inadequate competition in the gas market, section 21(1)(p) requires NERSA to determine, as a condition of a licence for a regulated entity (in this case, Sasol), "maximum prices" which it must approve.

[7] The prescribed manner referenced in section 4(g) of the Gas Act is described in regulation 4(3) – (4) of the Regulations.[7] Regulation 4(3) provides that:

> "[NERSA] 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."

[8] Regulation 4(4) provides:

> "Maximum prices referred to in subregulation (3) must enable the licensee to—
> recover all efficient and prudently incurred investment and operation costs; and
> make a profit commensurate with its risk."

[9] Section 4(h) of the Gas Act also provides that NERSA's function is 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". Section 22 goes on to elaborate on the requirement of non-discrimination.

[7] Piped Gas Regulations GN R321 *GG* 29792, 20 April 2007 (Regulations).

[10] During the course of carrying out its statutory functions, NERSA determined that there was inadequate competition in the piped-gas market. Prompted by NERSA's determination, on 24 December 2012, Sasol made two applications, the one for determination of its maximum gas prices (Maximum Price Application) and the other for the determination of its transmission tariffs (Tariff Application).

[11] Applications for approval of transmission tariffs are determined in accordance with NERSA's Guidelines for Monitoring and Approving Piped-Gas Transmission and Storage Tariffs in South Africa of 1 May 2009 (Tariff Guidelines). The Tariff Guidelines provide for the use of various methodologies by an applicant for tariff calculation. In its Tariff Application, Sasol opted for the "Rate of Return" methodology. It adjusts the overall tariff level according to a company's efficient level of accounting costs and costs of capital. It is based on the calculation of revenue a company will be allowed to earn to cover its efficient operational expenses and to provide a return on its efficient level of investment in capital and assets.

[12] After public hearings and further submissions, NERSA approved Sasol's Tariff Application on 26 March 2013. NERSA published reasons for its decision on 24 April 2013 (Tariff Decision).

[13] NERSA's decision with regard to the Maximum Price Application was based on three interrelated steps, some of which pre-dated Sasol's application.

[14] The first step was to determine the methodology by which the maximum prices would be set under section 21(1)(p) of the Gas Act (Maximum Pricing Methodology). This process involved NERSA publishing a first and second draft methodology for public comment and, finally, publishing the approved methodology on 28 October 2011. NERSA published its reasons for adopting the methodology on 24 November 2011.

[15] The Maximum Pricing Methodology stated that the maximum prices proposed by an applicant or licensee were to be reviewed on the basis of a formula using indicator prices in a basket of coal, diesel, electricity, heavy fuel oil (HFO) and liquefied petroleum gas (LPG), with their respective weightings being apportioned at 37% for coal, 24% for diesel, 37% for electricity and 1% for both HFO and LPG. Allowance was also made for discounts in respect of different categories of customers. After stating that it recognised the basket of alternatives method to be "appropriate under the prevailing circumstances", the Maximum Pricing Methodology states:

> "However, where the licensee deems the price determined by this methodology to be materially lower or higher than its preferred and appropriate gas price in that it impacts on the ability to compete and/or recover efficiently and prudently incurred costs and make a profit commensurate with risk, then the Energy Regulator will allow such licensee to opt for the use of the 'pass-through' approach to ensure that the licensee fully recovers all its efficiently and prudently incurred costs and makes a profit commensurate with its risk as provided for in the legislation. This will of course apply to instances when the preferred and appropriate price is either higher or lower, than the one determined by using the approach explained in Sections 3.1 to 3.4. The approach will then become the systematic methodology to be consistently applied throughout the licence period for such a licensee electing to use this 'pass-through' approach."

[16] The pass-through approach requires an applicant to justify their proposed price for gas on the basis of a cost-based price build-up, including at least the cost of procured or produced gas, and any transportation or regasification costs. The transmission and distribution tariffs and the trading margin, determined under this methodology, would be added to the maximum energy price. The pass-through approach is a simple "cost plus percentage" method of determining a price. Its use is commensurate with regulation 4(4), which provides that maximum prices must enable the licensee to recover all efficient and prudently incurred investment and operational costs; and make a profit commensurate with its risk.

[17] NERSA's second step was to determine whether there was inadequate competition in the gas market within the meaning of section 21(1)(p). NERSA first published a draft inadequate competition determination in September 2011, followed by a final inadequate competition determination on 29 February 2012.[8]

[18] The third step was to determine Sasol's Maximum Price Application. In the application, Sasol elected to use the basket of alternatives method and not the pass-through approach for the determination of its application. After initial public comments, NERSA published a draft of its determination of Sasol's application on 11 February 2013. After further public hearings and submissions, NERSA approved the Maximum Price Application on 26 March 2013. On 24 April 2013, NERSA published reasons for its approval of the Maximum Price Application (Maximum Price Decision). NERSA's approval was on the following bases:

(i) The maximum gas price is R117.69. This price is subjected to six categories of volume discount ranging from R73.56 to R108.86. The prices were subject to escalation from 26 March 2014.

(ii) Sasol may add a "trading margin" of R8.21 to the above prices for the first three months, and R10.40 thereafter.

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[8] In its reasons for the decision, NERSA stated that for seven years Sasol had sustained the price of gas consistently above a competitive level or marginal cost. It described the effect of the Regulation Agreement as follows:

> "(i) At present there is one licensee that provides transmission and distribution of piped-gas in the South African piped-gas market, namely Sasol Gas, who is effectively the sole supplier of gas and importer of natural gas into the South African market. This licensee is vertically integrated in that it owns and operates the pipeline network both at transmission and distribution level. It also owns the focal product which is the subject of the competition assessment being undertaken by the Energy Regulator. Furthermore, Sasol Gas is also a dominant player in the trading of gas at wholesale and retail levels. Currently there are four traders of natural gas in South Africa in addition to Sasol Gas most of whom resell gas purchased from Sasol Gas. It is important to point out that these independent traders do not own the infrastructure or network critical in transporting or distributing gas to customers around the country in competition with Sasol Gas.
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> (ii) The conditions in South African piped-gas market manifest those of a monopolist who has an influence in the market in terms of gas supply and prices. Notably, the price of natural gas and synthetic gas is referenced to the cost of an alternative energy source available to an individual customer."

(iii) The prices were subject to an overall "revenue neutrality" restriction for one year in order to ensure that Sasol did not earn more revenue overall in the first year of the new dispensation than it had in the final year of the old dispensation.

Litigation History

High Court

[19] Aggrieved by the substantial price increase which followed NERSA's decisions, the respondents applied to the High Court to review and set aside the Maximum Price Decision and the Tariff Decision on the basis that NERSA's determination had been irrational and unreasonable. They also sought an order reviewing and setting aside the Maximum Pricing Methodology, or alternatively, an order declaring the methodology to be invalid for the purposes of NERSA's consideration of Sasol's Maximum Price Application. The review was brought in terms section 6 of the Promotion of Administrative Justice Act[9] (PAJA), or alternatively, the principle of legality.

[20] The High Court held that the Maximum Price Decision falls within the ambit of PAJA, which requires that proceedings for judicial review must be brought "without unreasonable delay" and not later than 180 days after the person concerned became aware of the administrative action.[10] The High Court held that NERSA had a statutory duty to lay down the Maximum Pricing Methodology, which was done nearly two years before the review application was brought. It was therefore the Maximum Pricing Methodology that should have been challenged by the respondents. Applying the test in *OUTA*, the High Court concluded that the respondents' delay in bringing the review application was unreasonable and that it was only empowered to entertain the review if the interests of justice dictate an extension in terms of section 9

[9] 3 of 2000.

[10] Section 7(1) of PAJA.

of PAJA.[11] As the respondents had set out no facts which prevented them from taking the Maximum Pricing Methodology on review timeously and were big corporations with access to quality legal advice, the High Court declined to entertain the review because of the unreasonable delay. The High Court therefore did not decide the merits of the review and dismissed the application with costs.

