THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number : 368/04
Reportable

In the matter between :

MEC FOR AGRICULTURE, CONSERVATION, ENVIRONMENT & LAND AFFAIRS — APPELLANT

and

SASOL OIL (PTY) LIMITED — FIRST RESPONDENT
BRIGHT SUNS DEVELOPMENT CC — SECOND RESPONDENT

CORAM : HOWIE P, CAMERON, MLAMBO JJA, NKABINDE, CACHALIA AJJA

HEARD : 25 AUGUST 2005

DELIVERED : 16 SEPTEMBER 2005

Summary: Environmental law ─ Protection of the environment ─ Prohibition on undertaking of environmentally detrimental activities without written authorisation of competent authority as intended in s 22 of Environment Conservation Act 73 of 1989 (ECA) ─ Scope of mandate of competent authority;
- the words 'storage' and 'handling' facility for dangerous and hazardous substances are broad enough to include a filling station.
- decision taken in terms of policy guidelines not irrational ─ a party seeking to impugn rationality of decision must demonstrate exceptional basis to succeed in review application.
- section 36(2) of ECA read in context, together with s 35, does not constitute a time bar to the institution of review proceedings after internal remedies have been exhausted.

JUDGMENT

CACHALIA AJA/

CACHALIA AJA:

[1] This appeal concerns the refusal of a provincial authority to authorise the construction of a filling station in terms of the Environment Conservation Act 73 of 1989 ('the ECA'). It deals with whether:

1.1 The relevant authority had the power to refuse such authorisation,

1.2 the policy guidelines that it employed in arriving at the decision are *ultra vires*, and

1.3 the rationality of the decision.

[2] The first respondent, Sasol Oil (Pty) Ltd (Sasol), is an oil company, which wholesales and retails liquid fuels and lubricants. Together with the second respondent, Bright Sun Developments CC, Sasol identified a property during 2000, considered suitable for the construction of a filling station and convenience store. The respondents then entered into an agreement in terms of which Sasol would supply petroleum products to the second respondent for sale to the public after the filling station and convenience store had been constructed.

[3] As is the practice in the industry, the second respondent sought authorisation for the construction in terms of s 22(1) of the ECA from the Gauteng Department of Agriculture, Conservation, Environment and Land Affairs ('the Department'). The section requires that any activity that has been

identified in a notice by the Minister in the *Gazette* as potentially detrimental to the environment in terms of s 21(1) of the ECA may not be undertaken without the necessary authorisation of the Minister of Environmental Affairs and Tourism ('the Minister') or designated 'competent authority'. The MEC for Agriculture, Conservation, Environment and Land Affairs ('the MEC') is the 'competent authority' in the instant matter.[1]

[4] Section 22(2) of the ECA required the Department to consider reports concerning the environmental impact of the proposed activity, the scope and content of which has been prescribed by regulation.[2] Accordingly the application was supported by a 'scoping report' that the second respondent commissioned for this purpose, and further information that the Department requested later from the second respondent.

[5] To assist the Department in the evaluation of this and other such applications it issued general guidelines[3] in terms of which prospective applicants were advised that:

'1. New Filling Stations will generally not be approved where they will be:

- Within 100m of residential properties, schools, or hospitals, unless it can be clearly

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[1] S 22(2) of the ECA read with Government Notice No. R670, 10 May 2002.
[2] S 26 of the ECA.
[3] Environmental Impact Assessment ("EIA") Administrative Guideline – Guideline For The Construction and Upgrade Of Filling Stations and Associated Tank Installations, March 2002.

