THE COMPETITION APPEAL COURT

OF SOUTH AFRICA

CASE NO: 212/CAC/Apr 23

(1) REPORTABLE: **YES**
(2) OF INTEREST TO OTHER JUDGES: **YES**
(3) REVISED.

5 March 2024 .....

SIGNATURE

In the matter between:

SASOL GAS (PTY) LTD	Applicant
And	
THE COMPETITION COMMISSION OF SOUTH AFRICA	First Respondent
	Second Respondent
INDUSTRIAL GAS USERS ASSOCIATION OF SOUTHERN AFRICA	Third Respondent
EGOLI GAS PROPRIETARY LIMITED	Fourth Respondent
THE NATIONAL ENERGY REGULATOR OF SOUTH AFRICA	

Coram: Davis, Spilg and Potterill AJJA

JUDGMENT

SPILG AJA

INTRODUCTION

1. This is an application brought by Sasol Gas (Pty) Ltd ("*Sasol*") to review and set aside decisions taken by the Competition Commission of South Africa ("*the Commission*"). [1]

The decisions sought to be reviewed were those taken by the Commission;

a. to initiate an investigation under s 8(1)(a) of the Competition Act 89 of 1998 into an alleged abuse of dominance by Sasol for charging an excessive price to the detriment of its customers or the consumers[2]; and

b. subsequently to issue a summons on Sasol after it had failed to respond to the Commission's detailed request for information relevant to its investigation.

2. The orders sought form Part B of the review application. In Part A Sasol had applied for interim interdictory relief to suspend the operation of the summons pending the outcome of the review application.

3. The Industrial Gas Users Association of Southern Africa ("*IGUASA*") and Egoli Gas (Pty) Ltd were cited as the second and third respondents. Each filed complaints against Sasol under s 49B (2)(b) of the Competition Act which had led to the

[1]The Commission is the first respondent.

[2]Section 8(1)(a) provides:

"Section *8: Abuse of dominance prohibited.—*

(1) It is prohibited for a dominant firm to—

(a) charge an excessive price to the detriment of consumers or customers;"

Commission's decision to undertake an investigation. They complained that Sasol was abusing its dominance by charging an excessive price.

Sasol sought a cost order should they oppose the application.

4. The National Energy Regulator of South Africa ("*NERSA*") was joined as the fourth respondent. It is the designated regulator under the Gas Act 48 of 2001 of the piped-gas, electricity and petroleum pipeline industries in South Africa.

NERSA was clearly an interested party in the litigation because the Commission was in effect assuming jurisdiction to decide whether the maximum price the former had allowed Sasol to charge under s 21(1)(b) of the Gas Act was subject to scrutiny under the abuse of dominance provisions of the Competition Act.

Unless the context indicates otherwise, reference to a section of a statute means one under the Competition Act.

THE COMPLAINTS AND ENSUING LITIGATION

5. In early February 2022 Egoli Gas filed a complaint against Sasol on the grounds that as from September 2021 it had decided to implement and enforce a monopoly pricing structure on natural piped gas traders *"which is excessive and which will destroy the business models of all traders other than the Sasol trading arm. The price increase is currently in effect and stems from a new maximum pricing methodology determined by NERSA. The new methodology is irrational and permits Sasol to exploit its position of dominance to effectively destroy the business of all downstream competitors."*

A material allegation made in the complaint was that the new pricing methodology is directly linked to global spot pricing which has resulted in a scenario where soaring global prices have permitted the local piped natural gas price to reach unprecedented levels. It was alleged that as a further consequence, the new

methodology permitted Sasol, as the only supplier, to abolish previously granted bulk discounts and, save for its own trading arm, render the trading market effectively moribund.

This, it was urged, enables Sasol to receive an unprecedented monopoly windfall because it does not source its piped gas on international markets but rather pursuant to a series of agreements which had commenced in 2004 between itself, the South African Government and the Mozambique Government and which entailed Sasol constructing a transmission pipeline into South Africa from gas fields in the Mozambican interior.

In its complaint, Egoli Gas alleged that by 2014 Sasol had recouped its cost of investment and that the prevailing terms allow Sasol to lock in Mozambique gas supplies until 2029 at a landed cost currently of approximately USD2/gj (gigajoules). In other words, it was contended that global spot pricing cannot affect the domestic piped gas market because it is completely insulated against international competition by virtue of Sasol's monopoly which has been in effect since at least 2004.

6. In May 2022 the Commission decided to investigate Egoli Gas' complaint.

Shortly after the Commission did so, IGUASA filed its own s 8(1)(a) complaint. It however complained of excessive pricing consequent on an abuse of dominance not only under the new methodology but also going back to 2014 under the previous pricing methodology.

IGUASA contended that, based on publicly available information, Sasol over the years in question incurred total costs of between R2/gj and R17/gj in the production of gas and that the internal transfer price (which it pays to acquire the gas molecule from its upstream entity in Mozambique) has been between R11/gj and R36/gj[3] .

[3]With the *caveat* that this may have taken into account factors in addition to just operating costs, capital costs and a return on capital.

IGUASA alleged that Sasol had throughout the period charged and continues to charge prices far in excess of these cost metrics. It also relied on the Constitutional Court decision of *National Energy Regulator of South Africa & Another v PG Group (Pty) Limited & Others* 2020 (1) SA 450 (CC) which held that NERSA in its post-2014 gas pricing methodology had acted irrationally and for that reason the court had remitted the gas pricing back to NERSA for reconsideration[4]. One of the court's reasons for doing so was that NERSA had not accounted for Sasol's costs in determining the maximum gas price.[5]

7. IGUASA submitted that the effect of the Constitutional Court judgment required NERSA to adopt a cost-plus or pass-through approach in approving the maximum gas price. It claimed that NERSA in its new pricing, which applied retrospectively from 26 March 2014[6], adopted a methodology which was not based on an assessment of Sasol's costs but rather allowed the maximum piped-gas prices to move entirely independently of its actual costs because they are based on international benchmarks.

8. In June 2022 the Commission included IGUASA's complaint as part of its investigation.

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[4]The Constitutional Court upheld the decision of the Supreme Court of Appeal in *PG Group Proprietary Limited & Others v National Energy Regulator of South Africa & Another* 2018 (5) SA 150 (SCA) of 26 March 2013 to review and set aside NERSA's decision to approve the application by Sasol for maximum gas prices and for a trading margin for the period 26 March 2014 to 30 June 2017 . The Constitutional Court however did not follow the SCA reasoning for holding NERSA's decision irrational (which it paraphrased at paras 24 and 25) but, *per* Khampepe J for the majority, found at para 65 that:

> *" … 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 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."*

The Court then proceeded to set out a number of interrelated reasons for finding that Sasol's marginal costs were a necessary factor in determining its maximum price. The Constitutional Court declined to leave NERSA's decision in place or to substitute its own decision but remitted the issue back to the regulator for determination (at paras 89 and 91)

[5]See para 65

[6]Although the determination became effective on 31 March 2021, significantly for the positions taken both by Sasol and the industry it was made retrospective from the March 2014 date

9. It should be mentioned that six months earlier, in December 2021, IGUASA had brought an application before the Gauteng High Court in Pretoria against NERSA to review and set aside its new pricing methodology. IGUASA also sought an order directing that the matter be remitted back to the regulator for a new decision. Sasol was cited as the second respondent. The matter was argued, and judgment is awaited.

10. On 18 July 2022 the Commission delivered a request for information to Sasol in which it sought the disclosure of certain information. Sasol's failure to respond resulted in the Commission issuing a summons on 12 August calling for the requested information.

This prompted Sasol's review application which was brought before the Competition Tribunal in September 2022.

11. By the time the matter came before the Tribunal, the new adjustment method approved by NERSA was yielding a maximum gas price of R273.43/gj for the 2023 financial year end.[7]

12. This appears to have prompted IGUASA to bring its own application before the Tribunal to interdict Sasol from increasing its prevailing gas price of R68/gj until the conclusion of the Commission's investigation.

13. On 12 May 2023 the Tribunal (*per* Adv G Budlender SC, Ms Mazwai and Mr Roskam concurring) dismissed Part A of Sasol's review application and granted IGUASA the interdict sought subject to Sasol being able to give at least two months' written notice should it consider changing the price.[8]

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[7]Sasol did not apply NERSA's maximum rate. Instead it started charging R133.34/gj on the ground that the NERSA adjustment would negatively impact Sasol customers "*as well as the rationality test methodology*".

[8]The order included a provision that such a notice must specify the price which Sasol intends charging its customers and if and when that price was approved by NERSA. The interdict was to endure to the earlier of the dates referred to in s 49C (4) of the Act

Sasol then sought and obtained an order suspending the operation of the summons pending the final determination of the review. This order was granted by my brother Davis AJA.

14. Sasol also wished to pursue Part B of its review application. In light of the Constitutional Court decision of *Competition Commission of South Africa v Group Five Construction Limited (2022) ZACC 36*, which held that the Tribunal lacked jurisdiction to review a decision of the Commission, this court was approached to have the review transferred from the Tribunal.

The determination of Part B of Sasol's review application comes before us pursuant to the order made by Manoim JP on 5 May 2023. The order reads;

1. *Subject to paragraph 2 immediately below, Part B of the applicant's application launched under case number OTH110Sep 22, which was initially launched in the Competition Tribunal ("the Tribunal") is transferred to the roll of this Court for this Court's determination.*

2. *A further hearing for procedural directions in terms of section 38(2A)(e) will be held, upon a determination by the Tribunal in Part A of the application (currently reserved), or within one calendar month of the date of this order or such further period as may be determined by the Judge President*

3. *There is no order as to costs of this application.*

15. This Part is opposed by the Commission and IGUASA. Egoli Gas abides the decision and NERSA filed papers for the purposes of assisting the court.

THE ISSUES

16. Sasol contends that the decisions taken by the Commission fall outside its jurisdiction. It also contends that the decisions are unlawful "*for violating the legality*

principle as being irrational"[9]*. Mr Snyckers*, who represented Sasol, accepted that in the context of the case this was just another way of saying that the Commission could not have acted rationally because its decisions to investigate the complaints and later to issue the summons were not authorised by law as they fell outside its statutory powers and functions; the substance therefore remains the jurisdictional reach of the Commission. [10]

The submission advanced is that the Commission has no jurisdiction to investigate whether Sasol charges an excessive price for gas because another regulator, being NERSA, has made a price determination for that industry, the effect of which is to immunise it from the excessive pricing provisions of the Competition Act.

