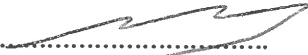


**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION PRETORIA**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED
<u>30/04/2021</u>	
DATE	SIGNATURE

Case Number: 26720/2019

JANKS OFFICE IMPORTS (PTY) LTD

Applicant

and

**THE MINISTER OF TRADE AND INDUSTRY
And another**

First Respondent

JUDGMENT

SC VIVIAN AJ

1. This application arises from the Department of Trade and Industry's Manufacturing Competitiveness Enhancement Programme ("MCEP").

2. At its heart, this is an application in which the applicant seeks to review and set aside the cancellation of what it perceives to be the purported cancellation of an approval to pay an incentive to the applicant and for substitutionary relief in the form of an order for the payment of money.
3. The respondents are the Minister of Trade and Industry and the Director General of Trade and Industry. The application concerns to conduct of officials employed at the Department of Trade and Industry, which I refer to as “the DTI”.
4. In their answering affidavit, the respondents explain that the MCEP is an incentive programme that is aimed at promoting enterprise competitiveness and job retention by supporting manufacturing enterprises with competitiveness improvement interventions. A further objective is to support capital investment in equipment upgrading and expansions that will lead to the creation of new jobs and retention of existing ones. The applying entities themselves are required to make minimum investments in the enterprise according to its size. By way of an example an entity with total assets with a historical cost below R5 million should have a minimum investment in machinery and equipment of R500 000. The incentive is a cost sharing incentive in terms of which the scheme contributes a percentage of the investment made by the entity. The incentive is paid directly to approved applicants based on actual qualifying costs incurred and subject to employment levels being retained.
5. The programme is aimed at compensating the applying entity for actual costs incurred as an investment by the entity itself in expanding its operation and creating

and retaining jobs. The respondents explained that in the absence of proof of actual costs incurred, the programme cannot pay the incentive.

6. The applicant's founding affidavit is terse. The deponent to the founding affidavit simply asserts that on 31 January 2014, the applicant submitted an MCEP Application. There is no explanation of the programme. It is not clear to whom the application was submitted.
7. On 10 September 2014, Mr Sitembile Tantsi, who is described as "Director: MCEP" sent a letter to the applicant. The letter recorded: "*We are pleased to inform you that your application for assistance under the dti's Manufacturing Competitiveness Enhancement Programme has been approved by the Adjudication Committee/ Technical Committee on 22 August 2014. The approval is conditional on the applicant meeting the requirements of the MCEP.*" The letter recorded that the total amount of assistance that was approved was R5 million.
8. The letter further recorded: "*In terms of MCEP guidelines the claim must be submitted within six (6) months. If a first claim is not submitted six (6) months after the start of commercial production, the incentive approval will be cancelled.*"
9. In the founding affidavit, the applicant also referred to "*the Guidelines*". But it did not annex a copy to the founding affidavit. The respondents also did not annex a copy to the answering affidavit.
10. I caused a note to be placed on Caselines in respect of this omission. In response, the applicant simply uploaded an unsigned version of the Guidelines. During

argument, I indicated to the applicant's counsel, Mr Nowitz, that as this document is not annexed to an affidavit, its evidentiary status is problematic and it could not be used unless the respondents agreed to its use. Mr Jozana, who appeared for the respondents, took a pragmatic approach. He indicated that he had a different version of the Guidelines. However, the differences were not material to this application. Accordingly, the respondents were prepared to accept that the Guidelines be placed before me despite the evidentiary difficulties. On this basis, the matter was able to proceed.

11. It is a requirement of the Guidelines that the first claim must be submitted within 6 months of approval. Importantly, the Guidelines provide:

"12.1.4 It is the responsibility of the entity to provide complete and accurate information to the dti to enable speedy and correct processing of the incentive. The entity must submit the following documents to the Programme Manager at the dti:

12.1.4.1 An originally completed Claim Form duly signed by the entity and an independent external auditor or accredited person ... "

12. The applicant submitted two claims – dated 1 September 2015 (the applicant says this was submitted on 31 August 2015, but nothing turns on the distinction) and 11 September 2015. These were accompanied by an independent auditor's report prepared by Corax Inc. The DTI received the claims and conducted a site visit on 14 October 2015.