Supreme Court of Appeal

[21] In the Supreme Court of Appeal, the applicants raised a further objection to the Court deciding the merits of the review, based on a contention that the matter was now of academic interest only (as the period for which the decision was made lapsed in June 2017). The Supreme Court of Appeal found that there was still a live issue between the parties as the respondents sought an order that, should the approval of Sasol's prices be set aside, any maximum prices for that period "shall apply retrospectively with effect from 26 March 2014 until the date of termination of such approval". The Supreme Court of Appeal also found that there was considerable public interest in resolving whether the Maximum Pricing Methodology NERSA adopted, and which it presumably intends to utilise again in the future, is valid.

[22] On the issue of undue delay, the Supreme Court of Appeal held that whilst regulation 4(3)(a) requires NERSA to "be objective i.e. based on a systematic methodology applicable on a consistent and comparable basis" when determining gas prices, it does not require it to make "a freestanding upfront determination of the methodology" before doing so. Accordingly, the Supreme Court of Appeal held that the determination of the Maximum Pricing Methodology and the determination of the Maximum Price Application form part of the same composite process under

[11] *Opposition to Urban Tolling Alliance v South African National Roads Agency Limited* [2013] ZASCA 148; 2013 JDR 2297 (SCA); [2013] 4 All SA 639 (SCA) (*OUTA*) at para 26 – which effectively states that before the effluxion of 180 days, the first enquiry in applying section 7(1) of PAJA is still whether the delay (if any) was unreasonable, but after the 180 day period, the issue of unreasonableness is pre-determined by the legislature (it is unreasonable per se) and can only be entertained if the interests of justice dictate that an extension be granted in terms of section 9.

section 21(1)(p) of the Gas Act and that, whilst NERSA may choose to carry out that process in a step-by-step fashion, it was not obliged to do so.

[23] Relying on *New Clicks*,[12] the Court held that the determination of the maximum gas price was made by way of a staged process which only became binding on its completion when NERSA made its decision on Sasol's Maximum Price Application. Therefore, the High Court erred in not recognising that the administrative action that fell to be reviewed was NERSA's decision to approve Sasol's Maximum Price and Tariff Applications (which review was brought within the requisite 180 day period).

[24] On the merits of the review, the Court held that the rationality and reasonableness of the decision had to be decided on certain elementary and undisputed principles of economics, the common cause facts, and the reasons NERSA set out when it gave its decision in October 2011, and that any further reasons were irrelevant.[13] The Supreme Court of Appeal held, looking at the reasons for NERSA's decision,[14] that the evils it had set out to address were gas prices higher than would have been charged in a competitive market and abuse by Sasol of its market power. Instead NERSA, irrationally, did the opposite. It proceeded to determine a methodology referencing 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).

[25] The Supreme Court of Appeal held that, by employing the cost of a basket of alternatives as a proxy for a maximum price of gas, NERSA had set a benchmark

[12] *Minister of Health v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign as amici curiae)* [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR (1) (CC) (*New Clicks*) at paras 136-8.

[13] Relying on *National Lotteries Board v South African Education and Environment Project* [2011] ZASCA 154; 2012 (4) SA 504 (SCA) at paras 24-8. This was in light of the various expert reports filed which the Supreme Court of Appeal said played no part in NERSA's decision making and were an *ex post facto* attempt to either justify or condemn it.

[14] See Supreme Court of Appeal judgment above n 4 at paras 43-4.

which established a price that a monopolist would have charged. This, the Court said, was hardly a reasonable or rational decision taken to mimic a competitive price. The Court also held that as the Tariff Decision was inextricably linked to the Maximum Price Decision it should be set aside. The appeal therefore succeeded.

[26] In order to address and correct the consequences of the invalidity, the Supreme Court of Appeal ordered that any maximum gas prices subsequently approved by NERSA for Sasol would apply retrospectively with effect from 26 March 2014 until the date of termination of the approval (this effectively required NERSA to determine a new maximum price to be applied retrospectively).

Jurisdiction and leave to appeal

[27] This matter concerns the review of public power in terms of PAJA, which directly impacts on the right to just administrative action in terms of section 33 of the Constitution.[15] It is therefore a constitutional issue that engages this Court's jurisdiction. It is also in the interests of justice that leave to appeal should be granted as there are reasonable prospects of success.

Issues for determination

[28] The following issues arise for determination:

(a) Can the Maximum Price Decision be reviewed independently, without reviewing the Maximum Pricing Methodology?

(b) If the answer to the first question is positive, was NERSA's Maximum Price Decision irrational or unreasonable?

(c) Is the lawfulness of the Tariff Decision dependent on the lawfulness of NERSA's Maximum Price Decision?

Each of these issues is addressed below.

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

(a) Review of the Maximum Pricing Methodology

[29] The applicants submit that the High Court was correct in dismissing the review on the basis of unreasonable delay. They contend that the Maximum Pricing Methodology constitutes reviewable administrative action and that the Supreme Court of Appeal erred in finding that it did not. Sasol submits that it is clear that the Maximum Pricing Methodology contains a set of rules that binds NERSA and all persons applying for approval of maximum prices unless it is set aside by a court. This, Sasol argues, means that the respondents needed to set aside the Maximum Pricing Methodology if they wished to impugn the Maximum Price Decision. If the methodology is valid (which must be assumed until set aside by a court), then NERSA was bound to follow it when making the Maximum Price Decision.

[30] The respondents submit that the Supreme Court of Appeal was correct in finding that the High Court erred in upholding Sasol's special plea of undue delay. The respondents argue that, while regulation 4(3) required NERSA to be objective (by applying a systematic methodology on a consistent and comparable basis), it did not oblige NERSA to make a freestanding upfront determination of its methodology before doing so. NERSA gave Sasol the choice between the basket of alternatives and the pass-through approaches, meaning that until Sasol's choice was made, the Maximum Pricing Methodology was, in its own terms, hypothetical and subject to change. The Maximum Pricing Methodology was also not binding on NERSA in its determination of Sasol's gas prices – it was merely an interim step towards NERSA's determination of Sasol's maximum prices.

[31] If the applicants' arguments were accepted, that would imply 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,[16] even when the Maximum Pricing Methodology might not have applied to a specific entity at that

[16] In terms of section 7 of PAJA.

stage. It may well be that a methodology, like the one in this case, could constitute administrative action reviewable in terms of PAJA. However, for the reasons that follow, I find that it is not necessary for this Court to determine whether or not the Maximum Pricing Methodology constitutes administrative action in terms of PAJA.

[32] The Maximum Price Decision is a separate and independent administrative action that is reviewable in and of itself. There is nothing that bars the respondents from electing to review the Maximum Price Decision and not the Maximum Pricing Methodology, as these are two separate, independent decisions. It may seem desirable for this Court to treat the Maximum Pricing Methodology and the Maximum Price Decision holistically as one continuous process. However, this case does not provide the facts to support and endorse this treatment.

[33] The Maximum Pricing Methodology is not law, but rather a guideline made in accordance with the empowering legislation. NERSA thus has discretion not to rigidly apply the methodology if its application would lead to irrational or otherwise unlawful results. In *Britten*, Innes CJ noted that although policies and general principles are sometimes inevitable, a decision-maker must remain alive to the existence of circumstances in a case that would justify a departure from the policy or precedent.[17]

[34] This principle in *Britten* was reaffirmed in *Kemp N.O.*, where the Supreme Court of Appeal held:

> "[G]enerally there can be no objection to an official exercising a discretion in accordance with an existing policy if he or she is independently satisfied that the policy is appropriate to the circumstances of the particular case. What is required is only that he or she does not elevate principles or policies into rules that are considered to be binding with the result that no discretion is exercised at all."[18]

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[17] *Britten v Pope* 1916 AD 150 at 158-60.

