

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO:19613/2022

In the matter between:

HAMMARSKJOLD (PTY) LTD

First Applicant

INDY PENDANT FILMS (PTY) LTD

Second Applicant

and

**DEPARTMENT OF TRADE,
INDUSTRY AND COMPETITION**

First Respondent

**ACTING-DIRECTOR GENERAL OF THE
DEPARTMENT OF TRADE
INDUSTRY AND COMPETITION**

Second Respondent

**MINISTER OF TRADE ,
INDUSTRY AND COMPETITION**

Third Respondent

**BROADBASED BLACK ECONOMIC
EMPOWERMENT COMMISSION**

Fourth Respondent

JUDGMENT

NDITA, J

Introduction

[1] The Applicants applied for a foreign film incentive in terms of the First Respondent's Foreign Film and Television Production and Post-Production Incentive Guidelines. The application was rejected by the First Respondent.

[2] The South African Film and Production Incentive Programme is aimed at strengthening and promoting the country's film and television industry as well as contributing towards the creation of employment opportunities in South Africa. Foreign owned Film and Production and Post-Production qualify for incentives as set out in the Programme Guidelines. The Applicants made an application in 2022 to the film unit of the First Respondent for a foreign film incentive for the film "Hammaraskjold". Hammaraskjold was the Secretary-General of the United Nations Organisation and used his position to resist powerful European powers that were involved in the extraction of Africa's rich mineral resources, especially in Congo. The film relates to hardships that Africans faces as a result of colonialism. The application was refused by the First Respondent.

[3] In this application, the Applicants seek an order declaring unconstitutional and invalid the First Respondent' decision to refuse the aforesaid application for a foreign film incentive on the basis that the refusal was premised on a material error of law concerning the proper interpretation of the requirements of the incentive guidelines and the statutory scheme created by the Broadbased Black Empowerment Act 53 of 2003. The Applicants also seek an order substituting the decision of the First Respondent with a decision granting the application. More specifically, the Applicants seek a declaratory order to the effect that:

3.1 The First Respondent's principal reason for the refusal was the incorrect legal interpretation of the statutory scheme and incentive guidelines and its apparent belief that it is bound to follow and adopt the Commission's interpretation in this regard.

3.2 This Court in deciding that legal issue is therefore in as good a position to make the decision of the First Respondent as the outcome is a foregone conclusion once the law is correctly applied.

[4] The Applicants also seek an order declaring unconstitutional and invalid a related decision of the First Respondent not to waive a requirement for the incentive that principal photography must not commence until an approval letter has been received from the First Respondent. They ask for the decision to be reviewed and set aside and replaced with a decision retrospectively waiving the requirement.

The parties

[5] The First Applicant is Hammarskjold (Pty) Ltd ("HPL"), a private company registered in accordance with the laws of the Republic of South Africa, with its registered address at 8[...] R[...] Road, Woodstock, Cape Town, Western Cape.

[6] The Second Applicant is Indy Pendant Films (Pty) Ltd ("Indy"), a private company, registered in accordance with the laws of the Republic of South Africa, with its registered address at 8[...] R[...] Road, Woodstock, Cape Town, Western Cape.

[7] The Applicants bring these proceedings in their own interest and in the public interest, in terms of section 35 (a) and (d) of the Constitution.

[8] The First Respondent is the Department of Trade and Industry and Competition ("the Department") with its address at 8[...] S[...] G[...] M[...], Cape Town City Centre, Cape Town.

[9] The Second Respondent, the Acting-Director General of the Department of Trade is the Head of the aforesaid Department and is responsible and accountable

for the official conduct of the staff of her department in the course and scope of their duties, and for the decisions which she has authorised them to make on behalf of the Department. Her registered address is [...] W[...] Building, 8[...], S[...] G[...] M[...], Cape Town.

[10] The Third Respondent is the Minister of Trade, Industry and Competition and his physical address is the same as that of the Second Respondent. The Minister is joined insofar as he may have an interest in the issues raised in these proceedings. No relief is sought against him, save for costs in the event of opposition.

[11] The Fourth Respondent is the Broad-Based Economic Empowerment Commission (“BEE Commission”), an entity within the administration of the Department, established in terms of section 13B of the Broadbased Black Empowerment Act 53 of 2003 (“BEE Act”), with its address at the DTI campus. Its registered address is 7[...] M[...] Street, Sunnyside, Pretoria. No relief is sought against the Commission, save for costs in the event of opposition.

[12] The application is opposed by the First, Second and Third Respondents.

[13] The Applicants allege that this court has jurisdiction to determine this application in terms of sections 1, 6, and 8 of the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”).

Factual Background

[14] The factual background underpinning this application may be summarised thus: In an affidavit deposed to by Mr Lukhanyo Sikwebu (“Mr Sikwebu”), a shareholder and director of the Second Applicant, Indy, the Applicants alleges that they, on 10 March 2022, lodged an application for the Foreign Film Incentive for the production Hammarskjold. The film is being produced by HPL and Indy. Indy is a 52% black-owned company which was incorporated in 2017. According to the Applicants, Indy lay dormant until HPL, a newly incorporated company made an application to the film unit of the Department for an incentive. The date for commencement of production was 28 June 2022. The application was therefore in

full compliance with the mandatory conditions set out in clause 4.2 of the Guidelines which require that an application of this nature must be completed and submitted not earlier than forty-five calendar days prior to the commencement of principal photography. Clause 4.2.1 obliges an applicant to register s Special Purpose Corporate Vehicle (“SPCV”) in South Africa solely dedicated to the production and/or post production activities of the project. The SPCV must be a legal entity in terms of the Companies Act of 1973, or 2008, or the Co-operatives Act. HPL is the SPCV for this purpose. According to the Applicants, HPL was going to be responsible for all production and post-production activities in South Africa.