13. On 16 November 2015, the DTI sent two letters to the applicant. In the first letter, it rejected the 1 September 2015 claim on the basis that it was a duplication of the 11 September 2015 claim. It appears that the DTI later accepted that this was incorrect. There were two separate claims. In the second letter, the DTI rejected the 11 September 2015 claim on the basis that “*We were unable to verify the existence of the supplier on the invoices supplied with the claim.*”
14. In the terse chronology of events in the founding affidavit, the next event recorded is a request from the DTI in an email dated 31 May 2016 to “... *furnish the team with verifiable proof of investment to bring the assets into production and of payments made to the related financing agreement.*” This was followed by a response from the applicant on 3 June 2016, to which it attached proofs of payment by it to a beneficiary described on the statements as “Northgate”.
15. The narrative then jumps to 26 September 2016, when the applicant's former attorneys, Werksmans, sent a letter of demand to the DTI. In the letter, it was asserted that the applicant had complied with the Guidelines. It demanded payment of R5 million, failing which it would “*launch appropriate legal proceedings.*”
16. The DTI responded on 3 October 2016. It pointed out that no beneficiary of any incentive scheme has a right to an incentive in that the approved amount is subject, amongst other things, to compliance with “*the Incentive Guidelines and Schedule to all incentives*”. It is also subject to economic policy and availability of funds. In the letter, reference is made to paragraph 12.1 of the Schedule, which is said to state:

"The approval of an incentive application does not give the Beneficiary any right to payment."

17. Neither party has referred me to a document that could be "the Schedule". The quoted paragraph does not appear in the Guidelines.
18. Importantly, in the 3 October 2016 letter, the DTI referred to a letter from the DTI which it said was dated June 2016 ("the June 2016 letter"). It recorded that the June 2016 letter said that the approval letter was cancelled as the documents submitted to substantiate the claim is insufficient evidence and the claims do not justify payment due to non-compliance with the Guidelines and relevant statutes. Reference was made to specific paragraphs in the Guidelines.
19. The applicant says that it did not receive the June 2016 letter at the time that it received the 3 October 2016 letter. In a letter dated 31 October 2016, Werksmans requested a copy of the June 2016 letter. The letter must have been provided to the applicant at some point in time as it is annexed to the founding affidavit, but the applicant does not disclose when that point in time was.
20. The applicant points out that the June 2016 letter to which the DTI referred is in fact unsigned and undated. Nonetheless, the thrust of this application is an attempt to set aside the administrative decision communicated in the June 2016 letter.
21. I accept that the applicant did not receive the June letter in June 2016. However, the fact of the purported cancellation was communicated to the applicant in the 3

October 2016 letter. If there was an cancellation, it was communicated on 3 October 2016.

22. Mr Jozana described the use of the word “*cancelled*” in the correspondence as unfortunate. He submitted that the initial approval of the applicant did not create a contractual relationship where the applicant became entitled to payment of the incentive. Instead, the applicant only acquired rights when it submitted a compliant request for payment. This would include the necessary evidence to substantiate the request.
23. Mr Jozana submitted that the administrative decision that was made was not in effect to “cancel” the approval of the applicant as a person who qualified for the incentive. He submitted that the administrative decision was the decision not to pay. Insofar as there was a purported cancellation of the approval of the applicant, he submitted that it should be set aside.
24. The June 2016 letter commences with the words: “*We regret to inform you that the your claim for the MCEP incentive incentive was cancelled, due to failure to provide substantiated evidence ...*” It concludes with the words: “*Based on the above factors the approval amount to the value of R5 000 000 has been terminated with immediate effect.*”
25. Read as a whole, this communicates a rejection of the submitted claims, not a cancellation of the approval of the applicant as a person who qualified for the incentive. It was a decision not to pay. This was misstated by the DTI in its later

letter of 3 October 2016, in which it said that the June letter informed the applicant that the approval was cancelled. But it is the decision communicated in the June letter that the applicant seeks to have reviewed and set aside.