At the heart of Sasol's argument is Mr Snycker's contention that its conduct, in charging for piped gas in accordance with the maximum price level determined by NERSA, is intended to be removed from the market and is therefore not a product of the market (so as to render it subject to competition scrutiny).[11]

17. The argument is premised on the assertion that the Gas Act is sector-specific legislation which clothes NERSA as the regulator Parliament has directed to exercise exclusive jurisdiction to determine the legality of gas pricing. The contention is that NERSA was given the sole power *"to address a potentially prohibited practice inherent in the pricing*".

18. Couched in this fashion, Mr Snyckers argues that the issue of concurrent jurisdiction provided for in s 3(1A) of the Competition Act remains stillborn because s 21(1)(p) of the Gas Act determines where the authority and jurisdiction is situated.

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[9] Sasol's HoA para 20

[10] Compare *Telkom* at para 12

[11] Sasol's HoA para 42:
"whether the conduct in question (in this case charging in accordance with the maximum price level determined by NERSA) is intended to be removed from the market or is instead to be a product of the market –- in the latter case, it is subject to competition scrutiny; in the former not."

In other words, there is a preceding question which must be considered before s 3(1A) of the Competition Act comes into play - namely, whether s 21(1)(p) of the Gas Act confers exclusive sovereignty over the legality of the conduct in question; if it does then s 3(1A) of the Competition Act is not engaged.

KEY LEGISLATIVE PROVISIONS

19. Sasol relies on the provisions of s 21(1)(p) of the Gas Act which read:

> *"Conditions of licence.—*
>
> (1) *The Gas Regulator may impose licence conditions within the following framework of requirements and limitations—*
>
> *(p) maximum prices for distributors, reticulators and all classes of consumers must be approved by the Gas Regulator where there is inadequate competition as contemplated in Chapters 2 and 3 of the Competition Act, 1998 (Act No. 89 of 1998)*

Sections 21(2)(a), (b) and (c) also appear to be relevant. They provide:

> *"(2) (a) Any person aggrieved by a condition imposed by the Gas Regulator in terms of subsection (1) may in the prescribed manner apply to the Gas Regulator to have the condition reviewed.*
>
> *(b) If the aggrieved person is not the licensee the Gas Regulator must inform the licensee regarding the application for review.*
>
> *(c) Whenever there is an application for review in terms of paragraph (a) the Gas Regulator must conduct an investigation and may for that purpose summon witnesses to appear before it.*

20. Each of the respondents, including NERSA, contends that far from s 21(1)(p) conferring exclusive jurisdiction on the latter to determine a gas price which is immunised from scrutiny under the Competition Act, ss 3(1) and 3(1A) of that Act provide for a regime of concurrent jurisdiction. These sections read as follows:

"*Section 3. Application of Act*

(1) *This Act applies to all economic activity within, or having an effect within, the Republic, except—*

(a) *collective bargaining within the meaning of section 23 of the Constitution, and the Labour Relations Act, 1995 (Act No. 66 of 1995);*

(b) *a collective agreement, as defined in section 213 of the Labour Relations Act, 1995; and*

(c) *…. (deleted by Act 39 of 2000)*

(d) *… (deleted by Act 39 of 2000)*

(e) *concerted conduct designed to achieve a non-commercial socio-economic objective or similar purpose*

(1A) (a) In so far as this Act applies to an industry, or sector of an industry, that is subject to the jurisdiction of another regulatory authority, which authority has jurisdiction in respect of conduct regulated in terms of Chapter 2 or 3 of this Act, this Act must be construed as establishing concurrent jurisdiction in respect of that conduct.

(b) The manner in which the concurrent jurisdiction is exercised in terms of this Act and any other public regulation, must be managed, to the

extent possible, in accordance with any applicable agreement concluded in terms of sections 21 (1) (h) and 82 (1) and (2).

Chapter 2 of the Competition Act houses the s 8(1)(a) abuse of dominance provision which, it is common cause, is the subject matter of the investigation undertaken by the Commission and to which the summon for the production of information relates.

The sections of the Competition Act referred to in s 3(1A)(b) are relevant. They provide:

Section 21(1) (h):

Section 21. Functions of Competition Commission. —

(1) The Competition Commission is responsible to—

(h) negotiate agreements with any regulatory authority to co-ordinate and harmonise the exercise of jurisdiction over competition matters within the relevant industry or sector, and to ensure the consistent application of the principles of this Act;

Section 82 (1), (2) and for sake of completeness (3) provide:

Section 82 Relationship with other agencies. —

(1) A regulatory authority which, in terms of any public regulation, has jurisdiction in respect of conduct regulated in terms of Chapter 2 or 3 or on matters set out in Chapter 4A within a particular sector—

(a) must negotiate agreements with the Competition Commission, as anticipated in section 21 (1) (h); and

(b) in respect of a particular matter within its jurisdiction, may exercise its jurisdiction by way of such an agreement.

(2) *Subsection (1) (a) and (b), read with the changes required by the context, applies to the Competition Commission.*

(3) *In addition to the matters contemplated in section 21 (1) (h), an agreement in terms of subsection (1) must—*

a. *identify and establish procedures for the management of areas of concurrent jurisdiction;*

b. *promote co-operation between the regulatory authority and the Competition Commission;*

c. *provide for the exchange of information and the protection of confidential information; and*

d. *be published in the Gazette.*

STATUTORY INTERPRETATION

21. Since the court is dealing with original legislation passed by the National Assembly, the contents of any agreement concluded under s 82 of the Competition Act should not be considered at the initial stage of the interpretation process. The reason is that the conclusion of such an agreement is comparable to the exercise of a delegated, and therefore a subordinate, power which remains subject to the overriding provisions of the principal pieces of legislation which are being scrutinised.

22. Mr Snyckers properly conceded that there is no express provision in the Gas Act ousting the jurisdiction of the Commission to investigate a complaint of excessive pricing by Sasol. Counsel was therefore driven to argue that the ouster of the Commission's jurisdiction must be necessarily implied.

This exposes the first difficulty confronting Sasol's submission. Section 3(1A) of the Competition Act expressly states that its provisions apply, and that the institutions established under it enjoy concurrent jurisdiction, irrespective of whether another regulatory authority has jurisdiction to investigate or otherwise deal with the same conduct complained of- provided the conduct falls under Chapter 2 or 3 of that Act[12]. It will be recalled that the conduct complained of in the present case is abuse of dominance under s 8(1)(a) which is a Chapter 2 provision.

23. The applicant attempts to overcome this difficulty by arguing that s 21(1) (p) of the Gas Act properly interpreted requires a court, again by necessary implication, to ignore the provisions of the Competition Act. Based on this line of reasoning Sasol argues that a court is obliged to first analyse the "*sector specific legislation*" of the Gas Act and determine if it excludes the jurisdiction of the competition authorities in respect of the impugned conduct.

According to this argument, it is therefore only permissible to consider the concurrent jurisdiction provisions of the Competition Act if the Gas Act in its terms does not implicitly (once again because Sasol concedes it is not expressly so stated) exclude the Commission enjoying concurrent jurisdiction[13].

24. Sasol relies for these propositions on its understanding of the Supreme Court of Appeal decision ("*SCA*") in *Competition Commission of South Africa v Telkom Ltd* [2010] 2 All SA 433 (SCA) at para 29.

The cited extract does not support the proposition contended for. It reads:

[12]See the wording of s 3(1A)(a)
[13]Sasol HoA. Paras 32 and 37

> *"Section 3(1A)(a) establishes concurrent jurisdiction "in so far as" the Competition Act may be applicable to an industry, or sector of an industry, that is subject to the jurisdiction of another regulatory authority, and which authority has jurisdiction in respect of the conduct regulated in terms of Chapter 2 and 3 of the Competition Act. It is conceivable that the jurisdiction of the competition authorities may by legislation be excluded entirely from a particular industry. The operation of competition legislation may also be retained expressly such as under sections 52 and 53 of the Telecommunications Act which in a limited sense provided for concurrent jurisdiction between the competition and telecommunication authorities. The jurisdiction of the competition authorities may also continue but subject to certain reservations such as under section 67(9) of the Electronic Communications Act which provides that "[s]ubject to the provisions of this Act, the Competition Act applies to competition matters in the electronic industry". (emphasis added)*

The highlighted sentence says no more than that legislation may exclude the application of s 3(1A), not how one goes about construing whether it does or does not- that remains within the realm of well understood principles applicable to the interpretation of statutes.

25. Sasol does however rely on one of the aids to interpreting a statute, but this only comes into reckoning *provided* it is found that a statutory provision is inconsistent with an earlier enactment[14].

As will be demonstrated, even if resort may be had to it, the foundation remains speculative.

[14]Sasol, HoA paras 35 to 36

26. In any event, a reading of *Telkom* as a whole indicates that, by reason of the concurrent jurisdiction conferred by s 3(1A), a court would require explicit legislation to immunise another regulator's decision which may result in a restrictive practice (or affect mergers) from the Commission's scrutiny or exclude the adjudicative functioning and powers of the Tribunal or this court having regard to the specialist attributes each possesses to deal with a restrictive practice issue and its effect.[15]

27. Whichever way one wishes to characterise the issue or frame the critical question, the starting point remains that there exist two statutes which engage the subject of pricing by a dominant firm; it being common cause that NERSA was obliged under the Gas Act to determine whether there was inadequate competition as contemplated by Chapter 2 and 3 of the Competition Act before it could lawfully set a maximum price level that Sasol could charge for piped gas.

This is therefore an *a fortiori* case where the conduct under consideration would also be subject to the investigative powers conferred on the Commission under the Competition Act unless excluded by legislation.[16]

28. The attempt by Sasol to ignore engaging the jurisdictional reach of ss 3(1) and 3(1A) of the Competition Act by contending that the answer must first be sought exclusively within the sector specific legislation is impermissible. It disregards the basic principles of interpreting statutes and the methodology which must be adopted both generally and specifically in cases where there are conflicting statutory provisions. These will now be considered.