- demonstrated that no significant impacts will occur by reason of factors such as noise, visual intrusion, safety considerations or fumes and smells;
- Within three (3) kilometres of an existing filling station in urban, built-up or residential areas;
- Within twenty-five (25) kilometres driving distance of an existing filling station in other instances (i.e. rural areas, and along highways and national roads), or
- Within a sensitive area…'

[6] In September 2002 the Department refused the application. From the reasons furnished, it appears that the application was unsuccessful principally, though not exclusively, because it failed to comply with the spatial stipulations in the guidelines.[4] There were already two filling stations within three

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[4] This appears from the "Record of Decision" in which the main reasons for declining the authorisation fall into three categories:

1. Incompatibility with the Guidelines.
   - There are several filling stations within a 3km driving distance of the proposed sites, with the closest being approximately 250m away from the proposed site.
   - There are already two filling stations within 3km of the proposed site, the closest being 800m.
   - The proposed site is within 100m of an existing and developing residential area.
2. Incompatibility in terms of the National Environment Management Act 107 of 1998. Not environmentally and economically sustainable in terms of section 2(3).
   - There already exist several filling stations in close proximity to the proposed site, two of which are located on CR Swart Drive.
   - Predicted volumes for the proposed service station do not comply with current trends within the area.
   - Filling stations are considered to be point sources of pollution as petrol is considered to be a volatile compound, which could potentially have significant impacts on residents where they are located close to residential properties.
   - The proposed filling station will significantly impact on the visual character of the surrounding neighbourhood. It is located on a topographical incline and will therefore be highly noticeable to surrounding residential areas.
   - The proposed filling station will be located adjacent to a church, which is considered to be socially and culturally sensitive.
3. Incompatibility in terms of the Development Facilitation Act 67 of 1995. The promotion of the optimum use of existing resources relating to transport is compromised in terms of Section 3(c)(iv) of the Act.
   - There are several filling stations within a 3km driving distance of the proposed site, the closest being 250m.

kilometres of the proposed development and it was located within a hundred metres of an existing and developing residential area. Sasol appealed against the Department's decision to the MEC. She dismissed the appeal and confirmed the Department's decision and reasoning.[5]

[7] The respondents then sought an order in the Johannesburg High Court declaring that the guidelines were *ultra vires* the ECA. In the alternative they sought to review and set aside the decisions of the Department and the MEC. The court *a quo* (Willis J) refused the application for declaratory relief. It nevertheless reviewed and set aside the decisions of the Department and the MEC but ordered each party to pay its own costs. The MEC appeals against this decision. The respondents in turn cross-appeal against the court *a quo's* refusal to grant them declaratory relief. The parties approach this court with leave of that court.[6]

[8] The principal finding of the court *a quo* was that the Department has the

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- The proposed site is located within an established and developing residential area.

Additional Comments:
The department has the responsibility to adopt a risk-averse approach and places emphasis on point source pollution, cumulative and social impacts.

[5] The appeal was lodged in terms of Section 35(3) of the Environment Conservation Act 73 of 1989. It provides that any person who feels aggrieved at a decision may appeal to a competent authority.

[6] The judgment of the court *a quo* is reported as *Sasol Oil (Pty) Ltd and Another v Metcalfe NO* 2004 (5) SA 161 (W).

power only to regulate the environmental aspects of the storage and handling of petroleum products on the premises of a filling station but not the environmental aspects of filling stations *per se*. Flowing from this, the court *a quo* stated that the guidelines issued by the Department were for the most part 'totally irrelevant and inappropriate': the Department had purported to extend the remit of the activity subject to potential prohibition in the erroneous belief that it had the power to do so. Consequently the MEC's refusal of authorisation for the construction of the filling station, based on the guidelines, was declared invalid.

[9] The starting point is the Minister's notice, which was issued in terms of s 21(1) of the ECA. Among the activities that the Minister identified in item 1(c)(ii) of the notice as having a potentially detrimental effect on the environment[7] are:

'1. The construction, erection or upgrading of—

…

(c) with regard to any substance which is dangerous or hazardous and is controlled by national legislation-

…

(ii) manufacturing, storage, handling, treatment or processing facilities for any such

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[7] This appears from GN No. R 670 of 10 May 2002. The Minister identified various activities in several Gazettes as contemplated section 21(2) of ECA. These were initially set out in Schedule 1 of GN No. R 1182 of 5 September 1997. That schedule was amended by GN No. R1355 of 17 October 1997, GN No. R448 of 27 March 1998 and finally GN No. R 670 of 10 May 2002.

substance…'

[10] The parties agree that petroleum products are 'dangerous or hazardous' substances, which are controlled by national legislation.[8] The potentially detrimental environmental aspects of the management of such products are therefore self-evident. What is in issue is whether a filling station is a 'storage' or 'handling' facility for petroleum products. If it is, the Department and MEC had the power to refuse authorisation for its construction.