[15] The applicant Eligibility Criteria for the incentive are set out in paragraph 5 of the Guidelines as follows:

“5.1.1 Compliance with Broad Based Black Empowerment (B-BBEE)

5.1.1.1 The SPCV and holding company must be in compliance with the requirements for Broad Based Black Economic Empowerment (B-BBEE Codes of Good Practice (refer to <http://bee.thedti.gov.za>).

5.1.1.2 The holding company must achieve at least a level (3) B-BBEE contributor statuses in terms of B-BBEE Codes of Good Practice;

5.1.1.3 The SPCV must achieve at least a level four (4) B-BBEE Codes of Good Practice;

5.1.1.4 The SPCV and holding company must submit a valid B-BBEE certificate of compliance issued by an accredited verification agency or an affidavit at application stage.”

[16] The incentive applied for by the Applicants is R12 000 000. It thus exceeds R10 000 000 but is less than R50 000 000.

[17] Pursuant to the lodgement of the application, the Applicants and the film incentive unit of the Department, exchanged emails, wherein the latter enquired about the financing for the film from the Swedish Film Institute. It is apparent from the emails that the exchange was from Ms Marlow de Mardt (“Ms de Mardt”) of the Applicants utilizing her email from DO Productions (Pty) Ltd Film and TV Producers , *“which is a company wholly owned by Marloe de Mardt & Brigit Olen”* while Indy is

“52% owned by Ian Gabriel and Lukhanyo Sik and 48% owned by Marlow De Mardt + Brigid Olen”. Amongst the emails exchanged, one was sent by Mr Dimakatso Kgomo (“Mr Kgomo”), the Deputy Director of the unit on 28 March 2022 requesting further information concerning the film’s funding and seeking:

“... more clarity on the current Service Company [i.e. Indy] and its relation to DO Productions, the reason for now using a new entity that has never traded before or produced any work to date. If this was for transformation, why was it not done under the Service Company already in production/business and has been accessing the incentives.”

[18] Ms de Mardt responded to this email on 29 March 2022 and explained that:

“Indy Pendant was first registered in 2017 and the intention was always that Indy Pendant will be a collaboration with Ian and Luke and act as the service company for international projects as well as to develop and execute local projects so we registered this company to be ready to service all work going forward.

We were unable to secure any international work whilst our claim on “438” days remained unpaid. This payment was finally settled in September 2020. So between waiting for this claim to be paid and the industry to start up again after COVID there was a delay of 3 years during which time we did not produce any projects.

DO Productions main function is to obtain and secure the potential projects, to develop and co-develop projects from abroad with our long established track record and experience which is well known and respected in the international industry.

Our intention in establishing the Service Company Indy Pendant Film Pty Ltd with our partners Ian and Luke is to diversify our business model between DO Productions with the main focus on securing international projects and Indy Pendant Films, which will be the dedicated physical production service

company executing international projects confirmed for filming in South Africa. Our partners Ian and Luke will also focus on development of local content and series under the banner of Indy Pendant Film.

Our intention with the establishment of Indy Pendant Films, that will be the exclusive physical production service company and local content development arm, and retaining our long established company DO Productions was to:

- A. Focus on transformation and provide our partners with the opportunity to participate and grow in the international service arena and in turn make sure we are compliant with the BEE and DTI regulations.
- B. Retain our presence and network under the reported brand DO Productions and continued to develop and secure international projects for South Africa.
- C. Grow Indy Pendant Films and establish this as a brand/entity over time.”

[19] On 31 March 2022, Mr Kgomo responded to the above email and stated that the Department would engage with its legal unit regarding the new entity and would thereafter provide further guidance. On 19 April 2022, Mr Kgomo indicated in yet another email that the question of empowerment compliance was being considered and required further information:

- “1. Will PRODUCTIONS be involved in this production, if so, what services or activities will it provide, and at what cost.
- 2. Profit share agreement and shareholder’s agreement.
- 3. Financial statements and BEE Certificate or Affidavit for DO PRODUCTIONS.
- 4. Contact details of the black shareholders and their profiles/CV’s.
- 5. Reasons on why the shares are held directly and not by DO Productions?
- 6. Clarity on whether Do Productions will still be an applicant under which conditions, since it seems to be the key to the success of this Service Company?”.

[20] Mr Kgomo also stated that “[t]here is a risk that a detailed assessment at a later stage might result in the entity not being compliant with the BBEEE Act and there is also a possibility of circumvention due to the use of both/multiple entities to access the scheme for the benefit of specific shareholders.”

[21] On 27 April 2022, Ms de Mardt responded and explained, inter alia, that:

21.1 although DO Productions had sourced the project, all production would be serviced through the service company and its dedicated SPCV, HPL;

21.2 DO Productions was not an applicant, and the relevant parties to the application (Indy and HPL) held requisite levels of black ownership to meet the Guidelines;

21.3 the empowerment of DO Productions itself was therefore not relevant to the application. Moreover, to introduce black ownership into DO Productions would be an expensive transaction for which the black owners would need to find finance as DO Productions had been in business for a very long time and its value was considerable; and

21.4 DO Productions would however maintain an ongoing relationship with Indy as a source of projects into the future.

[22] Further communication between the parties led to the crucial email of 30 May 2022 wherein Mr Kgomo stated that:

“Unfortunately, your current structure and history of the shareholders pose a potential risk in terms of compliance with the B-BBEE Act and as such we will be seeking advice from the BEE Commission, in the context of the history of previous support received through DO Productions (Pty) Ltd. The aim of the incentive scheme is to also drive its beneficiaries within the industry towards meaningful transformation and in this case, one can argue the transformation should happen in DO Productions (Pty) Ltd.