Interpretational Principles

[15]This is dealt with later. For present purposes see e.g. *Telkom* at para 28. See also the Preamble and ss8(c) and(d) of the Competition Act with their references to anti-competitive effect and anti-competitive practices
[16]See also *Telkom*

29. A number of basic interpretational principles were set out by Madjiedt AJ (at the time) in *Cool Ideas 1186 CC v Hubbard and another* 2014 (8) BCLR 869 (CC) at para 28:

> *A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:*
>
> *(a) that statutory provisions should always be interpreted purposively;*
>
> *(b) the relevant statutory provision must be properly contextualised; and*
> *(c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).*

This formulation has been consistently followed and applied[17]. While the formulation refers to a tenet, any perceived limitation on the development which had occurred since the 1950s in respect of the principles to be applied was clarified by Madjiedt J in a judgment jointly penned with Rogers J in *Minister of Police and others v Fidelity Security Services (Pty) Ltd (Sakeliga NPC and others as amici curiae)* 2023 (3) BCLR 270 (CC) at para 34. The justices said:

> *"The interpretation of the Act must be guided by the following principles:*
>
> *(a) Words in a statute must be given their ordinary grammatical meaning unless to do so would result in an absurdity.*

[17] E.g. *Chisuse and others v Director-General, Department of Home Affairs and another* [2020] JOL 47812 (CC) at paras 47

(b) This general principle is subject to three interrelated riders: a statute must be interpreted purposively; the relevant provision must be properly contextualised; and the statute must be construed consistently with the Constitution, meaning in such a way as to preserve its constitutional validity.[18]

(c) Various propositions flow from this general principle and its riders. Among others, in the case of ambiguity, a meaning that frustrates the apparent purpose of the statute or leads to results which are not business-like or sensible results should not be preferred where an interpretation which avoids these unfortunate consequences is reasonably possible. The qualification "reasonably possible" is a reminder that Judges must guard against the temptation to substitute what they regard as reasonable, sensible or business-like for the words actually used.

(d) If reasonably possible, a statute should be interpreted so as to avoid a lacuna (gap) in the legislative scheme.

At this stage it is appropriate to mention that *Cool Ideas* relied on the minority judgment of Schreiner JA in *Jaga v Donges* at 664E-H to support its analysis of the law.

30. It is also significant that these developments came about as a response to the limitations of the so-called golden rule of interpretation. Solomon J in *Venter v R*

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[18]This follows from Khampepe J's judgment in *Chisuse* at para 49

> *"Strengthening this interpretive exercise is the obligation enshrined in section 39(2) of the Constitution, which requires courts when interpreting legislation to give effect to the "spirit, purport and objects of the Bill of Rights". This requires that:*
>
> > *'. . . judicial officers [must] read legislation, where possible, in ways which give effect to [the Constitution's] fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution.'*
> (citing *Investigating Directorate: Serious Economic Offences and others v Hyundai Motor Distributors (Pty) Ltd and others: In re Hyundai Motor Distributors (Pty) Ltd and others v Smit NO and others* [2000] ZACC 12, 2001 (1) SA 545 (CC) at para 22

1907 TS 910 at 919 explained it by reference to the following passage in *Caledonian Railway Co. v North British Railway Co.* 6 App. Cas. 114 at 131:

> " *Now I believe there is not much doubt about the general principle. Lord Wensleydale used to enunciate … that which he called the golden rule for construing all written engagements. I find that he stated it very clearly and accurately, in Grey v Pearson, in the following terms: 'I have been long and deeply impressed with the wisdom of the rule, now, I believe, universally adopted, at least in the courts of law in Westminster Hall, that in construing wills, and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further.*

Solomon J then further qualified the golden rule by reference to the Privy Council decision in *The Mayor and Councillors of the Burgh of Pietermaritzburg v The Natal Land and Colonisation Co.*, 13 App. Cas. 478 (at 488), observing at 921 that repugnancy may arise when regard is had to the intention of the legislature as gathered from the other portions of the statute when read as a whole. [19]

31. It therefore follows that both the words used in ss 3 (1) and 3(1A) of the Competition Act and those of s 21(1)(p) of the Gas Act have to be taken into account. Neither can be ignored in the interpretational process.

32. Schreiner JA's minority judgment in *Jaga v Donges* did not stop there but also considered the methodology to be applied in resolving interpretational problems:

> *"The second point is that the approach to the work of interpreting may be along either of two lines. Either one may split the inquiry into two parts and*

[19] See also *Dadoo Ltd and Others v Krugersdorp Municipal Council* 1920 AD 530 at 554-5. *Venter* has been consistently followed- see for example *Shiva Uranium (Pty) Ltd (In Business Rescue) and another v Tayob and others* 2022 (3) SA 432 (CC) at para 38 ftn 15

> *concentrate, in the first instance, on finding out whether the language to be interpreted has or appears to have one clear ordinary meaning, confining a consideration of the context only to cases where the language appears to admit of more than one meaning; or one may from the beginning consider the context and the language to be interpreted together.*[20]

After identifying each approach, Schreiner JA concluded:

> "*No doubt the result should always be the same, whichever of the two lines of approach is adopted since, in the end, the object to be attained is unquestionably the ascertainment of the meaning of the language in its context. But each has its own peculiar dangers. While along the line approved by Lord Greene there is the risk that the context may in a particular case receive an exaggerated importance so as to strain the language used; along the other line there is the risk of verbalism and consequent failure to discover the intention of the law-giver. The difference in approach is probably mainly a difference of emphasis, for even the interpreter who concentrates primarily on the language to be interpreted cannot wholly exclude the context, even temporarily; and even the interpreter who from the outset tries to look at the setting as well as the language to be interpreted cannot avoid the often decisive first impression created by what he understands to be the ordinary meaning of that language. Seldom indeed is language so clear that the possibility of differences of meaning is wholly excluded, but some language is much clearer than other language; the clearer the language the more it dominates over the context, and vice versa, the less clear it is the greater the part that is likely to be played by the context.*
>
> *Ultimately, when the meaning of the language in the context is ascertained, it must be applied regardless of the consequences …."*[21]
> (emphasis added)

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[20] *Jaga v Donges* at 662H to 663A
[21] *Jaga v Donges* at 664C to G

The highlighted portions of the judgment reflect that neither approach should be exclusively applied. Rather that a unitary enquiry which considers the impugned legislation from both perspectives is to be preferred.

33. The minority judgment of Schreiner JA in *Jaga v Donges* was approved by the Constitutional Court in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC). Ngcobo J (at the time) adopted the passages at 662G to 663A of *Jaga v Donges* and added that :

> *"The emerging trend in statutory construction is to have regard to the context in which the words occur, even where the words to be construed are clear and unambiguous. Recently, in Thoroughbred Breeders' Association v Price Waterhouse 2001 (4) SA 551 (SCA). the SCA has reminded us that:*
>
> > *'The days are long past when <u>blinkered peering at an isolated provision in a statute was thought to be the only legitimate technique</u> in interpreting it if it seemed on the face of it to have a readily discernible meaning. As was said in University of Cape Town v Cape Bar Council and Another 1986 (4) SA 903 (A) at 914D-E:*
> >
> > > *'I am of the opinion that the words of s 3(2)(d) of the Act, clear and unambiguous as they may appear to be on the face thereof, should be read in the light of the subject-matter with which they are concerned, and that it is only when that is done that one can arrive at the true intention of the Legislature.'' [22]*

[22] *Bato Star* at para 90.
The same portion of Schreiner's minority judgment had already received Constitutional Court approval in the case *of S v Makwanyane & Another* 1995 (6) BCLR 665 (CC) at para 13

(emphasis added)

34. In *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) ("*NJMPF*") Wallis JA at paras 18 and 19 gave perhaps the fullest explanation of the methodology courts should apply when interpreting a statute or other document:

> *"[18] Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.*
>
> *[19] All this is consistent with the "emerging trend in statutory construction" It clearly adopts as the proper approach to the interpretation*

of documents the second of the two possible approaches mentioned by Schreiner JA in Jaga v Dönges NO and another, Bhana v Dönges NO and another namely that from the outset one considers the context and the language together, with neither predominating over the other. This is the approach that courts in South Africa should now follow, without the need to cite authorities from an earlier era that are not necessarily consistent and frequently reflect an approach to interpretation that is no longer appropriate. The path that Schreiner JA pointed to is now received wisdom elsewhere. Thus, Sir Anthony Mason CJ said:

> *"Problems of legal interpretation are not solved satisfactorily by ritual incantations which emphasise the clarity of meaning which words have when viewed in isolation, divorced from their context. The modern approach to interpretation insists that context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise."*

More recently, Lord Clarke SCJ said "the exercise of construction is essentially one unitary exercise."

35. The "*unitary*" nature of the interpretational task is the common thread running through the judgments of the Constitutional Court and the SCA. It was again emphasised by Wallis JA in *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) at para 12. The relevant extract reads:

> "*Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of*

all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is 'essentially one unitary exercise' [23]

36. Ultimately the purpose of interpreting a statute is simply stated; to discern the intention of the legislature having regard to the only form of expressions open to it, namely words which because they are by nature imprecise also requires an understanding of their context which includes legally acceptable factors extrinsic the legislation.

37. A further accepted and fundamental consideration in interpreting statutes, and which Sasol's approach also offends, is that existing law, whether it is the common law or a statute, is not presumed to be altered unless it is expressly repealed or altered; the corollary to which is that courts must first endeavour to reconcile conflicts between the existing law and a new statutory provision.[24].

38. This is regarded as one of the "*seminal presumptions*" and has been referred to as "*the most fundamental of all the presumptions*"[25]. Devenish in *Interpretation of Statutes* at p159 considered that:

"… it is an all pervasive presumption since the interpretation of a provision of a statute should always be contextual, firstly, in regard to the statutes as a whole, secondly, in regard to other cognate statutes and then, finally, in regard to the common law. The application of this presumption also facilitates legal certainty

[23]It is accepted that the method of interpreting a document, whether it be a statute or an agreement, are essentially the same, save of course that s 39(2) of the Constitution brings a consideration of the Bill of Rights into sharper focus when a statute requires interpretation and issues of parole evidence may intrude when discerning the terms of a contract (see *University of Johannesburg v Auckland Park Theological Seminary and another* 2021 (8) BCLR 807 (CC) at paras 88-92 and the cases cited)

[24]*See Kent NO v SA Railways and another* 1946 AD 398 at 405, Devenish *Interpretation of Statutes* (1992) at 161 and the other cases cited at ftn 43

[25]Devenish at 159

and the effective administration of justice. The interpretation of a provision of a statute should therefore be in contextual harmony with both the letter and spirit of the whole body of law (statutory and common). The presumption therefore results in a restrictive interpretation in favour of the existing general system of law, both common and statutory. This presumption is of course rebuttable and does not constitute an impenetrable obstacle because of the doctrine of legislative supremacy, and hence there are innumerable examples in which the courts have interpreted the provisions of statutes in a way that makes penetrating inroads into the principles and precepts of our common law"

(emphasis added)

Devenish continues at 279:

> *"The presumption that the legislature does not intend to alter existing law more than is necessary is fundamental to the process of the interpretation of statutes and applies to both statute law and the common law. It is therefore the duty of the courts, if it is at all possible, to endeavour to reconcile conflicts that are encountered in the process of interpretation of statutes.*
>
> *…*
>
> *The courts endeavour to reconcile prima facie conflicting statutes as well as apparently conflicting provisions of the same statute. <u>To this end the language of every part of the statute should be construed as to be consistent, so far as possible, with every other part of that statute, and with every other unrevealed statute enacted by the same legislature</u>*
>
> (*Chatabai v Union Government (Minister of Justice) and Registrar of Asiatics 1911 AD 13 at 24 and the other cases cited at ftn 7)*
>
> (emphasis added)