[18] *Kemp N.O. v Van Wyk* [2005] ZASCA 77; [2008] 1 All SA 17 (SCA) at para 1.

[35] Accordingly, NERSA was not precluded from exercising its discretion and departing from the Maximum Pricing Methodology. This is evinced by the fact that NERSA did not determine Sasol's gas prices in accordance with its own methodology because at the eleventh hour it added the overriding requirement of "revenue neutrality" to achieve a more equitable result.[19] This further illustrates that there was a level of independence between the Maximum Price Decision and the Maximum Pricing Methodology as NERSA still had to make an independent decision, exercising its discretion, about the former.

[36] In any event, even if the Maximum Pricing Methodology did constitute a reviewable decision in terms of PAJA, it is not the decision that is being reviewed and it does not preclude the Maximum Price Decision, which is an administrative action in terms of PAJA, from being reviewed. The implementation of the Maximum Pricing Methodology in deciding the maximum gas prices was a separate, substantive administrative decision, capable of being independently reviewed.[20] Counsel for the respondents agreed with this proposition in oral argument. Nevertheless, even where the Maximum Pricing Methodology was found to be lawful, the substantive validity alone of the methodology could not validate a decision taken in terms of it. It must therefore follow that the Maximum Price Decision, when implemented, is capable of independent review. Any other approach would be incorrect.

[37] As the Maximum Price Decision is capable of being independently reviewed, and the review application was brought within the requisite 180-day period, there is no time bar to considering the merits of this review application. Thus, the question of whether a methodology constitutes administrative action is left open.

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[19] See Supreme Court of Appeal judgment above n 4 at para 38.

[20] In *Oudekraal Estates (Pty) Ltd v City of Cape Town* [2004] ZASCA 48; 2004 (6) SA 222 (SCA) 36; [2004] JOL 12742 (SCA) at paras 29–31, the Supreme Court of Appeal held that the proper enquiry in each case is not whether the first act was valid but rather whether its substantive validity was a necessary precondition for the validity of consequent acts.

(b) Review of the Maximum Price Decision

[38] I now turn to the review of the Maximum Price Decision. I find that the Maximum Price Decision was irrational, however, I do not fully agree with the Supreme Court of Appeal's reasoning nor do I agree with the reasoning in the concurring judgment written by my brother, Jafta J (the second judgment). In considering this review, I begin by dealing with whether the expert reports provided by the parties can be relied upon. I then set out the statutory background to the Maximum Price Decision. I follow that by explaining why I do not agree with the second judgment. Next, I consider the findings of the Supreme Court of Appeal relating to NERSA allowing Sasol to raise prices and failing to mimic a competitive market, in light of the submissions made by the parties. Lastly, I set out the other grounds that point to irrationality. I find that NERSA, in applying the basket of alternatives approach to Sasol, was irrational because it did not take into account a vital material fact for making a rational decision in light of the empowering legislation and purpose thereof – Sasol's own costs and profits.

Expert reports

[39] The Supreme Court of Appeal found that the reports by economic experts submitted by NERSA were an impermissible attempt to justify the decision after the fact and therefore could not be considered by the Court.[21] I disagree. It is true that reasons formulated after a decision has been made cannot be relied upon to render a decision rational, reasonable and lawful.[22] However, a report by an expert will not necessarily constitute *ex post facto* (after the fact) reasons; it may merely explain the rationale of the reasons that were provided prior to the making of the decision. Economics is a specialist field and, to the extent that the reports provide explanations for the process followed by NERSA in coming to the decision, this Court can benefit from the explanations advanced. Moreover, the respondents submitted economic reports in order to challenge NERSA's decision. Significantly, the reports the

[21] Supreme Court of Appeal judgment above n 4 at para 41.

[22] *National Lotteries Board* above n 13 at paras 27-8.

applicants rely on are meant to fend off the alleged faulty analyses and conclusions found in the reports the respondents rely on.

Statutory background to the Maximum Price Decision

[40] Section 6(2)(f)(ii) of PAJA provides that administrative action will be 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."

[41] NERSA is required in terms of section 2(e)–(h) read with section 4(j) of the Gas Act to promote the development of a competitive market for gas and gas services in South Africa on an equitable basis considering the interests and needs of all parties concerned. Where there is inadequate competition in the gas market, NERSA is required to regulate and approve maximum gas prices – which it does in accordance with the Maximum Pricing Methodology that it adopted.

[42] The prescribed manner referenced in section 4(g) of the Gas Act for regulating the maximum gas price is described in regulation 4(3)–(4) of the Regulations. Regulation 4(3) provides:

> "[NERSA] 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."

[43] Regulation 4(4) provides:

> "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."

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

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

[45] NERSA also confirmed in its papers and during oral argument that it sought to "mimic a competitive market in order to achieve competitive outcomes".

[46] Under the previous dispensation, Sasol could arguably exploit its market power by pricing up to the next best alternative energy source available to each individual customer. This price discrimination is the process described above as market value pricing.

The second judgment

[47] I have had the benefit of reading the second judgment, which agrees and endorses the grounds adopted by the Supreme Court of Appeal. It holds that the failure to consider Sasol's marginal cost did not render the Maximum Price Decision irrational under PAJA specifically because it claims that rationality review is only of decisions and not of process. It holds that even if procedural irrationality does render the decision irrational, because procedural irrationality was not pleaded, this Court should not decide this matter on that ground. I do not agree with this reasoning.

[48] I do not believe that we can separate process rationality and substantive rationality in the way the second judgment purports to. The relevant question for

rationality is whether the means (including the process of making a decision) are linked to the purpose or ends. To my mind, rationality necessarily, whether found in PAJA or anywhere else, must include some evaluation of process. If not, then we are simply asking whether a decision is right or wrong based on *post hoc* reasoning.

[49] It is a natural and inescapable denouement that the process leading to a decision "must also be rational in that it must be rationally related to the achievement of the purpose for which the power is conferred".[23] As stated in *Democratic Alliance*:

> "The means for achieving the purpose for which the power was conferred must include everything that is done to achieve the purpose. Not only the decision employed to achieve the purpose, but also everything done in the process of taking that decision, constitutes means towards the attainment of the purpose for which the power was conferred."[24]

[50] Additionally, in *Zuma*, Navsa ADP stated that a rationality review also covers the process by which the decision is made.[25] There is no reason why rationality under PAJA should be given a different (more restrictive) meaning. It follows that rationality under PAJA includes an assessment of whether the means (including everything done in the process of taking the decision) links to the end. Problems found in the process used to reach a decision can be very useful evidence or illustration of a faulty rational link. How far that evaluation of process goes depends on the facts of a particular case.

[51] For purposes of this case, I rely on the absence of consideration of Sasol's marginal costs because it is sufficient evidence of a missing or faulty link between the means and the ends. It is procedural irrationality that signifies the material irrationality. In the following paragraphs I explain why I believe simply evaluating

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[23] *Democratic Alliance v President of the Republic of South Africa* [2012] ZACC 24; 2013 (1) SA 248 (CC); 2012 (12) BCLR 1297 (CC) (*Democratic Alliance*) at para 36.

[24] Id.

[25] *Zuma v Democratic Alliance* [2017] ZASCA 146; 2018 (1) SA 2000 (SCA) at para 82.

the final Maximum Price Decision in a *post hoc* manner, as the Supreme Court of Appeal and the second judgment do, does not lead to a legal conclusion of irrationality. I then go on to explain why the procedural fault, and the substantive irrationality it evidences, is a more viable route to finding irrationality.

The Supreme Court of Appeal's findings on price increases and mimicking a competitive market

[52] The Supreme Court of Appeal used a comparison between the prices before and after the Maximum Price Decision as a barometer for measuring its irrationality.[26] The Court held:

> "[T]he 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."[27]

While it is tempting to follow the Supreme Court of Appeal down this path, I do not find the matter as clear-cut for the reasons set out below.