[11] The construction adopted by the court *a quo* is that these words describe only specific aspects of the activity of a filling station viz. storage and handling of petroleum products and not any other related activities within a filling station.[9] Adopting this construction the respondents say that any commercial activity that is associated with filling stations therefore falls outside of the ambit of the Minister's notice. The respondents contend that if the Minister intended to include filling stations he would have done so expressly.

[12] In my view this construction does not withstand scrutiny. The Minister could certainly have been more explicit by including filling stations in the list of activities that trigger environmental impact consequences. But his failure to do

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[8] This is apparent from the definition of a petroleum product in s 1 of the Petroleum Products Act 120 of 1977 as 'any petroleum fuel and any lubricant…'
[9] See *Sasol Oil (Pty) Ltd and Another v Metcalfe NO* 2004 (5) SA 161 (W) at [15].

so does not imply that he intended to exclude them.

[13] In order to construe item 1(c)(ii) properly, the construction must be consistent with the purpose of the enactment giving rise to it, the environmental clause in s 24 of the Constitution, as well as other relevant statutory enactments which constitute the panoply of environmental law.[10] Of immediate relevance are the ECA and the National Environmental Management Act 107 of 1998 (NEMA).

[14] Section 24(a) of the Constitution guarantees the fundamental right of everyone 'to an environment that is not harmful to their health or well-being'. To realise this right, s 24(b) imposes positive obligations on the state to protect the environment 'through reasonable legislative and other measures that prevent

[10]Discussed by Claassen J in *BP SA (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 (5) SA 124 (W) at 140G-150A;
Jan Glazewski: *Environmental Law in South Africa*, Butterworths 2000 at 13 says that:
'The bulk of environmental law is contained in a multiplicity of statutes and regulations. These are either general in nature such as the ECA, which has been to some extent, but not completely, supplemented by the NEMA, or those dealing with specific resources as the National Water Act 36 of 1998, or those dealing with specific waste management or pollution control problems such as the Dumping at Sea Control Act 73 of 1980. Apart from national statutes, cognisance must be taken of provincial laws and local authority by-laws. The focal point for nature conservation legislation, for example, has historically always been the provincial rather than the national level of government. The advent of nine provinces in the new South Africa as opposed to four in the previous dispensation implies that there is an increasing plethora of legislative instruments of which the environmental lawyer has to be aware.'

pollution…while promoting justifiable economic and social development'.[11]

[15] The first steps that were taken to protect the environment after the advent of the Constitution were the promulgation of regulations under s 21(1) of the ECA that listed the activities that are potentially detrimental to the environment and set out the rules regarding the compilation of environmental impact assessments relating to such activities.[12] This was followed by the enactment of NEMA, which gives effect to s 24 of the Constitution. Of particular importance is NEMA's injunction that the interpretation of any law concerned with the protection and management of the environment must be guided by its principles.[13] At the heart of these is the principle of 'sustainable development', which requires organs of state to evaluate the 'social, economic and environmental impacts of activities'.[14] This is the broad context and framework within which item 1(c)(ii) is to be construed.

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[11]The relevant constitutional provision reads as follows:
'ENVIRONMENT
24. Everyone has the right ─
(a) to an environment that is not harmful to their health or well-being; and
(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that ─
(i) prevent pollution and ecological degradation;
(ii) promote conservation; and
(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.'
[12] See fn 7 above.
[13] S 2(1)(e) of NEMA.
[14] S 2(3); s 2(4)(i).