39. The status of the Competition Act in relation to conduct which may be subject to another regulatory regime was definitively determined in the very case Sasol has sought to rely on. In *Telkom*, Malan JA on behalf of the court said:

> "*Both the repeal of section 3(1)(d) and the introduction of section 3(1A)(a) brought about a complete change from the earlier position. <u>They are general provisions intended to regulate the subject-matter comprehensively and intended to establish the general jurisdiction of the competition authorities in all competition matters</u>. The Competition Act applies to all economic activity within or having an effect within South Africa. It provides for wide powers and general remedies more effective than the limited ones given by the Telecommunications Act."*
> (emphasis added)

40. Accordingly, whether regard is had to fundamental principles of interpretation, or to the methodology to be applied. or to situations where presumptions apply in the case of an apparent conflict between two statutory provisions, the court is not entitled, as Sasol would have it, to bury its head in the sand and only look at one of the statutes. It is obliged to consider both pieces of legislation and, as its first task, to attempt to reconcile such conflict as may exist and if that is not possible because there is no express provision doing so, then, and only then, can consideration be given to the aids to interpretation regarding sector specific legislation or that the legislature intended to alter existing law by necessary implication (as opposed to only a "*possible implication*"[26]).[27]

41. The court therefore cannot have regard to the Gas Act alone in order to determine if its words were intended to preclude the jurisdictional scrutiny of the Competition Act and its institutions, but is obliged to consider both statutes. In order to undertake the

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[26]Devenish at 161 under the heading " 2.2 Statute law' citing *Kent* and the other cases at ftn 43

[27]See especially Devenish at 279 citing *Sedgefield Ratepayer's and Voters' Association and others v Government of the Republic of South Africa and others* 1989(2) SA 685 (C) at 700: " *... courts do not readily come to a conclusion that there is an irreconcilable conflict, rather by using all means at their disposal they attempt to effect a reconciliation."*

required unitary exercise for the purposes of this case it is first necessary to determine whether the two Acts are reconcilable. If they are, then that ends the matter and questions as to whether there was an implied repeal of s 3(1A) of the Competition Act by s 21(1)(p) do not arise.

42. In undertaking the enquiry it is necessary to have regard to the meaning of the words used in their "*context*".

In *Makwanyane* at para 13 Chaskalson P explained the meaning of context in relation to interpretating legislation:

> "*Our Courts have held that it is permissible in interpreting a statute to have regard to the purpose and background of the legislation in question.*
>
> > *'Certainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that 'the context', as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and, within limits, its background. (*Per Schreiner JA in *Jaga v Dönges NO and Another* (*supra*) at 662G-H)'"
> (emphasis added)

In *NJMPF* Wallis JA qualified the notion that the court's interpretational function is to discern the intention of the legislature and distilled the unitary enquiry to reading "*the words used in the context of the document as a whole and in the light of all relevant circumstances*"[28]. Constitutional Court and SCA cases still identify the enquiry as one to glean the intention of the legislature although it may

[28] At para 24 read with paras 20 to 23

now be understood in the more nuanced sense explained in *NJMPF* [29]. I will also use it in this sense.

WHETHER THE COMPETITION ACT AND THE GAS ACT ARE RECONCILABLE

43. The first enquiry is whether the two statutes are reconcilable.

Even if the enquiry commences with a consideration of s 21(1)(p) of the Gas Act, the unitary nature of the interpretational process requires the court to also have regard to the provisions of s 3(1) and 3(1A) of the Competition Act.

44. Since Sasol correctly concedes that the Gas Act does not expressly exclude the operation of these umbrella provisions of the Competition Act, what remains is s 21(1)(p) which identifies that among the many conditions NERSA is entitled to impose as a requirement or limitation on the issue of a licence is its approval of a maximum price for distributors, reticulators and all classes of consumers where there is inadequate competition as contemplated in Chapters 2 and 3 of the Competition Act.

45. At this initial stage three observations can be readily made regarding this provision.

The first is that, in it the legislature readily acknowledges the existence of the Competition Act. The next is that it only refers to the Competition Act as a convenient point of reference and statutory shorthand to identify the meaning which

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[29]By way of illustration see *Cool Ideas* at para 36, Bato Star and Chisuse, *Smit v Minister of Justice and Correctional Services and others*
2021 (3) BCLR 219 (CC) at para 121; *KGA Life Limited v Multisure Corporation (Pty) Ltd and others (Funeral Federation of South Africa as Amicus Curiae)* [2023] 4 All SA 613 (SCA) at para 36 and *Mazars Recovery & Restructuring (Pty) Ltd and others v Montic Dairy (Pty) Ltd (In Liquidation) and others* [2022] JOL 55888 (SCA) at para 30

is to be ascribed to the term "*inadequate competition*". Finally, despite being aware of the Competition Act and therefore appreciative of its intent, purpose and reach into all other legislation where the decision of a regulator may impact on a restrictive practice, the drafters did not see fit to expressly exclude the concurrent jurisdiction of the Commission or the collaborative agreement mechanism provided for in that Act.

46. As to the reach of the Competition Act, all the respondents submitted that the scope of the Competition Act and the activities to which it applies are clearly set out in s 3 (1) which, in unambiguous terms states that the Act applies to;

> "… all *economic activity within, or having an effect within, the Republic.*"

and expressly explains in s 3(1A) what occurs if an economic activity is also subject to another regulator who *in addition* has jurisdiction over a practice prohibited in terms of Chapter 2 or 3 of the Competition Act[30]. In such event s 3(1A) directs that;

> " … *this Act must be construed as establishing concurrent jurisdiction in respect of that conduct*".
> (emphasis added)

47. It was further argued that the SCA decision of *Competition Commission of South Africa v Telkom SA Ltd and others* [2009] ZASCA 155; [2010] 2 All SA 433 (SCA) made two significant observations with regard to s 3(1) and 3(1A) of the Competition Act which are destructive of Sasol's position.

The first is that before the repeal of s 3(1)(d) of the Competition Act (with effect from 1 February 2001[31]) certain restrictive practices were immune from

[30]See the s 1 definition of "*prohibited practice*" in the Competition Act
[31]Competition Second Amendment Act 39 of 2000 which was assented to on 5 December 2000

the Competition Act "*despite their anti-competitive aspects not being regulated by the other regulatory authorities*". [32]

The other is that;

> "*The Legislature established the competition authorities as the primary authority in competition matters and by introducing section 3(1A)(a) established that where another regulator has jurisdiction over any area of matters covered by the Competition Act their jurisdiction would be concurrent with that of the competition authorities".*[33]

48. In other words, the legislature was aware that the Competition Act had excluded anti-competitive behaviour which was subject to or authorised by public regulation from its purview, but then took a deliberate decision by Act 39 of 2000 to no longer immunise such behaviour from scrutiny under the provisions of the Competition Act. Instead, it created a regime where even in such cases, the Competition Act would enjoy concurrent jurisdiction, the exercise of which would be addressed through the agreements contemplated by ss 21(h) and 82(1) to (3).. In this way the legislature expressly extended the range of economic activity to which the Competition Act applied to even those where anti-competitive behaviour remained subject to or was even authorised by another regulator.

49. One of the significant issues dealt with in *Telkom* was whether the Commission exceeded its powers by investigating a matter that fell within the purview of another regulator- on that occasion ICASA.[34]

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[32] *Telkom* at para 27. Prior to its repeal s3 (1)(d) read:

> *"(1) This Act applies to all economic activity within, or having an effect within, the Republic, <u>except</u>—*
>
> *(d) acts subject to or authorised by <u>public regulation</u>; …"*
>
> (emphasis added)

[33] *Telkom* at para 27

[34] *Telkom* at paras 1 and 12.
ICASA is the Independent Communication Authority of South Africa established in terms of s 67 of the Independent Communications Authority Act 13 of 2000

A number of contentions were advanced to support Telkom's contention.

Telkom argued that ICASA had exclusive jurisdiction to deal with "*uncompetitive actions*" covered by s 53(1) of the Independent Communications Authority Act 13 of 2000 ("*the Telecommunications Act*");

a. despite s 9(1) of the Competition Act covering the same conduct which would otherwise be subject to the jurisdiction of the Commission, Tribunal and this court[35].

   Telkom asserted, as does Sasol in the present case, that conduct authorised under specific legislation will ordinarily not be conduct to which a general enactment applies (*generalia specialibus non derogant*).[36]

b. despite Telkom being under investigation by the Commission for allegedly breaching ss 8(b), (c) or (d)(i) of the Competition Act by engaging in excessive pricing or price discrimination.[37]

   As Sasol does in the present case, Telkom claimed that its alleged excessive price fixing or price discrimination was regulated and approved by ICASA under the functions entrusted to it by s 45 of the Telecommunications Act.[38]

50. The SCA dealt with both issues, and unless distinguishable, its decision is binding.

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[35]See *Telkom* at para 31
[36]Telkom at para 35
[37]Telkom at para 6. It was alleged that Telkom had charged customers of its own value-added network service provider lower prices than it charged licensees and their customers for certain line rental services and also that it had charged its own customers about half the price it charged private licensees and their customers for value-added services and other competing products
[38]Telkom at para 34

Telkom and the exclusive jurisdiction argument

51. Reference was made earlier to the SCA's *ratio* in *Telkom* that section 3(1) of the Competition Act contains words of great generality, that originally conduct subject to or authorised by public regulation was excluded and that this was expressly changed by the repeal of s 3(1)(d) and the introduction of s 3(1A).[39]

The SCA proceeded to deal with s 3(1A) and its establishment of concurrent jurisdiction in cases where the same conduct is susceptible to the jurisdiction of another regulatory authority. It considered the situation by reference to the primary object of the Telecommunications Act and it's functioning.[40]

After referring to the same conduct falling within Chapter 2 of the Competition Act, the SCA addressed Telkom's argument that ICASA enjoyed exclusive jurisdiction to deal with the conduct complained of by reason of the application of the *generalia specialibus non derogant* maxim. It did so in the following manner:

> *"The implication of exclusivity contended for will be refuted where it is clear that the intention is that the later general enactment should regulate the subject-matter. Where this is the position the later enactment necessarily supersedes the earlier specific legislation to the extent that they may differ. Both the repeal of section 3(1)(d) and the introduction of section 3(1A)(a) brought about a complete change from the earlier position. They are general provisions intended to regulate the subject-matter comprehensively and intended to establish the general jurisdiction of the competition authorities in all competition matters. The Competition Act applies to all economic activity within or having an effect within South Africa. It provides for wide powers and general remedies more effective than the limited ones given by the Telecommunications Act. There is no room for the implication of exclusive jurisdiction vested in ICASA contended for. The authorising legislative and other provisions Telkom relied upon did not oust the*