We understand that you were trying to “transform” outside the of the beneficiaries (DO Productions (Pty) Ltd) and that you would like to proceed in benefitting through a new not transformed but “black-owned” structure? (This

in itself poses a lot of questions on compliance, but we will have to engage the experts on this subject.)

In the meantime we also advise that you ensure that the SPCV (start-up enterprise) submits a Qualifying Small Enterprise (“QSE”) scorecard since it is applying for an incentive higher than R10 million.

In terms of B-BBEE Act, a Start-Up Enterprise must submit a Qualifying Small Enterprise (“QSE”) scorecard when tendering for any contract or seeking any other economic activity covered in terms of section 10(1) of the B-BBEE Act, which have value higher than 10 million and for contracts of R50 million and for contracts of 50 million or more, they are required to submit a Generic scorecard applicable to large entities.

NB: We also advise you to approach the commission for an opinion on the compliance of the new structure and we urge you to disclose the full history of the shareholders and DO Productions (Pty) Ltd, including that it has benefitted from the Film and TV incentive scheme. Also mention that one of the intentions of this new entity is to benefit from the film & TV incentive scheme. You will need to share the outcome from the Commission on the above request with the business unit, should you wish to reapply for the incentive. The current application will be rejected and you will have to resubmit once we have clarity on the matters raised in the email and can submit the applicable BEE certificate.”

[23] In addition, it directs that HPL would have to use a Qualifying Small Enterprise (QSE) scorecard and not provide a sworn statement. Whether the above email constitutes a decision by the Department rejecting the Applicants’ application for the incentive remains to be considered.

[24] The deponent to the founding affidavit Mr Sikwebu further avers that subsequent to the rejection of the application by the Department through Mr Kgomo, he sought audience with the Acting Director-General, Ms Molokoane as well as with Mr Kgomo, seeking waiver of the Guidelines requirement to the effect that the principal photography must not commence until an approval letter has been received

from the DTI. On 8 June 2022, Mr Sikwebu wrote an email to Mr Kgomo and Ms Molokoane stating the following:

“Warm greetings Nelly and Dimakatso. I trust you are well.

My name is Lukhanyo Sikwebu, Shareholder and Director of Indy Pendant Films (Pty) Ltd. I am also Cast Coordinator on the feature film Hammarskjold.

I took some time to draft you a letter regarding the serious and time-sensitive situation we find ourselves in, regarding our DTIC application for a foreign film and television production incentive.

I’ve written this letter because I am probably the most affected person in this stalemate we have.

In the letter I have articulated our requests, the proven values of all our shareholders, and also highlighted that our company structures and all of our supporting documents are in harmony with the B-BBEEE Act, and also the DTIC application regulations and prerequisites.

Please find my letter attached.

NB: I request an urgent meeting between all the parties involved in this application (DTIC and Indy Pendant Films representatives).

Secondly, I’d like to kindly remind you that we’re racing against time.

This is an urgent and time sensitive matter.”

[25] In an email of 24 June 2022, Mr Kgomo reiterated the rejection and declined the request for a waiver.

[26] It is common cause that principal photography for the film commenced on 28 June 2022.

[27] Prior thereto, and on 9 June 2022 the Applicants addressed a query to the BEE Commission and provided the facts pertaining to Indy and HPL and the production of Hammarskjold. They also enquired whether a 52% black majority owned company that has not previously applied to the Department can apply for a

foreign film and production incentive. Ms Madidimalo Ramare of the Commission responded to the query thus:

“Dear Lukhanyo

Thank you for your email.

Please note that in terms of the codes of good practice in of [sic] Statement 000, entities determine B-BBEE compliance in this manner:

B-BBEE compliance:

EMEs (annual revenue of R10 million and less) use a sworn affidavit or CIPC certificate.

51% black ownership must be verified against the QSE scorecard by a verification agency accredited by the South African Accreditation System.

The dtic has developed sworn affidavits templates for EME's and QSEs.

Large entities with annual revenue of R50 million and above, and must be verified against the large entity scorecard by a verification agency accredited by the South African Accreditation System.

From the facts presented, the SPCV seem[sic] to be a start-up enterprise and the codes of good practice have in paragraph 6 of statement 000 provided the following with regard to start-up entities:

Start-up entities

Start-up enterprises are defined as the codes of good practice as recently formed or incorporated entities that has [sic] been in operation for less than 1 year. Start-up enterprise does not include any newly constituted or restructured enterprise which is merely a continuation of a preexisting enterprise or business.

For B-BBEE measurement, start-up enterprises are measured same way as EMEs. However, a start-up enterprise must submit a B-BBEE certificate issued against the QSE scorecard when tendering for any contract, or seeking any other economic activity covered in terms of Section 10 (1) of the B-BBEE Act, which have a [sic] of between R10 million and R50 million. For contracts or economic opportunities to the value of R50 million or more, the start-up enterprise is required to submit a B-BBEE certificate issued against the large entity scorecard.

Therefore, the SPCV if applying for an incentive that the value is between R10 million and R50 million, it cannot use the EME sworn affidavit and will have to be verified by a SANAS accredited verification agency against the QSE scorecard or large entity scorecard if the value is more than R50 million and above.”