[53] NERSA correctly points out that comparing the average price before the decision and the maximum price after the decision is to compare apples to oranges. One of these is an *average actual price* at a specific point in time, while the other is just a *limitation price* on the overall market and at a completely different point in time.

[54] The pre- and post-price comparisons concern average prices, but when making its determination whether there was inadequate competition, NERSA was worried about isolated discriminatory pricing decisions. The prices NERSA was concerned with were prices for individual consumers that had more-expensive-than-average

[26] Supreme Court of Appeal judgment above n 4 at paras 24 and 47.

[27] Id at para 47.

substitution costs – in other words, for consumers whose alternative energy choices were considerably more expensive than those of other consumers. NERSA argues that those higher prices were successfully brought under control by the Maximum Price Decision.

[55] The Supreme Court of Appeal made factual findings that NERSA's decision allowed Sasol to raise average prices and prices on the specific respondents in this case. It is not this Court's duty to settle factual disputes that have already been determined by lower courts.[28] Therefore, we must accept the factual findings of the Supreme Court of Appeal in regard to its findings on price increases. However, the Supreme Court of Appeal's factual findings do not impact my reasoning because they are compatible with NERSA's claim that the Maximum Price Decision did in fact help the specific consumers experiencing discriminatory pricing when NERSA made the inadequate competition decision. Moreover, the fact that some prices rose after the Maximum Price Decision does not inevitably mean that the decision was irrational.

[56] There was no *regulatory* constraint on prices before the Maximum Price Decision, which logically suggests to me that there was some *market* constraint on prices for the consumers paying lower prices under the former regime. The consumers that were benefitting from whatever constraints were protecting them under the old pricing regime presumably still enjoy the same protections; and a regulatory maximum gas price higher than their old price would accordingly have no effect on them. Their price increases may therefore be explained by changes in other factors in the market.[29] This illustrates the problem with the Supreme Court of Appeal's comparison between the pre and post-decision prices.

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[28] *Makate v Vodacom* [2016] ZACC 13; 2016 (4) SA 121 (CC); 2016 (6) BCLR 709 (CC) at para 39.

[29] NERSA points towards inflation and the devaluation of the Rand against the Dollar over this time period, among other things, as legitimate causes of the price increases. I can imagine there are other unidentified market factors that would affect the actual price of gas, independently of whether the market is competitive or monopolistic.

Even in a perfectly competitive market, the Rand's depreciation over the relevant time would certainly cause a price increase on imported gas.[30]

[57] The factual finding that NERSA's Maximum Price Decision enabled Sasol to raise certain prices, including those charged to the respondents, does not have any bearing on whether NERSA's Maximum Price Decision allowed Sasol to inappropriately raise prices on the consumers who had experienced the negative effects of discriminatory pricing. The respondents seem to want a pricing regime that eliminates price discrimination to achieve a second goal – lowering the prices for *all consumers* – but they never explain why this second goal would be justified under the Act, let alone necessary. Without endorsing this second goal, I am not convinced that the Supreme Court of Appeal's legal conclusion flows from its factual findings.

[58] Once I recognise that the relevant prices and consumers (the respondents) in this case are not necessarily the ones that were most vulnerable under discriminatory pricing, it becomes far less likely that NERSA allowed Sasol to raise prices *specifically in contravention of its own purposes and mandate*. This is especially true because the Maximum Price Decision was just as it was described – a decision about a maximum price – and the Supreme Court of Appeal's approach centres on the actual prices charged by Sasol, which were not what NERSA was tasked with deciding.

[59] The Supreme Court of Appeal used the pricing analysis to support its finding that NERSA acted irrationally in trying to mimic a competitive market price.[31] It found that "NERSA set a benchmark which established a price that a monopolist

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[30] NERSA points towards inflation and the devaluation of the Rand against the Dollar over this time period, among other things, as legitimate causes of the price increases. In July 2011, $1 was worth approximately R6.70 and by the beginning of 2016, it was worth approximately R16.10 - indicating that the Rand had lost more than half its value over this time. Exchange rate data according to the South African Reserve Bank, available at https://www.resbank.co.za/Research/Rates/Pages/SelectedHistoricalExchangeAndInterestRates.aspx.
I can imagine there are other unidentified external factors that would affect the actual price of gas and the protections from higher prices individual customers' experience, whether the market is competitive or monopolistic.

[31] Supreme Court of Appeal judgment above n 4 at para 49.

would have charged. This was hardly a rational decision taken to mimic a competitive price".[32] Before this Court, the parties' arguments centred on whether NERSA's approach was a rational way to mimic a competitive maximum price.

[60] In this regard, NERSA conceded that it was mandated, and did set out, to mimic a competitive market. While it is tempting to find irrationality based on NERSA's failure to achieve this task, it may have some rational and even reasonable explanations of how it set out to achieve its task.

[61] The basket of alternatives approach is a practical attempt at selecting a proxy for the upper bound of a competitive supply-constrained market[33] and not the actual price of a competitive market.[34] The basket of alternatives approach that NERSA chose is intended to stop the worst discriminatory pricing while attempting not to regulate the actual price of piped-gas where it is not necessary to do so. Conceivably, it may (to a reasonable degree for an imaginary market) accurately replicate the upper bound of a South African competitive gas market that is still experiencing supply constraints. Under market value pricing, Sasol was able to discriminate between consumers based on their individual next best alternative, but under the Maximum Price Decision, that outcome may no longer be the reality for consumers with the most expensive alternatives.[35]

[32] Id at 46.

[33] A supply-constrained market, in this case, is one where there is more demand for piped gas at the marginal cost of the cheapest supplier than that supplier can in reality supply.

[34] NERSA suggests that the price in a competitive supply-constrained market may be set by the marginal costs of the marginal supplier rather than the marginal costs of the most competitive supplier. While I am not willing to fully endorse this argument, I do agree that in a competitive supply-constrained market the price will settle somewhere above the marginal costs of the most competitive supplier.

[35] The chosen ceiling price is an average of the alternatives, and in reality sets a "discount" lower price cap than the average or even the median of the alternatives because it is weighted towards coal and electricity, which are especially cheap energy alternatives in South Africa.

[62] While the basket of alternatives does seem somewhat arbitrary, it may be rationally related to a potential competitive price in the piped-gas market.[36] Further, any proxy for the upper bound of an imaginary competitive supply-constrained market would seemingly be arbitrary if not connected to a real-world metric like the costs of the gas supply. In any event, I would expect NERSA, when trying to mimic this upper bound, to come up with a number between Sasol's marginal costs and the marginal costs of the marginal supplier. The proxy NERSA chose seems to, more likely than not, fall into that band. The only more reliable test of whether it falls into that band, that I can conceive of, requires us to know Sasol's marginal costs.

Required material factor for a rational Maximum Price Decision

[63] In *Democratic Alliance*, this Court held that it is an established principle of administrative law that a failure to consider a relevant material factor in the process of coming to an administrative decision can render the decision irrational.[37] The entire process is tainted as irrational if the relevant factor that was not considered ought to be central to finding a rational or even reasonable final outcome.

[64] Rationality is concerned with one question: do the means justify the ends? *Democratic Alliance* developed the test for rationality by explaining that an absence of a sufficient link can arise for procedural reasons. This is not a new or different type of irrationality, but rather a way of evincing a broken or missing link between the means and the ends. The means chosen by an administrator include everything done (or not done) in the process of making that decision.

[65] In this case, NERSA failed to consider Sasol's marginal costs in the method it used to determine the maximum gas price for Sasol. The decision to apply the basket

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[36] Even the economists for the respondents agree that alternative fuel can be relevant for finding a good proxy maximum price for the imaginary competitive market. The Brattle Group Report submitted by the respondents argues that the only relevant alternative is the marginal energy alternative. While this is distinct from NERSA's approach that considers many alternatives, it is a concession that looking at fuel alternatives is generally a rational approach.