[39]Telkom at para 27
[40]Telkom at paras 31 and 32

jurisdiction of the Commission and the Tribunal but could well give rise to defences to the complaints referred. The competition authorities not only have the required jurisdiction but are also the appropriate authorities to deal with the complaint referred."
(emphasis added)

52. The highlighted portion of the judgment, when considered in the context of the broad issue concerning the purpose and function of the Commission, the Tribunal and this court (dealt with in the later paragraphs of *Telkom*[41]), makes it clear that the legislature intended the statute to *"establish the general jurisdiction of the competition authorities in all competition matters*"[42] because of the specialist knowledge required by members of its various bodies tasked with what may be complex and technical matters in order to apply and enforce its provisions from the investigative and referral stages to the adjudicative phases (in the first instance presided over by a specialist administrative tribunal and then to this specialist court).[43]

53. The SCA fully recognised that if the Competition Act could be by-passed in relation to any anti-competitive behaviour then so too would its specialised adjudicative bodies, which in the case of the Tribunal is presided over not only by lawyers but by other specialists and does not sit as an ordinary court but is inquisitorial and plays "*an active role … in protecting that* (i.e. the public) *interest*[44]. It also noted that the competition authorities are provided with wide powers and general remedies (see s 27(1)(a)) which are more effective than those under the Telecommunications Act.[45]

54. Mr. Snyckers for Sasol could not suggest any distinguishing feature between the Gas Act and the Telecommunications Act or the regulatory powers of NERSA when

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[41]*Telkom* at paras 36 to 38
[42]*Telkom* at para 35
[43]Telkom at paras 36 to 38
[44]Telkom at para 38
[45]Telkom at paras 35 and 38

compared to ICASA save that the Competition Act preceded the enactment of the Gas Act whereas it proceeded the Telecommunications Act.

While that is correct, it does not engage the *ratio* of *Telkom* set out earlier; namely that the object and purpose of the amendment was to take away exclusive jurisdiction from all regulatory authorities to deal with conduct amounting to anti-competitive trade practices under Chapters 2 or 3 and to confer concurrent jurisdiction to the institutions, established under the Competition Act. This will be reverted when considering the context of both the Gas Act and the Competition Act.

55. But even the argument that subsequent sector specific legislation may by necessary inference repeal other exiting laws overlooks the prior question which must asked before this interpretational aid is triggered: Where is there any indication that the Gas Act intended to confer exclusive jurisdiction on NERSA when *Telkom* tells us that the Competition Act is the specialised legislation which, at least since the introduction of s 3(1A) (and repeal of s 3(1)(d)), qualifies all other laws that purport to vest exclusive jurisdiction in other regulatory bodies to deal with anti-competitive practices?

It certainly cannot be inferred from the Gas Act as a necessary, as opposed to even a possible, interpretation of the legislature's intention. This is not a case where remedial or consolidated legislation is enacted some years later justifying the irresistible conclusion that Parliament was well aware of the provisions found in s 3(1A) of the Competition Act and the reason for the repeal of s 3(1)(d), yet took a conscious step to exclude its impact on NERSA by means of enacting 21(1)(p) into the Gas Act. [46]

[46]It may well be that s 3(1)(d) was repealed and s 3(1A) was introduced because of the decision in *Standard Bank Investments Corporation Ltd v Competition Commission and others* [2000] 1 All SA 494 (T) (a judgment which came out on 7 February 2000). The court there found that because of the clear wording of the ouster provision contained in s 3(1)(d), the wide wording of s 3(1)(a) of the Competition Act was insufficient to deprive the Minister of Finance from exercise exclusive regulatory powers under section 37 of the Banks Act 94 of 1990 in relation to mergers and acquisitions and, for the same reason, an argument of concurrent jurisdiction also failed

Where the coming into effect of the Competition Act preceded that of the Gas Act by a number of months, such a conclusion would be highly speculative and certainly cannot support an argument that Parliament must have intended the latter to replace the former, which ultimately is the object of establishing meaning to a statute; i.e. to discern the intention of the legislature. [47]

In order to support such an argument in circumstances where legislation followed each other in short succession, it would be necessary in my view to produce evidence regarding the passage of the Bills, the existence of any White Papers, proceedings before separate or joint Portfolio Committees during the passage of the Bills prior to their enactment and Hansard in order to demonstrate whether the drafters of the two pieces of legislation[48] and the National Assembly during its debates were or were not aware of the prior passage of the Competition Act.

56. While the Gas Act may be sector specific legislation, *Telkom* is clear that the Competition Act is specialised legislation intended to comprehensively regulate its subject matter to all economic activity, which includes anti-competitive trade practices in the nature of restrictive practices, and that it is preferable to use specialist structures which have been "*designed for the effective and speedy resolution of particular disputes*".[49]

57. Sasol however contends that, if the Commission has jurisdiction over the piped-gas industry then it's decision would amount to an impermissible review of NERSA's maximum pricing determination since it has no powers of review.

The argument does not support there being an irreconcilable difference between the two statutes. The functions of NERSA and the Commission differ materially.

[47]The amendments to the Competition Act by Act 90 of 2000 which repealed s 3(1)(d) and introduction of s 3(1A) were assented to on 5 December 2000 and commenced on 1 February 2001. The Gas Act 48 of 2001 was assented to on 12 February 2001 which was less than two weeks after the Competition Act had come into law.
[48]The definition of "*Minister*" was substituted by s. 1 (*g*) of Act No. 18 of 2018 to mean "*The Minister responsible for the administration of the Act*"
[49]Telkom at paras 35 and 36

NERSA's function is to grant licences in order to "*promote the development of competitive markets for gas and gas services*" as well as to regulate prices in terms of s 21(1)(p) when issuing a licence in a market where there is inadequate competition[50].

Context where there is an apparent conflict between legislation

General

58. It has already been mentioned that case law requires a unitary interpretational process which must have regard to both the language used and to context.

By context is meant (*per Makwanyane* at para 13) not only considering the language of the rest of the statute but also, and possibly of greater importance, "*the matter of the statute, its apparent scope and purpose, and, within limits, its background*".

59. *Telkom* considered the scope and purpose of the Competition Act. This has already been dealt with: The SCA found that the legislature intended the Act to establish the general jurisdiction of the competition authorities in all competition matters because of the specialist knowledge required by members of its various bodies tasked with what may be complex and technical matters in order to apply and enforce its provisions from the investigative and referral stages to the adjudicative phases while also retaining the broader range of remedies provided under that Act.

NERSA and the Gas Act

60. In *National Energy Regulator of South Africa and Another v PG Group (Pty) Limited and Others* 2020 (1) SA 450 (CC) ("*PG Group*") the Constitutional Court had occasion to consider the provisions of the Gas Act in relation to piped gas.

The background to the procurement by Sasol of piped-gas from Mozambique in terms of a pipeline agreement with the Mozambican Government has already been

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

dealt with. The agreement was conditional on it being binding on NERSA for a period of ten years. This was achieved by the inclusion of suitable provisions to the Gas Act which was in embryonic form at that time.

Because the implementation of the agreement would result in Sasol enjoying a monopoly in the distribution of piped-gas, it was recognised that there would be inadequate competition in this market and that for as long as the situation prevailed NERSA would be required to regulate and approve the maximum price in the prescribed manner as one of the conditions for the grant of the licence to Sasol (being a regulated entity as defined).

These considerations were statutorily entrenched through ss 4(g) and s 21(1)(p) of the Gas Act.

Section 4(g) provides:

4. *The Gas Regulator must, as appropriate, in accordance with this Act—*

….

(g) regulate prices in terms of section 21 (1) (p) in the prescribed manner

61. Regulations were promulgated under Government Notice 321 of 20 April 2007. Regulations 4(3) and (4). set out the principles and procedures NERSA was obliged to apply when regulating prices under s 21(1)(p).

62. In *PG Group* the Constitutional Court set out the process by which the maximum gas prices were determined once NERSA had found that there was inadequate competition in the piped-gas market.[51]

After NERSA determined that there was inadequate competition, the next step was initiated by Sasol when it applied to NERSA for a determination of its maximum gas

[51] *PG Group* at paras 10, 14, 15, 17 and 18

price. In its application Sasol elected to use the basket of alternatives method and not the pass-through approach for the determination of its application.[52]

NERSA then proceeded to first decide on the methodology to be applied. This was determined after inviting public comment. NERSA published the reasons for determining the appropriate methodology to be the basket of alternatives approach. It is referred to as the *Maximum Pricing Methodology*.

The next and final interrelated determination made by NERSA was to decide on Sasol's Maximum Price Application.

63. The Constitutional Court also identified the matters which NERSA was obliged to consider in making its determinations as set out in Regulations 4(3) and (4).

In summary, under Regulation 4(3) NERSA must, when approving the maximum prices, be objective (i.e. based on a systematic methodology applicable on a consistent and comparable basis), be fair, be non-discriminatory, be transparent, be predictable and "*include efficiency incentives*". Regulation 4(4) then significantly adds that the maximum prices referred to in sub-regulation (3) " *must*" enable the licensee to recover all efficient and prudently incurred investment and operational costs and in addition make a profit commensurate with its risk.

64. It is therefore evident that under the Gas Act the licensee initiates the application and sets out what it considers to be the appropriate methodology as well as producing the data it wishes to rely on to motivate its application for a maximum price that should be regulated by NERSA.

In this regard it is significant that Regulation 4(7) requires the licensee to provide NERSA with sufficient information to enable it to determine maximum prices.

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[52]The distinction between the two is set out in paras 15 and 16 of the judgment. The basket of alternatives had regard to indicator prices in a basket of alternative sources of fuels while the pass-through approach adopts a "*cost plus percentage*" method

Moreover NERSA's function is to approve a maximum price pursuant to an application made to it by a licensee. Its determinations are the exercise of a discretionary power which must be taken within the four corners of the Gas Act as read with Regulations 4(3) and (4).