[16] In essence a filling station consists of storage tanks where fuel is stored and pumps through which fuel is pumped. A pump is clearly a 'handling' facility for petroleum products within the meaning of item 1(c)(ii). Once this is accepted, and I did not understand the respondents to contend otherwise, the fact that the fuel is sold from the same premises does not change the essential features associated with filling stations. Nor does the fact that a convenience store may be part of the proposed development. To attempt to separate the commercial aspects of a filling station from its essential features is not only impractical but makes little sense from an environmental perspective. It also flies in the face of the principle of sustainable development, which is referred to above. The adoption of such a restricted and literal approach, as contended for by the respondents would defeat the clear purpose of the enactment. This was explained succinctly, and in my view correctly, by Claassen J in *BP SA (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs*,[15] decided in the same division after the present matter:

'… To prove the point, one may merely ask the rhetorical question: Absent the storage and handling of petroleum products in a filling station, what is then left of the "filling" station? In my view, s 1(c) [ii] seeks to regulate the entire construction of the facility and not merely the construction of storage tanks and petrol pumps on the site. It seems to me artificial to say that the department is only entitled to look at the storage and handling facilities of petroleum

[15] 2004 (5) SA 124 (W) at 160A-E.

products as an activity distinct and separate from the rest of the activities normally associated with a filling station. In any event, if it is accepted that the department has a say in the construction of the fuel tanks and the petrol pumps as constituting storage and handling facilities of petroleum products, then, for environmental purposes, it will remain a concern where and for how long those fuel tanks and petrol pumps will be operating. All the concerns listed in the guideline, including the future economic life-span thereof, will still be relevant and applicable to such fuel tanks and petrol pumps even though they may be regarded as distinct and separate from the filling station. Ultimately, from an environmental point of view, it makes little sense to draw a distinction between, on the one hand, a filling station *per se* and, on the other, its facilities which store and handle hazardous products.'

[17] It follows that the main issue in this appeal, whether the Department and the MEC had the power to regulate the erection and construction of filling stations *per se* must be decided in favour of the MEC. The respondents' contention that the guidelines are *ultra vires* the ECA because they are based on an erroneous belief on the part of the Department that it had the power to regulate filling stations *per se* and not merely the 'storage' and 'handling' facilities when formulating the guidelines is therefore similarly without merit.

[18] The respondents contend, in the alternative, that even if the guidelines are not *ultra vires*, the review must still succeed because they were applied mechanically, without due consideration of their applicability to the respondents' application. They contend, in other words, that the decisions were

not rational as contemplated by s 6(2)(f)(ii)[16] of PAJA since the decision-makers fettered their discretion by applying the guidelines rigidly instead of considering the specific environmental impact that the proposed development would have.

[19] The adoption of policy guidelines by state organs to assist decision makers in the exercise of their discretionary powers has long been accepted as legally permissible and eminently sensible. This is particularly so where the decision is a complex one requiring the balancing of a range of competing interests or considerations, as well as specific expertise on the part of a decision-maker. As explained in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*[17], a court should in these circumstances give due weight to the policy decisions and findings of fact of such a decision-maker. Once it is established that the policy is compatible with the enabling legislation, as here, the only limitation to its application in a particular case is that it must not be

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[16]Promotion of Administrative Justice Act 3 of 2000.
'6. Judicial review of administrative action—
(1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.
(2) A court or tribunal has the power to judicially review an administrative action if—
(a) …
(f) the action itself—
(ii) is not rationally connected to—
(aa) the purpose for which it was taken;
(bb) the purpose of the empowering provision;
(cc) the information before the administrator; or
(dd) the reasons given for it by the administrator.'
[17] 2004 (4) SA 490 (CC) [48].

applied rigidly and inflexibly, and that those affected by it should be aware of it.[18] An affected party would then have to demonstrate that there is something exceptional in his or her case that warrants a departure from the policy.[19]

[20] The respondents' complaint is that the decision to refuse the application for the proposed development is irrational because the reasons given by the Department and the MEC evince a rigid adherence to the distance stipulations in the guidelines. This is, so it is contended, because no reference is made to any possible environmental harm that may result from the proposed development. The MEC however meets this criticism in her answering affidavit as follows:

'…A distance stipulation… is… a rational basis for controlling an unnecessary and harmful proliferation of filling stations. It allows the establishment of new filling stations where the need therefore exists but has a justifiable bias against allowing new filling stations where no need exists. The purpose of the Guideline is not to play a role in economic regulation but to regulate the consequences of uncontrolled proliferation of filling stations for environmental reasons… The distance stipulations… were the product of experience of, and research by, the Department and consultation with various stakeholders, including SASOL… (We) do not believe that (the Guidelines) should be applied inflexibly…The point I wish to stress is that the Department (and I) are open-minded as to whether, in a particular situation, good grounds may exist for permitting a filling station within less than 3km of an existing filling station.'