[37] *Democratic Alliance* above n 23 at paras 36 and 39.

of alternatives approach specifically to Sasol was not rational. Sasol is a monopolist and any rational attempt at regulating its prices needed to consider its costs in order to fairly and equitably divide the economic surplus between Sasol's profit and the economic value for Sasol's consumers.

[66] There are a number of interrelated reasons why Sasol's marginal costs are a necessary factor in determining its maximum price. It is important to note that NERSA was regulating the prices of a *recognised monopolist*. Section 2(e) of the Gas Act requires NERSA to take into account the interests and needs of all parties on an equitable basis.[38] This is given expression in the fairness requirement found in regulation 4(3). Importantly, this can be seen in regulation 4(4), which requires NERSA to account for both costs and profits of the regulated entity. This is set out in more detail below.

[67] Once NERSA made the second decision that there was inadequate competition in the piped-gas market, it was obliged to consider a maximum gas price specifically for the monopolist – Sasol.

[68] In both the draft and final inadequate competition determination NERSA itself stated that the spot price for gas in a market environment would tend towards its marginal costs. NERSA stated 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."

[38] Section 2(e) provides that one of the objects of the Gas Act is to—

> "ensure that gas transmission, storage, distribution, trading, liquefaction and re-gasification services are provided on an equitable basis and that the interests and needs of all parties concerned are taken into consideration."

[69] Despite this acknowledgment, NERSA did not consider Sasol's marginal costs when trying to set a competitive maximum price. In a traditional competitive market, Sasol's marginal costs would be a required input for finding the competitive maximum price.

[70] NERSA defends its decision not to use Sasol's marginal costs by pointing out that it was trying to mimic a competitive *supply-constrained* market. While it is true that there is a supply constraint, the reality of the situation is that Sasol is a monopolist and there are no competitors. Without a real-world competitor, NERSA's inclusion of the supply constraint as its justification for not considering Sasol's marginal costs is a backdoor which allows it to choose almost any imaginary maximum price it wants.

[71] I do not think NERSA is justified in trying to mimic the outer bounds of an imaginary supply-constrained market if that approach would not allow it to regulate the monopolistic vices it seeks to address. This would heavily favour the monopolist, which would be absurd for a legal regime meant to rein in the monopolist. Therefore, in trying to quell the market power of the monopolist by setting a maximum price, it is vital that a regulator considers the monopolist's marginal costs, even if there is a supply constraint. Without that inclusion, there is no way to test whether the maximum price will address the mischief of monopolistic market power.

[72] This is supported by the actual language of the Gas Act and the Regulations. As explicated below, the requirements to consider the interests of all parties in this market and equitably divide the economic surplus, strongly support requiring NERSA to consider Sasol's marginal costs when regulating its maximum price.

[73] NERSA was required to act in a manner consistent with section 2(e) of the Gas Act, read with the fairness requirement found in regulation 4(3), as set out above. To adhere to this section and regulation, NERSA had to set a maximum gas price that would balance the interests of both the monopolist and the consumers. This means

that NERSA needed to find a way to evaluate the economic surplus being created in the piped-gas market and to divvy it up between the interested parties.

[74] NERSA recognised the importance of finding a formula that "reflects a balance between encouraging new entry and *equitable sharing of any economic surplus between consumers and producers*". It is hard to imagine how NERSA could decide how to equitably split the surplus without considering Sasol's profits and thus costs. Under the basket of alternatives approach, NERSA has no way of calculating Sasol's profit from any given price, and therefore has no way of adequately judging the equities of distribution of the surplus.

[75] NERSA was tasked with setting a ceiling price for Sasol that allowed it to recover its costs and to make a profit that was commensurate with its undertaken risks, as set out in regulation 4(4).[39] In order for NERSA to rationally decide the maximum price which would include both costs and the chosen allowable profit, it needed to know and consider Sasol's marginal costs of production.

[76] Arguably, the Maximum Pricing Methodology has the potential to adhere to regulation 4(4) because it offers the licensee a choice between the pass-through of costs and the basket of alternatives. The former takes into consideration the regulated entity's marginal costs whereas the latter does not. By choosing the latter, Sasol was able to recoup its costs and possibly *more than* a reasonable profit. However, regulation 4(4) must be read in context. This context includes the task of regulating the prices of a recognised monopolist, the fairness constraint of regulation 4(3)(b), and the lack of any language like "at least" in regulation 4(4) itself. Regulation 4(4) cannot be read to say that NERSA's task was *merely* to consider the licensee's costs

[39] Regulation 4(4) of the Regulations provides as follows:

> "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."

when setting the floor of a maximum price, instead it sets a floor while pointing towards the rational approach that ought to be taken for finding the ceiling as well.

[77] Instead of considering Sasol's costs, NERSA considered the imaginary marginal costs of production for an admittedly unknown gas seller. The basket of alternatives option of the Maximum Pricing Methodology represents these imaginary marginal costs of production. There is likely some merit in this approach when trying to understand the limitations of an entrant into an imaginary supply-constrained market. However, it is totally divorced from a rational approach to choosing the maximum profit allowed by a recognised monopolist and then adding that profit onto the monopolist's actual costs.

[78] In trying to replicate a competitive market, NERSA considered what the maximum marginal costs of production of a fictional gas seller might be before it could no longer compete with the energy substitutes. NERSA then used those imaginary marginal costs of production when setting Sasol's maximum reasonable gas price. One of the most relevant factors in NERSA's entire equation for specifically regulating Sasol ought to have been Sasol's own marginal costs of production. Without considering Sasol's costs, NERSA could not set a maximum price that included an equitable division of profit for Sasol and economic value creation for consumers. Sasol's costs are a mandatory input to this kind of exercise. NERSA failed to consider this mandatory input, and thus I cannot find that NERSA acted rationally in deciding Sasol's maximum gas price.

(c) Review of the Tariff Decision

[79] In their founding papers in the High Court, the respondents had attacked the Tariff Decision on a series of self-standing grounds. However, these were not pursued in the Supreme Court of Appeal. Instead, the respondents adopted the position that the attack on the Maximum Price Decision would also determine the fate of the Tariff Decision. The Supreme Court of Appeal agreed that the two decisions were linked and that, as the Maximum Price Decision fell to be set aside, so too did the

Tariff Decision. The Court did so without assessing the lawfulness of the Tariff Decision separately from the Maximum Price Decision.

[80] Before this Court, the applicants contend that tariffs and prices are distinct and that the Supreme Court of Appeal erred in not appreciating the difference between the two. First, the applicants contend that the essence of the distinction lies in the definition of "price" and "tariff" as is contained in section 1 of the Gas Act. They contend that, on the one hand, prices amount to the payment for gas as a commodity – in other words, payment for the molecules, on the other hand, tariffs amount to the payment for services provided in relation to gas. In other words, the payment for the transportation of molecules. Second, the applicants submit that even the powers given to NERSA by the Gas Act are different when it comes to how it must determine maximum prices and tariffs. The applicants submit that under section 21(1)(p) of the Gas Act, NERSA only has the power to approve *maximum* prices whereas it has the power to regulate *actual* tariffs in terms of section 4(h). Third, the applicants contend that the methodologies applied by NERSA to approve the transmission tariffs and the maximum prices are also different. The applicants contend that tariffs are linked to the underlying capital asset base utilised 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.

[81] The respondents submit that the Supreme Court of Appeal was correct in its treatment of the Tariff Decision. The respondents place heavy reliance on regulation 4(6) and 4(13) of the Regulations and submit that the Regulations envisage a composite total price that, while comprised of constituent elements – is a single price for a single, undifferentiated product as received by the customer which also gets invoiced at the same time. The respondents argue that at all material times, NERSA understood that it was entrusted with the task of determining the maximum price that a customer would pay for the receipt of gas at its premises.