[28] The above explanation is best understood when read with the provisions of section 10 (1) of the BEE Act which provide as follows:

“(1) Every organ of state and public entity must apply any relevant code of good practice issued in terms of this Act in-

- (a) determining qualification criteria for the issuing of licences, concessions or other authorisations in respect of economic activity in terms of any law;
- (b) developing and implementing a preferential procurement policy;
- (c) determining qualification criteria for the sale of state-owned enterprises;
- (d) determining qualification criteria for entering into partnerships with the private sector; and
- (e) determining criteria for the awarding of incentives, grants and investment schemes in support of broad-based black economic empowerment.”

[29] The Applicants aver that as the Foreign Film Incentive is an incentive, only paragraph (e) of section 10(1) is relevant to the issues in the present application.

The grounds of review

[30] The Applicants aver that the Department’s decision to refuse the application is in terms of section 6(2) of PAJA and the principle of illegality vitiated by five irregularities, namely:

30.1 The decision to refuse the Film Incentive application was based on or materially influenced by an erroneous interpretation of the Guidelines and the statutory scheme of the BEE Act;

30.2 The Department acted on the directions of the BEE Commission in adopting the erroneous interpretation of the Guidelines and statutory scheme and falls to be reviewed.

30.3 The decision was influenced by the empowerment credentials of DO Productions whereas it should not have been, It therefore took into account irrelevant considerations resulting in it being invalid.

30.4 Before 30 May 2022, the entire film industry knew and understood that submitting a sworn statement to demonstrate the Level 4 contributor status credentials of the SPCV, was compiled with the requirements of the Guidelines, even where the rebate applied for exceeded R10 million.

30.4.1 Based on previous applications that were accepted by the Department, where a sworn statement was provided, the Applicants had a legitimate expectation that the applications in future would be assessed on the same basis.

30.4.2 Acting on this expectation, the Applicants complied with the requirements of the Guidelines as they had been previously understood, and applied by the Department in accepting applications for the foreign film incentive.

30.4.3 Only on 30 May 2022 were the Applicants informed of the Department's changed view that the QSE scorecard was required, when Mr Kgomo emailed the applicants.

30.4.4 This was less than a month before the principal photography was set to begin, and at a stage when it was impossible for the Applicants to satisfy the view expressed by the Department.

30.4.5 The Department entirely failed to give the Applicants any notice of its changed view concerning the requirements; or an opportunity to make representations concerning the changed view.

30.4.6 The Department accordingly unlawfully frustrated the Applicants' legitimate expectation and acted unfairly.

[31] The Applicants further aver that the Department's decision falls to be reviewed because she acted arbitrarily – by failing to treat like cases alike whereas it had publicly announced that a sworn affidavit (rather than a scorecard is acceptable) This is particularly so because in the past other applications for the incentive in excess of R10 million which used a sworn statement at application stage were accepted, and the incentive was paid out.

[32] In the alternative, the Applicants contend that if indeed it is so that HPL was required to comply with section 10(1) of the BEE Act and the Codes of Good Practice, and was required to use a QSE scorecard, that would render the scheme created by the Guidelines arbitrary and irrational.

[33] Turning to the Department's refusal to waive the requirement of not commencing with principal photography, the Applicants allege that the reason provided for refusing to waive as it "cannot" grant a departure from the Guidelines constitutes an incorrect interpretation of the Guidelines. According to the Applicants this is so, because Paragraph 13.3 of the Guidelines grants the Department a discretion to relax any of the "*minimum requirements, conditions or terms in these guidelines.*"

[34] Second, the Guidelines are a form of policy and are not legislation or subordinate legislation. The Applicants state that the Department has impermissibly fettered its discretion by applying paragraph 4.3 of the Guidelines rigidly.

[35] Third, the decision is influenced by procedural irrationality because the Department failed to consider the relevant fact that the Applicants were put in this position to have to request a waiver by its own failure to communicate the concerns with the applicants timeously. According to the Applicants this is so because the Department stated only on 30 May 2022 that HPL had to use a QSE scorecard, and that the application as it stood had to be rejected. This was 11 weeks after the application was made, and four weeks before they planned to start photography. The final decision to reject the application was only made by the Department and communicated to the Applicants on 24 June 2022 a mere four days before the principal photography was to begin. The Applicants state that by that stage, HPL had

already taken all steps necessary to ensure that the principal photography would commence - this included contracting with actors and service providers.

[36] The Applicants emphasize that by failing to process and decide the application promptly – despite them having made the application more than three months in advance ahead of photography, as well as their immediate responses to the Department’s various queries, and attempts to consistently follow up with the Department – the Department put the Applicants in a position where it was not possible to make a new application or challenge the final decision before the principal photography was to commence.

[37] Accordingly, so further aver the Applicants, it was patently irrational and arbitrary for the Department to fail entirely to consider the predicament in which it had placed HPL when it refused to grant the waiver. Thus, the decision is reviewable and falls to be set aside.

The Relief Sought

[38] The relief sought by the Applicants is three-fold in that they seek three substantive orders. First, the Applicants ask for orders to declare the impugned decisions unlawful and unconstitutional. More specifically, the Applicants seek an order declaring that paragraph 5.1.1.3 of the Guidelines to be irrational and therefore unconstitutional, in terms of section 172 (1)(a) of the Constitution, to the extent that this court finds that it required HPL to use a QSE scorecard. Second, the Applicants ask for the reviewing and setting aside of the impugned decisions in terms of section 8(1) of PAJA and section 172 (1)(a) of the Constitution. Third, in light of the fact that the Department has interpreted in the present matter, the provisions of the Guidelines which were issued in July 2018, the Applicants ask in terms of section 9 of PAJA or common law, for an order extending the 180 day period in section 7(1) of PAJA to the date the application is instituted. In addition, should the court grant the relief in respect of paragraph 5.1.1.3 of the Guidelines the Applicants further ask for an order reading in the words “*which may be demonstrated by use of an affidavit in terms of paragraph 5.1.1.4*” after the word “*Practice*” at the end of the paragraph. They allege that such relief will cure the irrationality of the Guidelines.