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[18] *Britten v Pope* 1916 AD 150 at 158; *Computer Investors Group Inc v Minister of Finance* 1979 (1) SA 879 (T) 898; *British Oxygen Co. v Bd. of Trade (H.L.(E.))* [1971] AC 610 at 625D-E, *Baxter Administrative Law* (1984) 415-419.

[19] *R v Port of London Authority, Ex Parte Kynoch Ltd* [1919] 1 KB 176 at 184.

[21] In fact, the reasons given do not support the criticism that the guidelines were applied rigidly and inflexibly, or that they impermissibly regulate economic activity. They reveal that the proposed filling station would be located diagonally opposite a church, which is considered by the Department to be culturally and socially sensitive. It is also adjacent to properties zoned for residential development. Even without the distance stipulations, the proximity of fourteen filling stations within five kilometres of the site would clearly have some environmental impact. In addition it was observed that the development would have a significant impact on the scenic vista, degrade the existing visual character or quality of the site and its surroundings, create a new source of substantial light or glare, which would adversely affect day or night time views in the area or negatively impact on the surrounding communities' physiological health, as well as increase ambient noise levels.

[22] In my view there is therefore no substance to the criticism that the guidelines were applied in a manner that affected the rationality of the decision. On the contrary, the reasons demonstrate the opposite. But in any event, as pointed out earlier, the respondents were thus required to demonstrate that there was something exceptional in their application that warranted a departure from

the usual application of the guidelines.[20] Filling stations bear a substantial resemblance to each other. The respondents advanced no argument that the guidelines for filling stations should be inapplicable to theirs.

[23] A further issue raised in this appeal is whether the respondents had instituted review proceedings in the High Court out of the time period prescribed in the ECA, as contended by the MEC. If the MEC's contention on this point is correct, the respondents were barred from pursuing their review in the Johannesburg High Court.

[24] The relevant provisions of the ECA that bear on this question read as follows:

'35. Appeal to Minister or competent authority—

…

(3) … [A]ny person who feels aggrieved at a decision of an officer or employee exercising any power delegated to him in terms of this Act or conferred upon him by regulation, may appeal against such decision to the Minister or the competent authority concerned, as the case may be, in the prescribed manner, within the prescribed period and upon payment of the prescribed fee.

(4) The Minister, … or a competent authority, as the case may be, may, after considering

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[20] The word exceptional in this context denotes 'something out of the ordinary and of unusual nature'. The expression was used in this sense by Milne J in *I A Essack Family Trust v Kathree* 1974 (2) SA 300 (D) at 304B.

such an appeal, confirm, set aside or vary the decision of the officer or employee or make such order as he may deem fit, including an order that the prescribed fee paid by the applicant or such part thereof as the Minister or competent authority concerned may determine be refunded to that person.

36. Review by court– (1) Notwithstanding the provisions of section 35, any person whose interests are affected by a decision of an administrative body under this Act, may within 30 days after having become aware of such decision, request such body in writing to furnish reasons for the decision within 30 days after receiving the request.

(2) Within 30 days after having been furnished with reasons in terms of subsection (1), or after the expiration of the period within which reasons had to be so furnished by the administrative body, the person in question may apply to a division of the Supreme Court having jurisdiction, to review the decision.'