65. In *PG Group* the Constitutional Court identified NERSA's objective as being:

> *" 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, nurser is required to regulate and approve maximum gas prices dash which it does in accordance with the maximum pricing methodology it adopted."*[53]

Ms Le Roux on behalf of NERSA also drew attention to the preamble of the Gas Act which identifies as its purpose:

> *"To promote the orderly development of the piped gas industry; to establish a national regulatory framework; to establish a National Gas Regulator as the custodian and enforcer of the national regulatory framework; and to provide for matters connected therewith."*
> (emphasis added)

66. NERSA exercises a discretionary power which is subject to review on grounds of legality and irrationality and its determination of a maximum pricing methodology is not law but a guideline made in accordance with its empowering legislation which meant that it enjoyed a " *discretion not to rigidly apply the methodology if its application would lead to irrational or otherwise unlawful results."*[54]

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[53] *PG Group* at paras 41 and 42 referencing ss 2 (e) to (h) and 4(g) and (j) of the Gas Act
[54] *PG Group* at para 33

The argument that NERSA had been concerned with prices for individual consumers whose alternative energy choices were considerably more expensive than those of other consumers and that it had successfully brought those higher prices under control through its maximum price decision, was therefore found by the Constitutional Court to be a rational consideration. [55]

67. One of the accepted means by which the purpose of a statute is determined is to inquire as to the mischief sought to be addressed.

Where there is introduced a provision such as s 3(1A) which immediately affects every existing statutory provision whereby a regulatory authority had jurisdiction in respect of conduct regulated under Chapters 2 and 3 of the Competition Act, then the first question to be asked is what mischief did the introduction of s 3(1A) and the repeal of s 3(1)(d) seek to address. That question was answered in *Telkom* . The next question therefore is what mischief could the legislature have in mind in relation to NERSA which differs from all other regulatory regimes affected by s 3(1A) that should set it apart from them. Sasol did not suggest any.

The Commission and the Competition Act

68. In performing its investigative powers in relation to alleged prohibited practices the Commission must have regard to the matters set out in s 8(3) in order to determine if a price is excessive. Section 8(3) provides:

> *8 (3) Any person determining whether a price is an excessive price must determine if that price is higher than a competitive price and whether such difference is unreasonable, determined by taking into account all relevant factors, which may include—*
>
> *(a) the respondent's price-cost margin, internal rate of return, return on capital invested or profit history;*

[55] PG Group at para 54

(b) the respondent's prices for the goods or services—

(i) in markets in which there are competing products;

(ii) to customers in other geographic markets;

(iii) for similar products in other markets; and

(iv) historically;

(c) relevant comparator firm's prices and level of profits for the goods or services in a competitive market for those goods or services;

(d) the length of time the prices have been charged at that level;

(e) the structural characteristics of the relevant market, including the extent of the respondent's market share, the degree of contestability of the market, barriers to entry and past or current advantage that is not due to the respondent's own commercial efficiency or investment, such as direct or indirect state support for a firm or firms in the market; and

(f) any regulations made by the Minister, in terms of section 78 regarding the calculation and determination of an excessive price.

Considerations differ

69. As pointed out by both *Mr. Ngcukaitobi* for the Commission and *Mr Wilson* for IGUASA, the factors mentioned in s 8(3) of the Commission Act are not expressly to be found in NERSA's discretionary remit.

Furthermore, the fact that the Gas Act has as its object the development of a competitive market does not mean that NERSA has usurped the Commission's powers and functions. On the contrary, a similar provision in the Telecommunications Act did not dissuade the SCA from finding that the Competition Act still retained its jurisdiction over that sector.

70. As already demonstrated in *PG Group*, the factors which NERSA is obliged to take into account differ from those which the Commission must consider in performing its functions and exercising its powers

71. In addition, as Mr Ngcukaitobi pointed out, the powers enjoyed by the competition authorities extend well beyond those of NERSA. They include the power to interdict prohibited practices, declare agreements void and direct a firm to supply goods on reasonable terms, while NERSA's remedies to regulate a market where there is inadequate competition are limited. [56]

Counsel pointedly referred to the power which the Tribunal has to declare conduct a prohibited practice with the consequence that an affected party may claim damages under s 65 of the Competition Act; a power absent under the Gas Act.[57]

72. Accordingly, the Gas Act and its Regulations require NERSA to apply different considerations when it exercises its discretionary powers to those which the Commission is required to consider.

This also addresses Sasol's argument that if s 3(1A) extended to the Gas Act then the Commission would be reviewing NERSA's decision. This cannot be the case because the factors each is required take into account differ. Furthermore, Mr. Wilson who appeared with Mr. Meiring for IGUASA correctly argues that if the Tribunal were to find that the price charged by a producer is excessive this does not

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[56] Compare Telkom at paras 31 and 35

[57] Mr Ngcukaitobi also argued that as a matter of statutory interpretation an outcome which preserves access to a civil court is to be preferred to one that does not and cited the Constitutional Court case of *Competition Commission of South Africa v Pickfords Removals SA (Pty) Limited* 2021 (3) SA 1 (CC) at para 41 which is wholly applicable:

" The interpretation of s 67(1) of the Competition Act as an absolute time bar would thus not only limit the Commission's access to the Tribunal, but also access to a civil court for potential claimants seeking damages arising from a prohibited practice. The far-reaching impact of that interpretation is a further reason for preferring the procedural time-bar interpretation."

give it the power to undo the licence which NERSA issued even if it refers to a higher maximum price.

73. It is therefore evident that NERSA's functions, duties and powers under the Gas Act are sufficiently different to those of the Commission, the Tribunal and this court under the Competition Act. Moreover, considerations which NERSA is entitled to take into account differ considerably from those to which institutions established under the Competition Act must have regard. Even how NERSA gathers its data to determine a maximum price initially takes into account the interests of the licensee.

THE UNIQUENESS OF s 3(1A) AND CONCURRENCY

74. Perhaps the most fundamental difficulty facing Sasol lies in both the unique provisions of s 3(1A) and the general nature of legislation.

75. Unlike other legislation, s 3(1A) expressly recognises the existence of conflicting statutes and intrudes on their jurisdiction by providing an over-arching mechanism to address this very situation.

The solution provided by s 3(1A) is to recognise in the first place that institutions established under other statutes will enjoy concurrent jurisdiction and then to provide a mechanism to manage such concurrency by way of individual agreements concluded between the Commission on the one hand and the respective regulatory authority on the other. Each therefore would approach the subject matter from its own unique legislative perspective.

76. In *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and another* 2009 (1) SA 337 (CC) the Constitutional Court found no difficulty in one "*sphere of control*" operating from its own perspective while another sphere of control with its own legislative

considerations operates in respect of the same subject matter from a different perspective. The court said at para 80:

> *"There is no reason why the two spheres of control cannot co-exist even if they overlap and even if, in respect of the approval of subdivision of 'agricultural land', the one may in effect veto the decision of the other. It should be borne in mind that the one sphere of control operates from a municipal perspective and the other from a national perspective, each having its own constitutional and policy considerations*."

Adv G Budlender SC on behalf of the Tribunal, when this case came before it for the urgent interdict under Part A, applied *Wary Holdings* and said that:

> *"The Constitutional Court held that both authorities must exercise their powers, even though they were dealing with a virtually identical matter, namely, the desirability or permissibility of the subdivision of agricultural land. The two authorities would no doubt approach the matter from a slightly different perspective – the national government from the perspective of national policies on the preservation of agricultural land, and the municipal government from the perspective of land use planning more generally."*[58]

77. By reason of the unique provisions of the Competition Act it is also difficult to apply any sector specific considerations as an aid to interpretation.

While the Gas Act may be sector specific, s 3(1) read with 3(1A) of the Competition Act is in turn specifically made to apply to all restrictive practice investigations irrespective of the specific sector implicated- if one will, an umbrella provision impacting all other statutes which fall within its purview.

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[58] *Industrial Gas Users Association of Southern Africa v Sasol Gas (Proprietary) Limited and Others* [2023] ZACT 55 at para 43

This mechanism dovetails neatly with Constitutional requirements that all spheres of government and all organs of State within such sphere must *inter alia* exercise their powers and perform their functions in a way that does not encroach on the "*geographical, functional or institutional integrity of government in another sphere*" but facilitates cooperation with one another based on mutual trust and good faith. This includes *"co-ordinating their actions and legislation with one another … adhering to agreed procedures and… avoiding legal proceedings against one another*".[59]

78. In addition, as with all legislation, s 3(1A) is also forward looking.

Legislation is intended to deal not only with present exigencies but to regulate future conduct and affairs in a changing world to the extent that they can be said to have been contemplated or envisaged by the legislature.[60]

The introductory words of s 3(1A) are unambiguous:

> *In so far as this Act applies to an industry, or sector of an industry, that is subject to the jurisdiction of another regulatory authority, …. this Act, this Act must be construed as establishing concurrent jurisdiction in respect of that conduct.*
>
> (emphasis added)

It did not limit the application of the Act to only an industry that was subject to the jurisdiction of another regulator at the time of its introduction. If the legislature intended that, then it would have said so. The provision is intended to apply for as long as it remains on the statute books. If at some date after its enactment the legislature wished to exempt a regulator from the concurrent jurisdiction provisions of s 3(1A) then that had to be expressed in the clearest terms to overcome its unique

[59] See generally Chapter 3 of the Constitution and in particular ss 40(2) and 41(1)(g) and (h)(iv) to (vi)
[60] *Malcolm v Premier, Western Cape Government* 2014 (3) SA 177 (SCA) at para 11

purpose and explicit wording. This was recognised in *Telkom*. However s 21(1)(p) is not such a provision.

79. In this regard, *Telkom* did not only consider the object and purpose of s 3(1A) but also considered the effect of the concurrent jurisdiction provision introduced by the section and the memorandum of agreement concluded between the telecommunication regulator and the Commission pursuant to it and as read with ss 82(1) and (2) .

In that agreement the Commission would deal *inter alia* with complaints of abuse of dominance and that non-compliance with the procedures contemplated in its provisions would not detract from the Commission's jurisdiction over the matter. [61]

Once the SCA established that the conduct of Telkom concerned alleged contraventions of s 8 and 9 of the Competition Act, including abuse of dominance[62], it confirmed that the Tribunal was the appropriate forum to decide the matter.

Non-application of the interpretational aids relied on by Sasol

80. There is therefore no irresoluble conflict between the provisions of s 21(1)(p) of the Gas Act and ss 3(1) and 3(1A) of the Competition Act which would trigger an application of the interpretational aid that a later enactment necessarily supersedes earlier legislation or that specific legislation alters an existing general statute (applications of the *generalia specialibus non derogant*" and *lex posterior derogant priori* maxims). [63]

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[61] *Telkom* at para 21

[62] *Telkom* at paras 30 and 35

[63] Devenish at p280 mentions that it is only where it is impossible to construe two statutory provisions together, because of an inescapable inconsistency between them, that the later statute is usually regarded as impliedly repealing the earlier one, or as amending it to the extent necessitated by the inconsistency. The two maxims concerned in resolving a conflict are "*generalia specialibus non derogant*" (a general statute should not be interpreted in such a way as to alter specific provisions of an earlier statute or of the common law) and lex posterior derogant priori (*a later statute amends an earlier one*).