[39] With regard to the substitution orders, the Applicants request first, an order substituting the Department's refusal to waive the requirement of not commencing with principal photography before prior approval, with a decision waiving the requirement with retrospective effect from 28 June 2022 (when principal photography commenced).

[40] Second, the Applicants request an order substituting the Department's decision to refuse the film incentive application, with a decision accepting the application. They contend that the circumstances in casu are exceptional. This is because due to the Departments erroneous interpretation of both the requirements of the guidelines and its discretion to waive the pre-commencement requirement, the Applicants were placed in a position where they had to commence with the principal photography even though the application was refused. Furthermore, so goes the contention, if the Department had correctly applied the Guidelines and statutory scheme under the BEE Act, and acted promptly, the application would have been accepted and there would have been no need for the Applicants to require a waiver of the pre-commencement requirement.

[41] According to the Applicants, this court is in as good a position as the Department to accept the application and grant the waiver as it is ultimately the arbiter of the legal issues in dispute herein, and the correct interpretation of the Guidelines and statutory scheme adopted by it will bind the Department. Moreover, because the decision to refuse the application was solely based on the Department's erroneous interpretation of the Guidelines and statutory scheme, there is no utility in remitting the matter back to the Department once the correct legal position has been established. In similar vein, this court is also well-placed to decide that it would be plainly irrational and arbitrary to refuse to waive the requirement, as that would effectively preclude the Applicants from being able to claim the incentive.

[42] The Applicants reiterate that the court is entitled to substitute the decisions of the Department as the results are forgone conclusions for the following reasons:

42.1 Once the correct legal position has been confirmed regarding the proper interpretation, there would be no reason to refuse the application;

42.2 There would be no reason to decline to grant the waiver retrospectively as no other decision in the circumstances could be rational.

[43] Furthermore, any further delay (in addition to the delays of the Department in processing the application), in the decision being finalised and in obtaining waiver, would cause material prejudice as the Applicants relied on the incentive to fund the film. Therefore, the granting of the waiver retrospectively is both appropriate and just and equitable relief.

Lack of effective internal appeal process

[44] The internal appeal process is governed by paragraph 14.1 of the Guidelines which provides as follows:

“Any dispute relating to a decision (including the rejection of an application, cancellation or reduction of a claim) taken by the dti is limited to one internal appeal per application lodged.

Such an appeal must be submitted within 30 days of the letter of notification.”

According to the Applicants, the appeal process is flawed because first, once a final decision has been made by a decision-maker, it is functus officio. If a statute does not create a right of appeal to an appeal body, that decision cannot be overturned pursuant to an appeal process created in a policy document. An official of the Department cannot vary or revoke a decision that has already been taken by the Department. Second, paragraph 14.1 does not specify on what grounds an appeal may be lodged, who the appeal authority is, the procedures for the appeal, or the remedies that may be granted in the appeal. Accordingly, there is no manner in which the Applicants can assess whether an appeal would provide any form of effective or adequate relief. Third, as the Guidelines are silent in this regard, the appeal could be determined by other officials of the Department, rather than external people. Accordingly, the Applicants are not required to exhaust internal remedies,

but should a duty to do so be found to exist, it is in the interests of justice to exempt the Applicants from complying with it because:

44.1 The issues raised in the review pertain to the proper interpretation of the guidelines and statutory scheme – these are legal questions which the court is appropriately placed to determine. An internal body would not be in a position to make final determinations of the legal issues raised in this application;

44.2 The Department's conduct and delays have already caused prejudiced to the Applicants - any further delays associated with an appeal and a possible review thereafter would exacerbate that prejudice.

The answering affidavit

[45] In the answering affidavit deposed by Mr Kgomo, the First to Third Respondents ("the Respondents"), oppose the Applicants' application mainly on the basis that it did not meet the eligibility criteria set out in the Guidelines to qualify for an incentive.

[46] Mr Kgomo explains the process followed by the Department in dealing with applications received and states that upon receipt applications are screened for compliance with minimum requirements for for that particular incentive. Thereafter, the application undergoes processing which entails verifying the information supplied and due diligence. Once the screening is completed and the application is deemed compliant, it can be placed before the Adjudication Committee for consideration on the merits. The Adjudication Committee is comprised of professionals from various sectors who are skilled in incentive administration, broadcasting, revenue, services (SARS), film and/or industry development. The Committee then considers the merits of the application, budget availability, and its overall compliance.

[47] It is common cause that the Applicants' application did not reach the stage of serving before the Adjudication Committee.

[48] Mr Kgomo explains that in the present matter an application was received from the First and Second Applicant. A file was opened by staff members designated for this purpose and escalated to his office for quality checking, final screening and determination whether it was ripe for referral to the Adjudication Committee. He states that upon perusal of the file, he immediately recognised the name of Ms de Mardt as it appeared on the application form. The reason he was able to recognise Ms de Mardt's name is because he had dealt with her on several prior occasions concerning film incentive applications on behalf of a well-established film production company known as DO Productions. Mr Kgomo further avers that DO Productions has over the years, even prior to 2018 been a beneficiary of numerous incentives from the Department and has been awarded millions of Rands. He states that he was surprised that the application whilst bearing the name of Ms de Mardt which he associated with an established film and television production company, was being brought under the name of unheard of, and new entrant, Indy Pendant, the Second Applicant. Mr Kgomo states that from gleaning the Department's records, he was able discern that DO Productions was owned by Ms de Mardt and Ms Olen wit a level 4 B-BBEE rating.