[82] It is true that the tariff is a constituent element of the maximum price of gas and that the entire process geared to the determination of a "resultant sum". The Maximum Pricing Methodology makes it perspicuous that the Tariff Guidelines give guidance on all tariff-related activities, which are charged for gas services and which must be added to the price(s) for piped gas. The Maximum Pricing Methodology states that the determination of the trading margins (a charge for a gas service) in that methodology is therefore referenced to the Tariff Guidelines to ensure that there is consistency in the decisions taken by NERSA.

[83] So while the Tariff Decision may have an influence on the Maximum Price Decision, the converse is not true. The maximum price of gas is not a constituent element of the tariff price. The fact that the tariff is a constituent element of the maximum price of gas does not, therefore, mean that the setting aside of the Maximum Price Decision invalidates the Tariff Decision.

[84] The independence of the Tariff Decision from the Maximum Price Decision is clear when one looks at the methodology used in the determination of the Tariff Decision. In Sasol's case, it elected to use the rate of return methodology in its Tariff Application. This methodology adjusts overall tariff levels according to the company's efficient level of accounting costs and costs of capital and is based on the calculation of the revenue the company will be allowed to earn to cover its efficient operational expenses and to provide a return on its efficient level of investment in capital assets. The Tariff Guidelines set out the components of the allowed revenue formula under the rate of return methodology – none of which include or reference to the maximum gas price.

[85] The Tariff Decision is made using a different methodology and formula which is entirely independent from the Maximum Price Decision. All of the elements that are considered in the determination of the Tariff Decision are independent from the Maximum Price Decision. Setting aside the Maximum Price Decision without setting aside the Tariff Decision will therefore not produce any absurd consequences – the

Tariff Decision will remain and when the Maximum Price Decision is reconsidered, it can refer to or utilise the Tariff Decision insofar as it may have any influence on that decision.

[86] It therefore seems nonsensical to set aside the Tariff Decision when the result would be that NERSA must re-take that decision in exactly the same way, taking into account exactly the same factors that will ultimately lead to exactly the same result. I would uphold the appeal insofar as it relates to the setting aside of the Tariff Decision.

Remedy

[87] Sasol submits that even if this Court were to find against the applicants, the appropriate remedy would be to allow the Maximum Price Decision to stand. This is because that decision has expired and is of no force and effect. In the event that NERSA's determination is less than what Sasol has charged its customers over the relevant period, it would be unduly prejudicial to require it to repay a portion of the agreed price to its customers, especially where Sasol has arranged its affairs in accordance with the Maximum Price Decision. In the event that NERSA's determination is more than what Sasol has charged its customers over the relevant period, then the exercise of determining a new maximum price would have been an exercise in futility and a waste of public resources.

[88] However, Sasol did not provide an alternative remedy in the event that this Court found against them.

[89] The default remedy for declarations of invalidity of administrative action is to set aside the invalid action and remit it to the decision maker for reconsideration.[40] Once a decision has been set aside, it ceases to have an effect and is treated as if it

[40] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* [2015] ZACC 22; 2015 (10) BCLR 1199 (CC); 2015 (5) SA 245 (CC) at para 42.

never existed.[41] Although this is the default remedy, it remains a discretionary remedy. As a result, there are certain instances where setting aside and non-remittal would be appropriate. The case of *JFE Sapela Electronics* is a prime example here.[42] In that case, Scott J reasoned that a remittal would be impractical and disruptive and accordingly held that it would be in the interests of finality, pragmatism and practicality for the invalid action in that case not to be remitted. This view was further adopted in *Millennium Waste Management*.[43] *Oudekraal* has also set out that legality on occasion may be overridden by these competing considerations.[44]

[90] Moreover, courts generally refer the matter to the original decision-maker, rather than correct the decision. This is so because courts prefer to exercise deference and do not want to be perceived as usurping the decision-making authority and powers that have been delegated to an administrator. The court in *Johannesburg City Council v Administrator, Transvaal* held that "the court is slow to assume a discretion which has by statute been entrusted to another tribunal or functionary".[45] This is a caution that courts should not hastily substitute the decisions of administrators with their own. This Court does not have the necessary information in front of it to step into the shoes of NERSA, including most importantly, Sasol's marginal costs, and therefore cannot set a maximum price.

[91] Given the finding of invalidity, and the fact that invalidity operates with retrospective effect,[46] we are left with no valid maximum price existing for the period

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[41] *Pikoli v President of the Republic of South Africa* ZAGPPHC 99; 2010 (1) SA 400 (GNP) at 408-9.

[42] *Chairperson: Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd* [2005] ZASCA 90; 2008 (2) SA 638 (SCA); [2005] 4 All SA 487 (SCA) (*JFE Sapela Electronics*).

[43] *Millennium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo Province* [2007] ZASCA 165; 2008 (5) BCLR 508; 2008 (2) SA 481 (SCA).

[44] *Oudekraal* above n 20 at para 36.

[45] *Johannesburg City Council v Administrator, Transvaal* 1969 (2) SA 72 (T) at 76D-E.

[46] See most recently this Court's judgments in *Aquila Steel (S Africa) (Pty) Ltd v Minister of Mineral Resources* [2019] ZACC 5; 2019 (4) BCLR 429 (CC); *Corruption Watch NPC v President of the Republic of South Africa*; and *Nxasana v Corruption Watch NPC* [2018] ZACC 23; 2018 (10) BCLR 1179 (CC); 2018 (2) SACR 442 (CC).

in dispute. The applicants have not provided any compelling reasons why it would be in the interests of justice to depart from the default remedy. It is not true that the order will necessarily have no practical effect – Sasol itself says that it may have the result of it having to repay its customers. The applicants have failed to furnish this Court with reasons that would persuade it to let the Maximum Price Decision stand, except for the possible inconvenience that may follow. Accordingly, remittal is the appropriate remedy in this matter.

Costs

[92] Although the applicants have been successful in the appeal in relation to the Tariff Decision, this is but a small part of the appeal. The respondents have been successful in the main part of the appeal, and costs should accordingly follow.

Order

[93] In the result, the following order is made:

1. The application for leave to appeal is granted.
2. The appeal is upheld in part, insofar as it relates to the Supreme Court of Appeal's setting aside of the decision of the first applicant of 26 March 2013 to approve the transmission tariffs for the period of 26 March 2014 to 30 June 2015.
3. The remainder of the appeal is dismissed.
4. Paragraph 2(a) of the order of the Supreme Court of Appeal is set aside and substituted with the following:
   "(a) The first applicant's decision of 26 March 2013 to approve the application by the second applicant for maximum gas prices and for a trading margin for the period 26 March 2014 to 30 June 2017 is reviewed and set aside."
5. The applicants must pay the respondents' costs in this Court, including the costs of two counsel.

JAFTA J

[94] I have had the benefit of reading the judgment of my colleague Khampepe J (first judgment). I agree with the outcome proposed and most of the reasons underpinning that outcome. But with regard to the invalidity of the Maximum Price Decision, I prefer disposing of the matter on the ground adopted by the Supreme Court of Appeal.

[95] I prefer the route followed by the Supreme Court of Appeal for four reasons. First, as it appears below, the pleaded case of rationality was directed at the impugned decisions and not the process leading up to those decisions. It was the decisions themselves which were said to be irrational. The test that applies to rationality of decisions differs from the standard for determining rationality of process.

[96] Second, the rationality ground that was pursued in the courts below was the one pleaded. Consequently, the decision of the Supreme Court of Appeal was based on the irrationality of the Maximum Price Decision itself and not the process preceding it. As this is an appeal against that decision, it must be upheld on the same ground of review unless the reasons furnished by the Supreme Court of Appeal were wrong. I am not persuaded that the Supreme Court of Appeal reached a correct outcome but for wrong reasons.