The two statutes are capable of being resolved on an application of *Telkom,* having regard to the specialised nature of the institutions established by the Competition Act in relation to abuse of dominance and the other conduct mentioned in Chapter 2 and 3 and the concurrent jurisdiction mechanism- unless that is otherwise resolved by the conclusion of an agreement as contemplated by 3(1A) read with ss 8(1) and (2).

81. Perhaps a more important consideration, if aids to the interpretational process are invoked, is that Sasol's argument would ouster this court's jurisdiction to finally determine (subject to an appeal to the apex court) a restrictive practice or merger case falling under Chapters 2 and 3 or to provide effective remedies. However, in our law the ouster of a court's jurisdiction must be in unambiguous terms because there is a strong presumption against it.[64]

82. This puts an end to Sasol's argument that NERSA enjoys exclusive jurisdiction. The fact that the Commission may only enjoy concurrent jurisdiction remains destructive of its case.

The Memorandum of Agreement

83. Once the primary legislation contained in both statutes is readily resoluble on the basis that the Competition Act enjoys concurrent jurisdiction, it becomes permissible to have regard to the terms of the memorandum of agreement ("*MoA*") between the Commission and NERSA contemplated by the Competition Act.

84. The agreement was signed in Pretoria and came into effect on 5 May 2021.[65]

The principal provisions in the agreement which deal with jurisdiction are to be found under the sections headed *Purpose of the Agreement, Legislative Framework, Complaints a*nd *Legal effect.*

[64] C*ompetition Commission of Sout Africa v Group Five Construction Ltd* [2022] ZACC 36 at para 115.
[65]See cl 16 of the agreement which provides that the effective date is when the last party signs.

They are all to the effect that the Commission enjoys jurisdiction to investigate and evaluate alleged prohibited practices in respect of complaints lodged with it so as to give effect to the Competition Act. This is clear from the following clauses:

Purpose of the Agreement

2.1 *This agreement is entered into to establish the manner in which the Commission and NERSA will interact with each other to enable both regulatory authorities 2, inter alia;*

2.1.1 *effectively coordinate the exercise of the commission's jurisdiction and powers when taking decisions on competition matters within the energy sector;*

Legislative Framework

4.1 The Commission has jurisdiction to investigate and evaluate alleged prohibited practices within any industry or sector, to grant or refuse exemption applications, and to review mergers within any industry or sector in terms of section 21(1) of the Competition Act. Accordingly, NERSA agrees that the Commission shall exercise its jurisdiction as provided for in terms of section 21(1) of the Competition Act, to investigate and evaluate alleged prohibited practices, to grant or refuse exemption applications, and to review mergers within the energy sector

…

4.3 This agreement shall in no way affect the independence and exercise of statutory powers by the two regulatory authorities in terms of their enabling legislation

Complaints

8.1 Where a complaint is lodged regarding a practice or conduct in respect of which either the Commission and NERSA have jurisdiction and the other one or either of the authorities has an interest in the complaint, the following process will be followed to the extent possible:

8.1.1 the complaint may lodge with the regulator that has jurisdiction ("recipient regulator")

….

8.1.5 if the Commission is the recipient regulator that has jurisdiction, it may in its discretion liaise and consult with NERSA;

8.1.6. The Commission and NERSA may, upon request from each other, participate in each other's proceedings in an advisory capacity;

8.1.7.1 the Commission is to exercise primary authority to investigate and evaluate alleged prohibited practices to give effect to the Competition Act; and

8.1.7.2 NERSA has primary authority to exercise powers and perform functions assigned to it in terms of the energy act, the electricity act, the gas act and the petroleum pipelines act in order to give effect to its relevant objectives and provisions contained therein;

…

8.1.10 In the event that the matter is dealt with by the Commission, representatives from NERSA may, at the request of the Commission, participate in the matter through, inter alia, attending meetings when required, providing inputs during the case investigation and making representations at the competition tribunal hearing, if necessary;

…

8.1.12Tthe decision by any of the parties to consult the other regulator shall be discretionary and voluntary, and either party shall be entitled, with or without consultation, to make its independent decision in respect to the complaint in terms of its enabling legislation;

8.1.13 Nothing in the consultation procedures contemplated herein, should detract from the jurisdiction of the Commission or the jurisdiction of NERSA to receive and deal with complaints in terms of their enabling statutes as they deem fit, or preclude the public from lodging complaints with both the Commission and NERSA

Legal Effect

20.1 This agreement is not intended to be a legally enforceable document and intends to describe the nature and cooperative intentions of the parties involved, and to suggest guidelines for cooperation. Nothing therefore shall diminish the full autonomy of either party nor may constrain either party from discharging its statutory functions.

(emphasis added)

85. It is therefore clear that the MoA does not resurrect NERSA's exclusive jurisdiction. Quite the contrary. It records NERSA's agreement that any complaint lodged with the Competition Tribunal involving an alleged prohibited practice will be dealt with by the latter as it deems fit. There are other provisions (such as cl 8.1.10*)* which enable NERSA to participate in the Commission's proceedings and to co-operate with one another.

86. A further aspect is that the MoA signed by NERSA and the Commission is not without consequences.

While it is accepted that Clause 20 states that the MoA is not a legally enforceable document (and accordingly Sasol would not have to apply to first set it aside), the agreement does acknowledge that each authority has full autonomy in discharging its statutory functions.

If Sasol's argument of exclusive jurisdiction was correct, then the co-operative governance provisions of Chapter 3 of the Constitution would be triggered. The inevitable outcome would be a resolution in accordance with s41(3), an outcome unlikely to be much different from the MoA placed before the court.

NERSA's concerns

87. NERSA filed papers to assist the court. One of the matters it raised was that legislation dealing with concurrent jurisdiction could be improved by having regard to the United Kingdom model which has developed a comprehensive concurrency regime through Regulations and the publication of Guidelines. It however accepts that while our legislation is not as streamlined , NERSA adopts the terms of the MoA and in so doing recognises that the Commission enjoys the jurisdiction to investigate and pursue the complaints because they were lodged with it and not NERSA.

88. NERSA did however submit that its Maximum Pricing Directive and presumably its Maximum Pricing Methodology constitute "*the structural characteristics of the relevant market".* Firstly this assumes that they accord with the ratio in *PG Group*[66]*.* However nothing further needs to be said about it as these matters are not before us.

CONCLUSION

[66] In an earlier footnote mention was made that Sasol did not apply NERSA's maximum rate because it claimed that NERSA's adjustment would negatively impact Sasol customers "*as well as the rationality test methodology*".

89. A unitary interpretation of the two statutes does not produce any anomalies but rather reveals a consistent understanding of the intention of the legislature in introducing s 21(1)(p) of the Gas Act and in introducing 3(1A) while at the same time repealing s 3(1)(d) of the Competition Act. And in doing so, the legislature did not reverse its position in respect of NERSA but maintained the consistent approach whereby the Commission and regulators in a sector which exercised jurisdiction in respect of conduct regulated under Chapters 2 and 3 of the Competition Act would both enjoy concurrent jurisdiction, the mechanism of which would be set out in an MoA between them.

ORDER

90. In the result the following order is made

"1. The application is dismissed.

2. The decision of the Competition Commission to investigate the complaints lodged by IGUASA and Egoli Gas as well as the issuing of the summons stands.

3. The applicant is ordered to pay the costs of the first and second respondents, including the costs of two counsel where applicable

_____

SPILG AJA

DAVIS AJA (POTTERILL AJJA concurring)

[1] I have had the distinct pleasure of reading the judgment of my brother Spilg AJA. I agree with the order which he has proposed but, as I have arrived at my conclusion for different reasons, I hereby set out my justification for concurring with his order.

[2] The facts have been set out carefully and comprehensively in Spilg AJA 's judgment. Hence I merely set out those facts which are relevant to the understanding of the reasons that I have employed for the conclusions to which I have arrived.

[3] The fourth respondent ('NERSA') is mandated in terms of s 21 (1) (p) of the Gas Act 48 of 2001 ('the Gas Act') to determine the maximum price that licensees which sell pipe gas such as the applicant ('Sasol Gas') can charge to consumers. On 21 March 2001 NERSA determined the maximum gas price for the period 1 July 2021 to 30 June 2022 that Sasol Gas could charge to its customers which included the members of the second respondent ('IGUASA') and the third respondent ('Egoli Gas'). Dissatisfied with this determination, IGAUSA and Egoli Gas lodged complaints in terms of s 49 B (3) of the Competition Act 48 of 1998 of ('the Competition Act'). They alleged that the gas price charged to them by Sasol Gas constituted an excessive price in breach of a s 8 (1) (a) of the Competition Act. Following these complaints, the Competition Commission ('the Commission') commenced an investigation of the prices charged by Sasol Gas and requested information from the latter which the Commission considered to be relevant as to the determination whether the complaints of excessive pricing could be justified.

[4] Sasol Gas refused to provide this information and contended that the Commission had no jurisdiction to investigate Sasol Gas' prices in the light of the determination that had been made by NERSA. As set out in the judgement of Spilg AJA the dispute which arose resulted in a transfer of the review application brought by Sasol Gas from the Competition Tribunal to this Court. In terms of its review application, Sasol Gas seeks to set aside the Commission's decision to investigate the complaint which was lodged. It argued that it is not competent for a NERSA regulated price to be investigated in terms of the prohibited practice provisions of s 8 of the Competition Act and that, in any event, the only regulator that is possessed with jurisdiction over gas prices is NERSA and not the Commission.

The relevant legislation

[5] Section 4 (g) of the Gas Act provides that the Gas Regulator must regulate prices in terms of s 21 (1) (p) in the described manner. Section 21 (1) (p) of the Gas Act provides:

> 'The Gas Regulator may impose licence conditions within the following framework of the requirements and limitation:
> (a) ...
>
> (p) maximum prices for distributors, reticulators and all classes of consumers must be approved by the Gas Regulator where there is inadequate competition as contemplated in Chapters 2 and 3 of [the Competition Act].' (my emphasis)

[6] The manner in which NERSA is required to determine gas prices is set out in Regulation 4 of the Pipe Gas Regulations. In particular, Regulation 4 (4) sets out the maximum prices that must enable licensees to recover all efficient and prudently incurred investments and operational costs and make a profit commensurate with its risk.

[7] Turning to the Competition Act, s 8 (1) provides that it is prohibited for a dominant firm to charge an excessive price to the detriment of consumers or customers. Section 8(3) provides that any person determining whether a price is an excessive price must

determine if that price is higher than a competitive price and whether such difference is unreasonable by taking into account all relevant factors. Section 8 (2) (a) – (f) then sets out a number of factors which should be considered by the Commission in the assessment of a complaint relating to an excessive pricing brought in terms of s 8 (1) (a) of the Act.