[49] According to Mr Kgomo, without improving the score, i.e, transformation, DO Productions would not meet the eligibility criteria set out in the Guidelines. It is undisputed that Ms de Mardt and Ms Olen's ownership of Indy is 48% whilst 52% is owned by Gabriel and Mr Sikwebu. Indy Pendant has a B-BBEE level rating of 2. Based on information supplied in the application documents, it formed an opinion, that Ms de Mardt was exercising control of Iny Pendant because:

49.1 Ms de Mardt is cited as the contact person for Indy Pendant;

49.2 She is cited on the papers as one of the company directors;

49.3 The company registered addresses for both DO Productions and Indy Pendant are the same;

49.4 The Applicants' application for the incentive was lodged by Ms de Mardt and he dealt with her throughout, over a period of about three months. Mr Sikwebu first featured on 8 Jube after he (Kgomo) had already made the decision to decline the application.

[50] In Mr Kgomo's opinion, this kind of arrangement defeated the B-BBEE requirements that had been introduced by the Department in the Guidelines in order to effect transformation. He also noted during the screening process that one of the Mandatory Conditions in clause 4.1.2 of the Guidelines, namely, that the Applicants must have secured 80% of the budget at application stage had not been met. This prompted him to relay to Ms de Mardt the following missive dated 28 March 2022:

"Dear Marlow

Thank you for taking my call today.

Please note that the finance letter from the Swedish F1 which accounts for 11,5 is still on LOI and you must have secured 80% of your funding at this stage. Another issue is that we need more clarity on the current Services Company and its relation to DO Productions, the reason for now using a new entity that has never traded before or produced work to date.

If this was for transformation, why was it done under the Service Company already in production/ business and has been accessing the incentive?

I will engage with our colleagues, but in the meantime it will be very helpful if we can get clarity and any supporting info on the above."

[51] The issue concerning the financing by Swedish FI was resolved as the Applicants later produced the requisite confirmation.

[52] Mr Kgomo avers that his engagement with colleagues within the unit yielded a similar response, viz, that in order for true transformation to be achieved as intended, internal restructuring at DO Production level was required. Ms de Mardt responded to this query the following day on 29 March 2022 and explained in the email already referred to in the founding affidavit. In that email Ms de Mardt gave a full explanation of the reasons Indy Pendant (Pty) Ltd was formed. In a further email dated 20 April 2022, Mr Kgomo sent an email wherein he requested further information regarding DO Productions. These were profit share agreement and shareholder's agreement as well as financial statements and BEE certificate or affidavit for DO Productions.

[53] Whilst protesting that the information relating to DO Productions was irrelevant in the consideration of Indy Pendant's eligibility to receive the incentive, Ms

de Mardt nonetheless provided the required details. Ms de Mardt gave a detailed response. I find it necessary to quote copiously it.

“1. As laid out in my earlier emails, DO Productions Pty Ltd secured this project. We have been in discussions with Swedish Producer since May 2020. DO Productions will hand over the physical production to the service company Indy Pendant Film Pty Ltd. As a company DO Productions will not involved in the service production of “Hammarskjold”, but naturally there will be benefits to Indy Pendant the service company by being associated with DO Productions.

2. There are no separate profit share agreements or shareholder's agreements. Indy Pendant and the SPCV are each regulated by standard form of MOI prescribed under the Companies Act. There is only one class of shareholder in each of these companies and there is no differentiation in shareholding rights and economic benefit enjoyed by the shareholders. They all enjoy the same rights in proportion to the shareholding. No shareholder's agreements have been concluded. The relationship between shareholders is regulated by the standard form MOIs and the Companies Act.

3. The relevant parties in this application are Indy Pendant + Hammarskjold the SPCV. There should be no need nor obligations to provide financial statements for DO Productions, however, in the interests of transparency and the fact that you find this important, they are attached. The value of DO Productions, however, is not on paper but rather connected to Brigid Olen and Marlow de Mardt's experience + intellectual capital.

4. Our partners are Ian Carthew-Gabriel/i[...] 0[...] +Lukhanyo Sikwebu / I[...] 0[...]/ Cv's attached.

5. DO Productions has a trading history and a value linked to both Marlow de Mardt + Brigid Olen. Accordingly, if DO Productions itself was to be transformed, there would be a finance cost to be borne by any new BBBEE shareholders. Rather than grappling with this issue, which is common to all empowerment transactions, we chose to set up a new entity. This was the most efficient structure which allowed the 2 new shareholders to be part of a new company rather than the relevant share% in DO Productions being bought by these new shareholders.

This way, through the relationship between the parties DO is able to add considerable value and an opportunity share in the experience we bring to the new company without a transactional cost to the new shareholders.

6. It is certainly not the intention for DO to be an applicant going forward. DO Productions will abide by the regulations as stipulated by the DTIC. The intention is to use Indy Pendant starting with this production going forward. The success of Iny Pendant is dependant on the success of the current project as is the case in this industry. We cannot as a new company predict the future. Naturally we hope for commercially viability and on going success and good collaboration with our new partners.

Now that you have received the LOC from the Swedish Film Institute we meet the requirements of 80% funding secured.