[97] Third, at the hearing of this appeal, NERSA and Sasol in challenging the judgment of the Supreme Court of Appeal, restricted themselves to the reasons furnished by that Court. Likewise, the respondents in defending the judgment, limited themselves to the rationality of the decisions of NERSA. None of the parties addressed rationality of process. Therefore, I am reluctant to decide this matter on a legal issue that was not addressed by the parties. In *Magajane* this Court declined to

decide an issue raised in the pleadings but in respect of which no argument was presented.[47]

[98] Fourth, the grounds of review advanced by the respondents (applicants in the High Court) in attacking NERSA's decisions were all based on PAJA. PAJA separates grounds of review directed at a process leading up to an administrative action from those that relate to the action itself. Under PAJA, rationality as a ground of review is limited to an administrative action. It is not mentioned in respect of process.

[99] It is now convenient to substantiate each of these reasons.

Rationality addressed by the parties

[100] The parties' argument dealt with the rationality of the impugned decisions and not procedural rationality. However, this does not mean that this Court was not entitled, *mero motu* (of its own accord), to raise procedural rationality if conditions for doing so were met. The first one is that procedural rationality must be apparent on the papers. If it does not arise from the record, it cannot be raised *mero motu*. The second condition is that, having raised it, the Court must give the parties an opportunity to address the point.[48]

[101] The second requirement accords with the parties' fair hearing right that requires them to be heard before a decision that affects their rights is taken. This is fundamental to our system of justice. And this opportunity is afforded to the parties even where it appears that the point raised by the Court is unanswerable. As this Court noted in *My Vote Counts,* points which are apparently unanswerable may still be

[47] *Magajane v Chairperson, North West Gambling Board* [2006] ZACC 8; 2006 (5) SA 250 (CC); 2006 (10) BCLR 1133 (CC) at paras 26-32.

[48] See *CUSA v Tao Ying Metal Industries* [2008] ZACC 15; 2009 (2) SA 204 (CC); 2009 (1) BCLR 1 (CC) at para 68.

answered fully.[49] Here neither requirement is met. Procedural rationality is not apparent on the papers and the parties were not afforded a chance to address it.

Pleaded case

[102] It is common cause that before the impugned decision was taken, Sasol was allowed to charge monopolist prices for the gas it supplied to various distributors in this country. This attracted the attention of NERSA which is empowered by the Gas Act to intervene by fixing maximum prices in circumstances "where there is inadequate competition".[50] Evidently the purpose for which this power is conferred is to protect consumers against monopolist prices such as those that were charged by Sasol. This is achieved by fixing maximum prices which oblige suppliers of gas to charge competitive prices.

[103] Therefore, when NERSA took the Maximum Price Decision, it sought to achieve the objective of forcing Sasol to charge competitive prices. It was this decision that was challenged by the respondents on rationality, among other grounds. The respondents formulated their rationality challenge in these terms—

> "by virtue of section 6(2)(f)(ii) of PAJA, *the decisions* were 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; (dd) the reasons given for is by the administrator."

[104] Evidently in pleading rationality the respondents cut the relevant part from PAJA and pasted it into the founding affidavit. The quoted part of their pleading reflects the wording of section 6(2)(f)(ii) of PAJA in its original form. But an important thing emerging from the pleading so formulated is that the subject-matter of the rationality challenge is the decisions of NERSA. It is the decisions which it was

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[49] *My Vote Counts NPC v Speaker of the National Assembly* [2015] ZACC 31; 2016 (1) SA 132 (CC); 2015 (12) BCLR 1407 (CC) at para 177.

[50] Section 21(1)(p) read with section 4(g) of the Gas Act.

said were not rationally connected to the purpose for which they were taken or the purpose of the empowering provision or the information before NERSA or the reasons given by it.

[105] This pleading does not incorporate a challenge directed at a process leading up to the Maximum Price Decision. Rather it asserts absence of a rational link between that decision and the purpose for which it was taken or the purpose of the empowering legislation. The last two objects mentioned in the pleading do not apply here as they do not relate to purpose.

Overlooking Sasol's marginal costs

[106] This was pleaded in these specific terms—

> "by virtue of section 6(2)(e)(iii) of PAJA, in that irrelevant considerations were taken into account or relevant considerations were not considered."

[107] This is the only ground in PAJA that addresses the failure of the decision-maker to take into consideration relevant factors. That failure, of itself alone, constitutes a ground of review. But this ground bears no relation to rationality. It does not form part of section 6(2)(f) which deals with rationality. Instead, it is located in section 6(2)(e).

[108] Section 6(2)(e) of PAJA provides:

> "(2) A court or tribunal has the power to judicially review an administrative action if—
>
> . . .
>
> (e) the action was taken—
>
> (i) for a reason not authorised by the empowering provision;
>
> (ii) for an ulterior purpose or motive;
>
> (iii) because irrelevant considerations were taken into account or relevant considerations were not considered;

> (iv) because of the unauthorised or unwarranted dictates of another person or body;
> (v) in bad faith; or
> (vi) arbitrarily or capriciously."

[109] The differences in structure and language used in subsections (2)(e)-(f) do not support an interpretation that the failure to consider relevant factors is part of the rationality ground. The two grounds are listed separately as self-standing grounds, upon which an applicant for review may individually rely. Even at common law a failure to take account of relevant factors has always been regarded as different from taking a decision for a purpose other than the one for which the power was granted.

[110] But at common law both these grounds, together with others are taken to be proof of the decision-maker's failure to apply his or her mind to the relevant issues. In *Johannesburg Stock Exchange* Corbett JA said:

> "Section 17(3) clearly confers a discretion upon the president and, provided that his decision to suspend shares is taken after due consultation with the head of the listings department, it cannot be challenged in a court of law except upon what are known as review grounds. Broadly, in order to establish review grounds it must be shown that the president failed to apply his mind to the relevant issues in accordance with the "behests of the statute and the tenets of natural justice" . . . . Such failure may be shown by proof, *inter alia*, that the decision was arrived at arbitrarily or capriciously or *mala fide* or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or that the president misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or that the decision of the president was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter in the manner aforestated . . . . Some of these grounds tend to overlap."[51]

[111] What is apparent from this common law statement on grounds of review is that taking a decision for an improper purpose and ignoring relevant factors are separate

[51] *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd* 1988 (3) SA 132 (A).

grounds. While there may be some overlap between some of the listed grounds, they remain separate. Indeed it would be extraordinary to read the two grounds as one in PAJA, despite its language and scheme.

Duty to rely on PAJA

[112] Since PAJA is applicable to the present claim, the applicants for review were bound to rely on the grounds listed in section 6 of PAJA.[52] Where legislation has been passed to give effect to constitutional rights, the party that seeks to vindicate those rights must rely on that legislation and not directly on the Constitution. Therefore, it would not have been competent for the review applicants to rely on the principle of legality sourced directly from the Constitution.

[113] As PAJA does not provide for procedural rationality as a ground for review, reliance on this ground may not be endorsed. Litigants should not be allowed to sidestep PAJA where it applies, by relying on the principle of legality. To permit this would seriously undermine PAJA and the constitutional principle of subsidiarity. Reliance on the principle of legality must be endorsed where PAJA does not apply. This approach would bring coherence in our jurisprudence. As was noted in *Democratic Alliance,*[53] reliance on procedural rationality was permitted in executive decisions to which PAJA did not apply.

Procedural rationality

[114] Up to now this Court has recognised rationality of process in respect of executive decisions only.[54] In *Democratic Alliance* this Court was concerned with the exercise of executive power by the President who purported to appoint a National Director of Public Prosecutions. It emerged from the facts that the President

[52] *Bato Star Fishing* above n 15 at para 25.

[53] *Democratic Alliance* above n 23.

[54] Id.

had ignored adverse findings on the suitability of the candidate he sought to appoint, in circumstances where he had said he accepted those findings.