The question of concurrent jurisdiction

[8] It is apparent from this brief description of the relevant legislation that both regulators have a power to investigate the question of prices relating to gas. The Gas Act specifically empowers NERSA to do so. Section 3 (1) of Competition Act provides that the Act applies to all economic activity within or having an effect within the Republic. Manifestly, this provides the requirements for subject matter jurisdiction relating to complaints brought before it. The setting of gas prices within South Africa clearly falls within the scope of s 3 (1) of the Competition Act.

[9] It is for this precise reason that the Competition Act sought to reconcile the problem of potential competing jurisdictions by way of s 3 (1) A of the Competition Act which provides:

(a) in so far as this Act applies to an industry, or sector of an industry, that is subject to the jurisdiction of another regulator, which authority has jurisdiction in respect of conduct regulated in terms of chapter 2 or chapter 3 of this Act, this Act must be construed as establishing concurrent jurisdiction in respect of that conduct.

(b) The manner in which the concurrent jurisdiction is exercised in terms of this Act and any other public regulation, must be managed, to the extent possible, in accordance with any applicable agreement concluded in terms of s 21 (1) (h) and 82 (1) and (2).

[10] It should also be noted that in terms of s 21 (1) (h) of the Competition Act, the Commission is empowered to enter into a Memorandum of Agreement with another

regulator such as NERSA in order to 'negotiate agreements with any regulatory authority to coordinate and harmonise the exercise of jurisdiction over competition matters within the industry or sector and to ensure the consistent application of the principles of this Act.

[11] An agreement pursuant thereto has been concluded between the Commission and NERSA; in particular clause 2.1.1 of the Memorandum of Agreement provides:

> 'That the Commission and NERSA 'will interact with each other to enable both authorities to, inter alia, effectively coordinate the exercise of the Commission's jurisdiction and powers when taking decisions on competition matters within the energy sector.'

[12] Read together these sections are evidence that the Memorandum of Agreement between NERSA and the Competition Commission endorsed a co-ordinated response to the relevant exercise of their respective jurisdictions.

The issue in dispute

[13] The crisp question for determination by this Court is whether, notwithstanding the recognition of concurrent jurisdiction and hence the provisions of s 3 (1) A of the Competition Act, NERSA has exclusive jurisdiction to determine the maximum price which Sasol Gas charge for its gas product.

[14] On behalf of Sasol Gas, Mr Snyckers who appeared together with Mr Quilliam, submitted that s 21 (1) (1) (p) of the Gas Act intended NERSA to have sovereignty over competitive gas prices. In his view, for another body, such as the Commission, to have the power to determine whether a price charged consistent with the NERSA determined maximum price was excessive, as understood in terms of the Competition Act, would 'undeniably legally' have the effect of undoing the legal consequences of NERSA's determination. Following the NERSA determination, charging its price is lawful in addition to it being a competitive price. In other words, for Sasol Gas to be confronted

with this situation whereby a price sanctioned by NERSA could still be considered to be excessive by the Commission was to produce a consequence which undermined the very purpose of s 21 (1) (p) of the Gas Act.

[15] Two significant judgments shaped the entire debate concerning the outcome of this dispute. Accordingly, Mr Snyckers was constrained to contend that both judgments were in favour of the submissions which he had made. It is to these that I must turn.

The Telkom Case

[16] In *Competition Commission of South Africa v Telkom SA Ltd and others* [2009] ZASCA 155 the question of the relationship between the Commission and Icasa had to be considered by the Supreme Court of Appeal. It had been suggested that the subject matter of the dispute which related to Telkom's licenses and Telkom's powers in terms of the Telecommunications Act was the sole responsibility of Icasa. The argument was summarised thus by the Court:

> 'Because of its specialised expertise in the field of telecommunications, expertise both the Commission and the Tribunal lack. It was submitted that a mandatory and material procedure or condition of the Competition Act was not complied with, which rendered the decision to refer and the referral ultra vires, tainted by an error of law or otherwise unconstitutional or unlawful.' (para 28)

[17] Malan JA, on behalf of a unanimous court, held as follows at para 35:

> 'Both the repeal of s 3 (1) (d) and the introduction of s 3 (1A) (a) brought about a complete change from the earlier position. They are general provisions intended to regulate the subject matter comprehensively and intended to establish the general jurisdiction of the competition authorities in all competition matters. The Competition Act applies to all economic activity within or having an effect within South Africa. It provides for wide powers and general remedies more effective than the limited ones given by the Telecommunication Act. There is no room for the implication of exclusive jurisdiction vested in ICASA contended for. The

> authorising legislative and other provisions Telkom relied upon did not oust the jurisdiction of the Commission and the Tribunal but could well give rise to defences of the complaints referred. The competition authorities not only have the required jurisdiction but are also the appropriate authorities to deal with the complaint referred.'

[18] Mr Snyckers sought to circumscribe the implications of these dicta and interpret them in a manner which supported his case. In particular, he contended that the judgement had emphasised that the sector specific legislation in question expressly reserved the jurisdiction of the competition authorities in the Telkom case and further that the competition specific jurisdiction conferred on the sector specific regulator in relation to the conduct in question was limited. The Court had thus left open the possibility of an inference that the Commission's jurisdiction could be excluded, depending on the facts of the case.

[19] By contrast, Ms Le Roux, who appeared together with Mr Marolen and Mr Chavalala on behalf of NERSA, which significantly opposed the review application brought by Sasol Gas, submitted that the key implication of the judgment in Telkom was to suggest that the Commission may honour the powers it enjoys in terms of the Competition Act to entertain any complaint that is brought under the Competition Act, even one that concerns subject matter failing under the jurisdiction of another regulator. The critical question was whether the conduct could be considered to constitute economic activity within or having an effect within the Republic (that is in terms of s 3 (1) of the Competition Act) and a complaint concerning that activity had been lodged before the Commission in which case the wide general powers of the Commission could be invoked.

National Energy Regulator of South Africa and others v PG Group (Pty) Limited

[20] The dispute with regard to the judgment in Telkom has to be read within the prism of the judgment of the Constitutional Court in *National Energy Regulator of South*

Africa and another v PG Group (Pty) Limited and others [2019] ZACC 28. The dispute here concerned a review application to set aside the decision of NERSA to approve Sasol Gas' maximum gas price and transmission tariff applications on the dual basis of irrationality and unreasonableness. The dispute did not require the Constitutional Court to examine the concurrent jurisdictions of the two regulatory authorities. But it did make some important observations regarding the approach that NERSA is required to adopt pursuant to its obligations under the Gas Act. Considering the concession made by NERSA in this case that it was mandated to mimic a competitive market, a point strenuously emphasised by Mr Snyckers as providing a justification for the implication that the Gas Act provided exclusive jurisdiction to determine pricing in the gas market. Khampepe J, on behalf of the majority of the Constitutional Court, said at para 61:

> 'The basket of alternatives approach is a practical attempt at selecting a proxy for the upper bound of a competitive supply-constrained market and not the actual price of a competitive market. 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 Pricie Decision, that outcome may no longer be the reality for consumers with the most expensive alternatives.'

[21] By contrast, s 8 (3) of the Competition Act clearly mandates the Commission authority to determine whether the price charged is higher than the competitive price. This is the first stage of the enquiry. Unlike a NERSA determination, the Competition Act mandates the Commission in a case which is a pure monopolistic situation, absent import substitutes, to mimic a competitive price. This completes the first stage of the statutory inquiry. This indicates clearly that different approaches are required by the two regulators if the National Energy Regulator of South Africa judgment is to be followed. Mr Snyckers' foundational argument was that, as NERSA is required to mimic a

competitive price, that price can never be excessive. But the Court's judgment provides no support for this premise. By contrast, the role of a competitive price (which requires it to be mimicked) is vital to the Commission's ultimate determination.

[22] In addition, as Mr Ngcukaitobi, who appeared together with Ms Zikalala and Mr Quinn on behalf of the Commission, submitted, exempting Sasol from the Competition Act would erode the enforcement of the latter Act and in particular the remedial powers of the Tribunal would not be available to a complainant: The Tribunal's power to interdict prohibited practices and direct a firm to supply goods on more reasonable terms and to declare agreements void could not then apply. The Tribunal's, power to declare conduct to be a prohibited practice which would enable a 'follow on' damages claim would also not be available in respect of a justified complainant. No victim of Sasol's abuse could pursue a damages claim in terms of s 65 of the Act.

Rationality

[23] Sasol Gas also challenged the Commission's decision on the grounds of rationality. Given the finding to which I have arrived, the Commission could not have acted irrationally in the sense that it improperly exercised jurisdiction in circumstances where NERSA had performed its function. The argument that the Commission failed to take account of the fact that Sasol Gas may ultimately have a defence to an abuse of dominance referral, once the jurisdictional argument is dismissed also has no merit. The defence on the merits is clearly not a matter which has to be considered by this Court and Sasol Gas can, when appropriate rely on any defence in terms of s 8 of the Competition Act; that is when the merits of the s 8 (1) (a) complaint are heard.

Conclusion

[24] One consequence which emerges from this dispute is the important submission made by Ms Le Roux on behalf of NERSA that his court should provide some guidance as to the resolution of a dispute concerning concurrent jurisdiction. Going forward it appears to me that once NERSA has considered the existence of a maximum gas price in terms of the Gas Act, the Commission, confronted with a determination as to whether

the price charged is excessive in terms of s 8 (1) (a) of the Competition Act, should take account of NERSA's considerations and its determination in the setting of a maximum gas price. Thus, the NERSA determination would form part of the broad set of considerations undertaken by the Commission to determine whether the price charged is in breach of s 8 (1) (a) of the Competition Act. In this determination an argument which could be raised by Sasol Gas, namely that it followed the price adopted by NERSA, would constitute a weighty consideration in the ultimate determination, to be made by the Competition Tribunal, in the event of a referral.

[25] In the result, I concur with the order which is proposed by my brother Spilg AJA.

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DAVIS AJA

I concur with DAVIS AJA

_____

POTTERILL AJA

DATE OF HEARING:	30 November 2023
DATE OF JUDGMENT:	5 March 2024
FOR APPLICANT:	Adv F Snyckers SC Adv L Quilliam
FOR FIRST RESPONDENT:	Adv T Ngcukaitobi SC

	Adv L Zikalala
	Adv S Quinn
FOR SECOND RESPONDENT:	Adv J Wilson SC
	Adv JJ Meiring
	Adv L Phaladi
FOR FOURTH RESPONDENT:	Adv M Le Roux SC
	Adv T Chavalala
	Adv T Marolen
	(Heads of argument prepared by
	Adv P Ellis SC and Adv Chavalala)