Dimakatso could you please confirm that our provisional application will go before the board at the meeting tomorrow Thursday 28 April?"

[54] Mr Kgomo avers that after perusing the above explanation from Ms de Mardt, he considered the matter further, and having conferred with colleagues, came to the conclusion that the application did not meet all the criteria set out in the Guidelines. He dispatched a letter to this effect to Ms de Mardt on 30 May 2022. The letter concludes thus:

"The current application will be rejected and you will have to resubmit once we have clarity on the matters raised in this email and can submit the applicable BEE certificate."

According to Mr Kgomo, the letter of 30 May constituted the final decision to refuse the incentive application and any future application would be considered on materially different additional information such as BEE Commission opinion on the issues highlighted and a QSE scorecard. His office was therefore *functus officio*, thus, Ms de Mart was encouraged to submit a new application in the future.

[55] The above decision prompted the Applicants to request the Department to release them from the waiver as already outlined in the factual background. Mr

Kgomo states that seeing that the request to waiver was made after the decision was issued, it could not be granted.

[56] It is common cause that on 8 June 2022, Mr Sikwebu wrote to Mr Kgomo and Ms Molokoane attaching more information that indicated that, in his opinion, their company structures were B-BBEE compliant. Mr Kgomo states that Mr Sikwebu's email was irrelevant as the decision had already been reached in the email of 30 May 2022. However, he responded to his email re-affirming the decision he claims to have reached already. Given the issues in this application, his response must be fully recorded.

"Dear Lukhanyo and Team. I hope you are well.

Please note that as per my discussion with Marlow on the matters which led to your application being rejected, we still stated the following.

We unfortunately cannot with the application or provide any waivers from any requirements of the guidelines, the business unit and the Adjudication Committee do not grant waivers. The guideline is clear in that the project must not have commenced with principal photography.

I bring your attention to the following requirement of the applicable guidelines:

"4.3 The principal photography must not commence until an approval letter has been received from the dti."

We have previously advised you to approach the B-BBEE Commission for an opinion on your current structure and related parties/entities who have previously benefited from the incentive (see attached email). This poses a material risk to you being able to pass the final verification, should you receive a Form A approval.

We have also advised you on the requirement of QSE scorecard based on the following:

"Qualifying Small Enterprise ("QSE") scorecard when tendering for any contract, or seeking any other economic activity covered in terms of Section 10(1) of the B-BBEE Act, which have a value higher than "R10 million but less than R50 million", this affects SPCV's which are classified as a start-up applying for incentive greater than R10 million (see attached guide). This affects all applicants and not only this project."

Please advise if the email below and its attachments constitute your formal appeal? If this is true, your request will be forwarded to the relevant business units for consideration.”

[57] The above letter read with the one of 30 May 2022 according to the Department constitutes its final decision. In response thereto, on 24 June Ms de Mardt and Mr Sikwebu indicated in a letter that the Applicants were not intent on lodging an appeal and would be consulting with Senior Counsel. Mr Kgomo states that this was the first time that Ms de Mardt wrote under the letterhead of Indy and signed as director and of the company as previously she had been communicating under the logo, stationery and signature of DO Productions. This according to his affidavit supports his notion that the arrangement between Indy Pendant *“bears hallmarks of circumvention of the B-BBEE Act and Codes”* particularly when regard is had to Ms de Mardt’s email of 23 April wherein she stated, inter alia, that the project was secured by DO Productions but the physical production would be handed over to Indy Pendant. He describes the relationship between Indy Pendant and DO Productions as *“obscure and undocumented”*. According to his evidence, Indy *“appeared to be a vehicle to assist DO Productions to benefit from the incentive program where DO Productions, on its own, and as currently structured would be unable to qualify for the incentive benefits as it had previously”*. According to Mr Kgomo, this rendered the status of Indy Pendant as a service company dubious and this is was caused the Department to seek *DO Productions and Indy Pensant to self-report and seek advice on from the BEE Commission, which they failed to do*.

[58] Furthermore, the arrangement of Ms Mardt and Ms Olen (also referred to as Goldman) being a link between the two companies, Indy Pendant and DO Productions struck him and the Department’s officials in the unit as strange. Mr Kgomo, avers that it is similarly strange that Mr Sikwebu and Mr Gabriel did not participate in the discussions or seek to address the issues raised in his queries relating to the B-BBEE, transformation and risk of circumvention. He expresses an opinion that had they indeed been actively involved in the management and administration of Indy Pendant he expected to say something. Instead, it was only after he had made the final decision on 30 May 2022 that Mr Sikwebu featured. In short, Mr Kgomo insinuates fronting, in contravention of transformation and the BEE

Act. In fact he outrightly states that he finds it surprising to see Mr Sikwebu *“quibbling with these DTIC and government policies on transformation in the Film and Television Production industry”*.

[59] The Department alleges that there have been subsequent events which have overtaken the scorecard issue in this matter, and which have rendered this matter moot, even prior to the institution of the review proceedings. These are that a new Film and Television Interpretation Note has been issued effective 1 September 2022. The relevant section of the Interpretative Note reads as follows:

“In the event that the Holding (service company) and the SPCV are seeking an incentive greater than R10 million and are unable to provide a B-BBEE certificate issued in terms of either a QSE scorecard or Generic scorecard at application stage, due to Holding (service) company and/or the SPCV being an early stage start-up enterprise, the Holding (service) company and/or PCV is to submit a sworn affidavit which will be considered for support. This is on condition that the applicable (QSE or Generic) certificate will be required at the first claim for both the Holding (service) company and the SPCV, in line with Broad-Based Black Economic Empowerment Codes of Good Practice, issued in terms of Section 9 of the Broad-Based Black Economic Empowerment Act of 2003, as amended.”