26. The applicant has accordingly misconstrued the administrative decision that it seeks to impugn.
27. The applicant says that it subsequently launched a PAIA application. It also provided the DTI with a lever arch file of documents. Although these documents are annexed to the founding affidavit, the content is not dealt with in the founding affidavit.
28. The applicant refers to an exchanged of correspondence between 2016 and 22 June 2018. Again, although the letters are annexed to the founding affidavit, the content is not dealt with in the founding affidavit.
29. Eventually, on 4 December 2018, the applicant purported to lodge a notice of internal appeal in terms of Clause 12.3 of the Guidelines.

THE INTERNAL APPEAL

30. In the founding affidavit, the applicant referred to clause 12.3 of the Guidelines. That clause reads: *“Any dispute relating to a decision (including the rejection of an application) taken by the dti is limited to one internal appeal per application lodged within such time as set out in the letter of notification.”*

31. The applicant says that although the DTI acknowledged receipt of the notice of internal appeal, it did not respond to it at all. Eventually, on 15 April 2019, it launched this application.
32. During argument, I asked both counsel to point me to the empowering legislation in terms of which an internal appeal could be considered. I asked which body was empowered to consider the appeal. Neither counsel was able to point me to the appropriate empowering statute or regulation. Neither party could identify the body empowered to determine the internal appeal. As Mr Nowitz put it, although the Guidelines provide for an internal appeal, to all intents and purposes there is no mechanism for an internal appeal.
33. The first prayer in the notice of motion is for an order: *“Upholding the Applicant’s Internal Appeal in terms of Clause 12.3 of the dti Guidelines ...”* However, Mr Nowitz submitted that what was really being sought was a judicial review in terms of Section 6 (2) (g) of the Promotion of Administrative Justice Act (Act 3 of 2000; “PAJA”). He suggested that the first prayer could be amended to reflect what was really being sought.
34. In my view, however, the applicant failed to make out a case for this relief. The Court cannot judicially review a failure to make a decision when the applicant has not demonstrate who was required to make the decision or why that person or body was required to make the decision.

The delay in instituting proceedings to review the decision communicated in the June 2016 letter

35. The second prayer in the notice of motion is for the Court to review and set aside the purported cancellation in the June 2016 letter. The third prayer is for payment of the incentive. Mr Nowitz argued that this is a substitutionary remedy in terms Section 8 (1) (c) (ii) (aa) of PAJA. The second and third prayers are accordingly remedies in terms of PAJA and relate to the decision communicated in the June 2016 letter.
36. In terms of Section 7 (2) of PAJA, the Court may not review an administrative action unless any internal remedy provided in any other law has first been exhausted. As neither party can refer me to an internal remedy provided in any law, I must infer that there is no such internal remedy. Accordingly, Section 7 (2) is not a bar to me considering the remainder of the relief sought.
37. However, in terms of Section (7) (1) of PAJA, proceedings for judicial review had to be instituted within 180 days. As there was no internal remedy, that 180 day period commenced when the applicant received notice of the decision communicated in the June 2016 letter. That notice is contained in the 3 October 2016 letter. These proceedings were only instituted on 15 April 2019, some 2 ½ years after the administrative decision was communicated to the applicant. This is an inordinate amount of time. In the absence of an application in terms of Section 9 of PAJA, this Court does not have the power to review the decision communicated on 3 October 2016.

38. The respondents did not rely on Section 7 (1) – presumably because the first prayer related to the internal remedy. It only became apparent that there was no internal remedy during argument.
39. In **Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another 2011 (4) SA 42 (CC)** at para's 53 to 54, Brand AJ held that the Court can raise Section 7 (1) *mero motu*. However, the Court will only do so when the delay is manifestly inordinate and only after it had given the applicant an opportunity to explain the delay.
40. I did not give the applicant an opportunity to explain its delay. Accordingly, I would not have dismissed this application solely on the basis of non-compliance with Section 7 (1).