[25] The Department made its decision not to authorise the respondents' application on 2 September 2002 and furnished its reasons for so deciding to the respondents. They appealed to the MEC. She made her decision on 28 April 2003. It was received by the respondents on 5 May 2003. The review proceedings were commenced on 31 July 2003, almost three months later. It is submitted on behalf of the MEC that because s 36 is peremptory in requiring any review to be instituted within thirty days of the receipt of the decision and furnishing of reasons, the review was not brought within the prescribed time period.

[26] Sections 35 and 36 must be read together. The words ‘notwithstanding the provisions of section 35’ at the beginning of s 36(1) make this clear. So read, it is plain that an applicant who is aggrieved by a departmental decision, may appeal to a 'competent authority' in terms of s 35(3), or instead, review the decision without an appeal. If the latter option is chosen, the aggrieved party may institute review proceedings in the High Court in terms of s 36(2) within thirty days of having received the reasons. If however, an appeal is lodged against a departmental decision, the time periods provided for in s 36 are not applicable, as these relate only review proceedings where there is no appeal. But such an appeal must be lodged within thirty days from the date on which the record of the decision was issued.[21]

[27] The construction contended for by the MEC is not sustainable. This is best illustrated by the facts of this matter. The Department’s decision was made, and reasons furnished, on 2 September 2002. On 2 October 2002, before the thirty day period prescribed had expired, the respondents lodged their appeal. The MEC decided the appeal more than six months later, on 28 April 2003. If the respondents had elected to review the Department’s decision in terms of s 36, without appealing to the MEC, they would have been required to do so

[21] Regulation 7. Government Gazette 18261 GN R1183, 5 September 1997.

within thirty days of the Department's decision having been made on 2 September 2002, not within thirty days of having received the MEC's decision. Mr Freund, who appeared for the MEC, dealt with the conundrum by suggesting that an aggrieved party may be able to pursue both an appeal in terms of s 35, and a review in terms of s 36 simultaneously, which is an absurdity. Apart from the wastage of costs that such a dual procedure would entail, there is nothing in the language that supports this construction.

[28] It follows that sections 36(1) and (2) must be read permissively, and not as a time bar for the institution of review proceedings. The intention and purpose of s 36 is to provide the option of a speedy review to an aggrieved party without first having to exhaust the internal appeal remedy.[22] If, however, the party elects to by-pass the internal remedy, the thirty-day time bar must be observed.

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[22] It is a longstanding principle of our law that resort should not be had to the courts when there are other remedies specifically provided to resolve an aggrieved parties grievances and where it may transpire, once those remedies have been invoked, that it is unnecessary to approach the courts at all. *Shames v South African Railways and Harbours* 1922 AD 228 at 233-4. See further *Baxter Administrative Law* (1984) 720-723. The duty of a party to first exhaust internal remedies is now provided for in s 7(2) of PAJA:
The relevant subsections of PAJA read as follows:
'(a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.
(b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.
(c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interests of justice.'

[29] The erroneous construction contended for by the MEC appears to have been accepted by the court *a quo*. It however found that the 180-day period provided for in s 7(1) of PAJA[23] prevails over s 36 of the ECA because it is 'universal legislation', which derives its force from the Constitution.[24] The idea that national legislation enacted as a constitutional requirement enjoys some 'formal supremacy' over any other Act of Parliament is novel, and has been the subject of academic debate.[25] It is, however, not necessary to decide this question.

[30] Even though the point on the time periods has no substance, the MEC has been successful on the merits of this appeal. The appeal therefore succeeds with costs and the cross-appeal is dismissed with costs. The order of the court *a quo* is replaced with the following:

'The application is dismissed with costs.'

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ACTING JUDGE OF APPEAL

Concur: Howie P
Cameron JA
Mlambo JA
Nkabinde AJA

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[23] 7. Procedure of judicial review— (1) Any proceedings for judicial review in terms of section 6(1) must be instituted without reasonable delay and not later than 180 days after the date…

[24] *Sasol Oil (Pty) Ltd and Another v Metcalfe NO* 2004 (5) SA 161 (W) at [7].

[25] See G Devenish 'The application of the *generalia specialibus non derogant* principle in the interpretation of statutes' (2005) 112, *SALJ* p 72 at 75.