

**IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)**

1/4/2011
Case No: 57084/09

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES /NO.	
(2) OF INTEREST TO OTHER JUDGES: YES /NO.	
(3) REVISED.	
1/04/2011	/ /
DATE	SIGNATURE

In the matter between:

TAISHAN FIBREGLOSS SA (PTY) LTD

Applicant

and

**THE MINISTER OF TRADE AND INDUSTRY,
NATIONAL GOVERNMENT
THE MANUFACTURING DEVELOPMENT
BOARD**

1st Respondent

2nd Respondent

JUDGMENT

MNGQIBISA-THUSI, J

[1] The applicant is seeking the following relief:

- 1.1 that the decision of the second respondent taken on 18 February 2009 disapproving the applicant's application for the decrease in the investment, turnover and employment conditions set by the second respondent on 26 September 2007 when approving the applicant's incentives be reviewed and set aside;
- 1.2 that the application of the applicant for relaxation of conditions relating to the applicant's application for financial assistance and

incentives in respect of the Small and Medium Enterprise Development Programme (SMEDP) be granted;

alternatively, that the applicant's application for relaxation of conditions relating to applicant's application for financial assistance and incentives in respect of the SMEDP be remitted to the second respondent for reconsideration;

- 1.3 that the respondents be ordered, jointly and severally to pay the costs of this application.

[2] The first respondent introduced an incentive scheme in terms of the SMEDP consisting of certain investment grants. The purpose of the programme is to encourage small and medium size businesses to develop and grow, and to promote investment in plant and machinery. The scheme is managed by the second respondent on behalf of the first respondent.

[3] Around July 2005 the applicant lodged an application with the second respondent in terms of the SMEDP. However, this application was not approved on the basis that it had a low matrix score.

[4] As appears from the second respondent's answering affidavit a matrix:

"... comprises a system whereby all the financial statements and other information submitted by an applicant in support of its application are put on a spreadsheet. The spreadsheet allows for scores to be calculated in respect of different categories such as "machinery and equipment" and "wealth creation".

[5] For an applicant's application to be approved, the applicant must obtain a minimum matrix score of 50%. The matrix score is used as a basis for recommendations made by the second respondent to the first

respondent. Further, a deviation from the minimum matrix score is allowed only in exceptional circumstances.

[6] In March 2007 the applicant applied again (**the second application**). In this second application, the applicant had increased its investment in plant and machinery for the second year by at least R25 000 000.00. Furthermore, the applicant undertook to increase its employment figure from 55 to 118 persons. This application was approved on 26 September 2007 subject to what is termed 'a special condition', namely, that an employment figure of at least 118 would be maintained throughout the incentive period even though the applicant's projected employment figure was 50.

[7] The contract was signed on 28 January 2008.

[8] On 9 April 2008, the applicant submitted another application to the SMEDP in terms of which it sought an approval to decrease its projected investment in new machinery to R10 370 000.00, a lower turn-over level from 118 for the entire period to 50 for the first year and 8 for the second year.

[9] The applicant's motivation for seeking a revision in the conditions under the original contract was that as a result of the problems ESKOM experienced in supplying electricity to its customers throughout the country during that period, the applicant would not be in a position to use the full production of an additional Fibreglass Roving production line.

[10] Initially on receipt of this revised application, the second respondent rejected it outright under the erroneous belief that it was out of time. The letter rejecting the application as being out of time reads in part as follows:

"The board does not approve the decrease in investment and turnover figure as the request was received 27 days late and as no additional material motivation/information was received. The existing contract remains valid."

[11] However, when it was alerted by the applicant to the fact that it was wrong in its initial decision, the second respondent did consider the revised application. The letter pointing out the second respondent's mistake reads in part as follows:

"We respectfully submit that no additional motivation apart from argument contained in our covering letter was deemed necessary as the electricity shortage is regarded as common cause. No doubt, your Board is aware of Eskom's plea to mining/industry to cut down electricity consumption by at least 10%."

[12] The second respondent rejected the revised application on the ground that the motivation in support of the application was "meagre, scant and vague in the extreme and without any substance."

[13] The applicant and the respondents have applied for condonation for the out of time bringing of this application and the late filing of the answering affidavit, respectively. In consideration of the motivation supplied by each party, condonation is granted to both parties.