The merits of the decision communicated in the June 2016 letter

41. The applicant says in the founding affidavit that after 3 October 2016, and for a period of some 20 months, the DTI continued to call for stamped bank statements, invoices, and affidavit and the like, all of which it supplied to the DTI.
42. The applicant does not, however, explain in any detail in the founding affidavit exactly the basis on which it sought to justify its claims for a incentive. It was required to submit substantiating documents. It is clear that the DTI did not accept these documents. There is nothing in the founding affidavit that even explains what money was invested and how it was expended.

43. In argument, Mr Nowitz spent time working through the documents provided to the DTI. I noted above that although this bundle was annexed to the founding affidavit, the content is not canvassed save in the broadest terms.
44. In **Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others 2008 (2) SA 184 (SCA)** at para 43 Cloete JA held:
- “It is not proper for a party in motion proceedings to base an argument on passages in documents which have been annexed to the papers when the conclusions sought to be drawn from such passages have not been canvassed in the affidavits. The reason is manifest - the other party may well be prejudiced because evidence may have been available to it to refute the new case on the facts.”*
45. The applicant accordingly failed in its founding affidavit to show that it complied with the requirements set out in the Guidelines. It simply asserted the conclusion that it had complied without prejudicing evidence of compliance.
46. Even if I were to trawl through the annexures, they raise more questions than answers. It was explained that a bundle of substantiating documents was submitted to the DTI. These formed a single annexure to the founding affidavit, spanning some 72 pages. The documents include a series of bank statements. Some are addressed to the applicant. But others are addressed to “Harjean Properties (Pty) Ltd”, “Knock or Wood Furniture (Pty) Ltd” and “Northgate Trading (Pty) Ltd” (“Northgate”).
47. The bundle also included reconciliations. There is no evidence as to who prepared the reconciliations. The reconciliations include a column for “beneficiary” and a

column for “payer”. Other than each reconciliation having a heading such as “building” or “shelving” there is no identification of what was being purchased. The “payer” column for the building reconciliation includes a number of payers. Save for Northgate, there is no explanation as to why payments made by other persons constitutes evidence that the applicant had made the minimum investment needed to trigger payment of the incentive.

48. The applicant produced a loan agreement between the applicant and Northgate. In terms of the loan agreement, Northgate made the sum of R12 500 000 available to the applicant to be drawn by the applicant as and when required. This explains the fact that some payments were made by Northgate. However, the other entities are not identified.
49. Mr Jozana pointed out these and other anomalies. He said that this justified the DTI’s stance that the applicant had not supplied sufficient substantiation for its claim. Mr Nowitz’s reply was that the identity of the payers was irrelevant. The applicant provided reconciliations and backed this up with bank statements. Irrespective of where the funds came from, this was proof that money was expended.
50. I agree with Mr Jozana. The fact that the applicant supplied a bundle of documents, and indeed that it supplied documents in various tranches and at various times, does not assist it. The documents are inconsistent and do not constitute complete and accurate information.

51. The nature of the incentive is that, before it can receive payment of the incentive, the applicant must itself have made a minimum investment in the enterprise in order to trigger an incentive payment. This is so because the incentive is a cost sharing incentive. It is paid to applicants based on actual qualifying costs incurred. The applicant could not receive payment until it demonstrated that it had made this minimum investment. I have already said that there is no evidence in the founding affidavit that demonstrates compliance. Trawling through the annexures does not solve this inherent problem in the application. There is no evidence to link a payment by Harjean Properties (Pty) Ltd to the applicant. On what basis should the DTI have accepted that a payment by Harjean Properties (Pty) Ltd constituted the applicant making an investment in the enterprise?
52. Accordingly, the applicant has failed to make out a case under any of the grounds set out in Section 6 (2) of PAJA.
53. Mr Jozana informed me that the respondents do not seek an order for costs and I will accordingly not make a costs order.

54. The application is accordingly dismissed.

A handwritten signature in black ink, consisting of a series of loops and a long horizontal stroke, positioned above a solid horizontal line.

Vivian, AJ

Acting Judge of the Gauteng Division of the High Court of South Africa

APPEARANCES:

FOR THE APPLICANT:

Adv M Nowitz

FOR THE RESPONDENTS:

Adv A Jozana