[115] Recognising that the President's decision could be challenged on rationality this Court declared:

> "This Court in *SARFU* said that 'the exercise of the President's constitutional power to appoint a commission of enquiry is not directly governed by the principle in the *Johannesburg Stock Exchange* case'. It follows that this principle would not directly govern the President's power to appoint the National Director either. That is not to say that ignoring relevant factors can have nothing to do with rationality. If in the circumstances of a case, there is a failure to take into account relevant material that failure would constitute part of the means to achieve the purpose for which the power was conferred. And if that failure had an impact on the rationality of the entire process, then the final decision may be rendered irrational and invalid by the irrationality of the process as a whole. There is therefore a three-stage enquiry to be made when a court is faced with an executive decision where certain factors were ignored. The first is whether the factors ignored are relevant; the second requires us to consider whether the failure to consider the material concerned (the means) is rationally related to the purpose for which the power was conferred; and the third, which arises only if the answer to the second stage of the enquiry is negative, is whether ignoring relevant facts is of a kind that colours the entire process with irrationality and thus renders the final decision irrational."[55]

[116] It is significant to note that PAJA did not apply to the President's decision in *Democratic Alliance* simply because his decision did not constitute administrative action. Consequently, section 6(2)(e) of PAJA could not be invoked. Faced with this dilemma, the Court developed and extended the principle of rationality to also cover the process leading up to a decision and concluded that if the process followed when making a decision is tainted by irrationality, a decision taken as a result of such process would itself be irrational. This Court is yet to pronounce on whether

[55] Id at para 39.

rationality of process may be invoked to attack administrative action. Therefore the genesis of procedural rationality is *Democratic Alliance*.

Rationality of process or decision

[117] Our jurisprudence draws a clear line between two forms of rationality. That is between rationality of a decision and rationality that relates to process. This is not surprising because the taking of a decision and the process that precedes it are separate stages in decision-making. In *Democratic Alliance* this distinction was illustrated thus:

> "The conclusion that the process must also be rational in that it must be rationally related to the achievement of the purpose for which the power is conferred, is inescapable and an inevitable consequence of the understanding that rationality review is an evaluation of the relationship between means and ends. The means for achieving the purpose for which the power was conferred must include everything that is done to achieve the purpose. Not only the decision employed to achieve the purpose, but also everything done in the process of taking that decision, constitutes means towards the attainment of the purpose for which the power was conferred."[56]

[118] The difference between decisional and procedural irrationality was also observed by the High Court in *Minister of International Relations*.[57] In that matter the Court stated:

> "The above conclusion leads to the question of procedural rationality of the notice of withdrawal. The requirement for rationality is that government action must be rationally connected to a legitimate government purpose. The principle of legality requires that both the process by which the decision is made and the decision itself must be rational. In [*Democratic Alliance*] the Constitutional Court explained that to determine procedural irrationality is to look at the process as a whole and determine whether steps in the process were rationally related to the end sought to be achieved;

[56] Id at para 36.

[57] *Democratic Alliance v Minister of International Relations and Cooperation* 2017 (3) SA 212 (GP) (*Minister of International Relations*).

> if not, whether the absence of a connection between a particular step is so unrelated to the end as to taint the whole process with irrationality. In the present case the procedural irrationality lies in the finding that the national executive did not consult Parliament, as it was obliged to, before delivering the notice of withdrawal."[58]

[119] A further distinction between the two forms of rationality is to be found in the standard applicable to determining rationality in each of them. With regard to the rationality of a decision, the test is simply whether there was a rational connection between the decision taken and the purpose for which the power exercised was given. A different standard applies to rationality that concerns process. As this Court noted in *Democratic Alliance* in the statement quoted in paragraph 115, a three-stage enquiry is applied to determine whether a process that was followed is so irrational as to render the final decision irrational.

[120] I am not persuaded that here the three-stage test mentioned in *Democratic Alliance* was met. Overlooking Sasol's marginal costs, as I see it, would render the Maximum Price Decision irrational only if that decision could not be reached without it. The purpose of taking marginal costs into account is spelt out in regulation 4(4) which requires that the maximum price fixed must enable a licensee like Sasol to recover its operational costs. The facts, as determined by the Supreme Court of Appeal, show that the impugned decision did not disable Sasol from doing so. Instead, on those facts Sasol was able to charge prices that were even higher than the monopolist prices it charged before the Maximum Price Decision was taken.

[121] Therefore, it does not appear to me that in these circumstances the failure to consider Sasol's marginal costs vitiated the Maximum Price Decision because the purpose of recovering operational costs and making profit was satisfied. Since regulation 4 does not expressly oblige NERSA to consider marginal costs, it was open

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[58] Id at para 64.

to it to adopt whatever means it chose in taking the impugned decision. In affirming this proposition in *Albutt*[59] this Court said:

> "The Executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And if, objectively speaking, they are not, they fall short of the standard demanded by the Constitution. This is true of the exercise of the power to pardon under section 84(2)(j)."[60]

[122] However, the inapplicability of rationality of process and the failure to establish it here do not mean that the Maximum Price Decision was rational. As mentioned, the Supreme Court of Appeal whose decision is under appeal, held that the impugned decision was irrational because there was no rational link between it and the purpose of imposing competitive prices and bringing to an end Sasol's monopoly.

[123] Having determined the purpose for fixing maximum prices contemplated in section 21(1)(p) of the Gas Act, the Supreme Court of Appeal held:

> "Instead, and in my view . . . NERSA did the very opposite. It proceeded to determine a methodology which was once again referenced to more expensive alternative sources of fuel, and which had the effect of permitting an increase rather than reducing Sasol Gas'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

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[59] *Albutt v Centre for the Study of Violence and Reconciliation* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC).

[60] Id at para 51.

> 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. Indeed, although there is a dispute between the experts regarding the precise effect upon customers such as the appellants, 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."[61]

[124] The Supreme Court of Appeal found that the dispute between the evidence tendered by the experts was limited to the precise effect the impugned decision had on various circumstances. But that Court found that, notwithstanding this divergence, the impugned decision had allowed Sasol to charge prices that were even higher than its monopolist prices it had earlier charged. I am not convinced that these factual findings were not properly made and that intervention by this Court is warranted. Generally, this Court must decide appeals on the basis of the factual findings made by the courts below. No compelling reasons were advanced for a departure from this general principle and I can think of none.

[125] In *Makate* this Court considered the role it plays in our appellate system and declared that it decides cases on facts as determined by lower courts:

> "Moreover, this being the highest court in the Republic which is charged with upholding the Constitution, and deciding points of law of general public importance, this court must not be saddled with the responsibility of resolving factual disputes where disputes of that kind have been determined by lower courts. Deciding factual disputes is ordinarily not the role of apex courts. Ordinarily, an apex court declares the law that must be followed and applied by the other courts. Factual disputes must be determined by the lower courts and when cases come to this court on appeal, they are adjudicated on the facts as found by the lower courts. Of course this principle does not apply to matters that come directly to this court."[62]

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[61] Supreme Court of Appeal judgment above n 4 at para 46.

[62] *Makate* above n 28 at para 39.

[126] Proceeding from the premise that the Maximum Price Decision permitted Sasol to charge even more exorbitant prices, the Supreme Court of Appeal concluded:

> "Consequently, the methodology NERSA adopted 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. What it was obliged to do was to think away the monopoly 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 undercut each other's prices in order to take business from each other. By its very nature, the methodology NERSA adopted did not do this. Using that methodology to determine a maximum competitive price was therefore irrational for a regulator such as NERSA."[63]

[127] In these circumstances it is apparent that a rational connection between the Maximum Price Decision (the means) and the competitive prices (the end), does not exist. The means selected by NERSA to create an environment akin to competition were not capable of achieving the purpose for which the section 21(1)(p) power was conferred. Therefore irrationality has been established.

[128] It is for these reasons that I support paragraph 4 of the order proposed in the first judgment. With regard to other paragraphs of that order, I concur in the reasons set out in the first judgment.

[63] Supreme Court of Appeal judgment above n 4 at para 49.

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