[14] It is the contention of the applicant that the decision of the second respondent should be reviewed and set aside on the following grounds:

- 14.1 the second respondent has not paid due consideration to the circumstances which stopped the applicant's proposed expansion;
- 14.2 the second respondent's remedies were exhausted and if the matter is remitted back to the second respondent for reconsideration, this will probably not be done properly;

- 14.3 that the administrative action taken by the second respondent was not procedurally fair in terms of section 6(2) of **Promotion of Administrative Justice Act 3 of 2000 (PAJA)**, in particular 6(2)(c); 6(2)(e)(vi) and (vii); 6(2)(f)(ii) and 6(2)(h);
- 14.4 that the second respondent ignored the applicant's submissions and did not bother to provide reasons for its decision;
- 14.5 that the decision made was biased and taken in bad faith, arbitrarily or capriciously. The basis for this ground stems from the second respondent's response to the applicant's revised application that it was 'meagre, scant and vague in the extreme and without any substance'.

[15] It was argued on behalf of the applicant's that the second respondent as a regulator should be more sensitive to the challenges faced by actors in the manufacturing industry particularly the impact that the electricity outages would have on the output. Further that it does not seem as though the second respondent had applied its mind to the applicant's revised application since it appears that it used a general criterion to evaluate the application.

[16] The pertinent subsections of section 6(2) of PAJA read as follows:

- "6. (2) A court or tribunal has the power to judicially review an administrative action if –
- (c) the action was procedurally unfair;
 -
 - (e) the action was taken-
 -
 - (vi) arbitrarily or capriciously;
 - (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;

...

- (h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function."

[17] It was submitted on behalf of the respondents, firstly, that the applicant's second application was approved on the basis of its proposed increase in its employment quota. The respondents contend that special conditions as contained in the applicant's contract are imposed in instances where the applicant's matrix score does not meet the minimum requirements. Secondly, it was argued on behalf of the respondents that even after it was indicated to the applicant that additional motivation was necessary, the applicant did not deem it necessary to supply same beyond claiming that the problems with electricity supply were well known. Further it was contended that the electricity outages were not an occurrence unique to the applicant. It needed to motivate why within a short period of two months after the contract is signed it deems it necessary to revise its matrix, in particular, its employment component.

[18] In order to determine whether a decision-maker has failed to apply his mind in reaching a decision it was held in *Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another* 1988 (3) SA 132 (A) at 152B-D that:

"Such failure may be shown by proof, *inter alia*, that the decision was arrived at arbitrarily or capriciously or mala fide or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or that the president misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or that the decision of the president was so grossly unreasonable as to warrant the interference that he had failed to apply his mind to the matter in the matter aforestated Some of these grounds tend to overlap."

[19] Further, in *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 at paras [85] and [86] at 708D – F the court held that:

"[85] It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.

[86] The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle."

[20] The applicant has not given sufficient evidence in support of its contention that the decision taken by the second was not procedurally fair. Once the second respondent became aware of its mistake in dismissing the applicant's revised application, it had considered the application and responded to the applicant indicating its rejection of the application due to lack of sufficient motivation. The applicant was aware on receipt of the letter of the erroneous letter of rejection that besides the applicant considering the application to be out of time, the applicant also considered the application as not being sufficiently motivated. In response the applicant had indicated that in its opinion it did not deem it necessary to motivate for the revision in view of what it referred to as common knowledge, namely, the electricity outages.

[21] Furthermore I am not convinced that the second respondent was capricious, mala fide or irrational in deciding to reject the applicant's revised application. The second respondent made the decision based on the information supplied by the applicant being that it had to reduce its proposed plans as a result of the power outages and nothing else. The second respondent has correctly pointed out that it could not base its decision on an event of general application as the applicant was not the only one affected by the electricity outages. The applicant did not supply the second respondent with grounds applying specifically to it as an entity which would necessitate the agreed upon components. Furthermore bearing in mind that according to the second respondent the applicant's application was only approved, even though it did not meet the basic matrix score, on its employment component which was regarded as exceptional circumstances in terms of the respondents' criteria.

[22] In *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407 (SCA) at para 48 the court stated that:

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

[23] Furthermore, in *Logbro Properties CC v Bedderson NO and Others* 2003 (2) SA 560 (SCA) Cameron JA quoted from an article by Cora Hoexter entitled 'The Future of Judicial Review in South African Administrative Law' (2000) 117 SALJ 484 at 501-2 which reads as follows:

"... the sort of deference we should be aspiring to consists of a judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of these agencies in policy-laden or polycentric issues; to accord their interpretation of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate maladministration."

[24] In this matter I am guided by the sentiments expressed in the above mentioned cases. I do not find anything evidencing that the second respondent did not apply its mind when considering the application made by the applicant. Accordingly I do not think that this court can substitute the second respondent's decision with its own. What

is clear is that the second respondent followed the proper procedure in these applications and gave reasons for rejecting the application.

[25] Accordingly the following order is made:

‘The application is dismissed with costs.’



NP MNGQIBISA-THUSI J

Judge of the North Gauteng High Court