“For avoidance of doubt: Submissions of a sworn affidavit will be required at application stage but the relevant valid QSE or Generic certificate must be submitted at claim stage for the successful processing of the claim.”

[60] However, Mr Kgomo stresses that the decision to refuse the incentive application herein was not made only on the basis of the QSE scorecard. In addition, the Interpretation Note does not have a retrospective effect.

[61] Regarding the waiver, Mr Kgomo reiterates that Ms de Mardt’s request to waive the peremptory requirement not to commence with principal photography until after an approval letter was received was made subsequent to the final decision. In any event, so further avers Mr Kgomo, there are inherent dangers in waiving the requirement under clause 4.3 of the Guidelines as this would create an expectation

for an approval even before the consideration of the merits. In the present case, it would have exposed the Department to an unauthorised expenditure of some R12.5 million Rand in contravention of section 38 of the Public Finance Management Act 1 of 1999 (“the PFMA”). Likewise, such a waiver is precluded by Treasury Regulations providing that an official of an institution may not spend or commit public money except with the approval (either in writing or by duly authorised electronic means) of the accounting officer or a properly delegated or authorised officer.

[62] Insofar as substitution is concerned, Mr Kgomo denies that in *casu* there are exceptional circumstances justifying the substitution of the decision of the Department. According to his affidavit, the issues in this matter are not purely legal. He further states that the assailed decision was taken at the screening stage of the application and was rejected due to failure to comply with minimum guidelines, and substitution would bypass the Adjudication Committee, the administrative decision maker which deals with the substance of the application. Moreover, in terms of the Guidelines, the approval of any application is subject to availability of funds, compliance with incentive guidelines and relevant provisions of the Public Finance Management Act 1 of 1999. Because the Department works within a budget and depending on the number of approved applications within a specific financial year, funds may become depleted. For this reason, substitution would be inappropriate in the circumstances.

[63] Regarding the Applicants’ attack of the appeal process, Mr Kgomo avers that the Applicants did not enquire as to the appeal mechanism that was available to effect an appeal. Had they done so, a copy of the terms of reference of the DTIC Ad Hoc Decision Review Committee adopted on 18 October 2021 would have been made available to them. He further explains that in terms of clause 8(1) thereof, the Ad Hoc Decision Review committee serves as an appeal committee on decisions made across all incentive programmes. The Committee may uphold, dismiss or refer back for investigation or to obtain further information to clarify certain issues on the appeal/s concerned.

[64] Mr Kgomo alleges that the Applicants were aware of clause 14.1 of the Guidelines and were required to exhaust internal remedies before launching this

application. According to Mr Kgomo, the internal remedy is effective, available and adequate and the Applicants' refusal to exhaust internal remedies is unjustifiable. Furthermore, by refusing to pursue the appeal process, the Applicant seek to undermine the autonomy of the DTIC administrative process and seek for the court to usurp the executive role and function of the Ad Hoc Decision Review Committee.

The replying affidavit

[65] In the replying affidavit, Mr Sikwebu stressed that the Department's email of 30 May 2022 was not a final decision as the BEE Commission was to investigate certain issues. He also points out that what is clear from the affidavit of Mr Kgomo is that the thrust of the opposition is that the Department considers Indy to be fronting for DO Productions, which he emphatically denies. Regarding the allegation of circumvention, Mr Sikwebu retorts by stating that the credentials of DO Productions are irrelevant in the consideration of an application filed by Indy Pendant notwithstanding the fact that it appears that Applicants' application for the incentive was rejected because of DO Productions' BEE status. Furthermore, that DO Productions sourced the project and handed it over to Indy Pendant is to the advantage of the majority shareholders (Mr Sikwebu and Mr Gabriel) as it exposes them to an international production through a business they own. Mr Sikwebu further states that the contentions made by the Department to this end, impugn his integrity and character.

[66] As to the Department's suggestion that Ms de Mardt exercised control over Indy, the Applicants vehemently deny that this is so and explain that Ms de Mardt was tasked with ensuring the success of the application because of her experience. Furthermore, each of the shareholders have different roles within the company. Mr Sikwebu states that there was nothing nefarious about the fact that Ms de Mardt is the only one who dealt with the Department initially.

[67] Regarding the Department's Interpretation Note to the effect that at an affidavit may be accepted in lieu of a scorecard as having no retrospective effect, the Applicants contend that same is supportive of its case because when one

interprets a document, one is not amending it and the meaning does not change from one day to the next.

[68] As to the Ad Hoc Review Committee , the Applicants state that a guideline or policy cannot provide a public body with authority to revoke a decision already taken as that would be inconsistent with a functus officio doctrine.

Issues for determination

[69] Flowing from the factual background, this matter raises the following issues:

69.1 Is the decision of the First Respondent of 30 May and 24 June rejecting the Applicants' application irrational and unconstitutional? Are they in any event administrative decisions as envisaged in PAJA?

69.2 Should the Applicants be non-suited on the basis that they approached this court without first complying with the provisions of section 7(2)(a) of PAJA, or have they established exceptional circumstances entitling them to exemption from the aforesaid section? Linked to this issue, is the consideration of whether the internal appeal process provided in the Guidelines constitutes an effective remedy.

69.3 Was the Department entitled to rely on section 10(i)(e) requiring it to include B-BBEE status levels as well as on the scorecard as criterion for eligibility to refuse the incentive justified?

69.4 Do the circumstances of this matter establish exceptional circumstances that affords a court the discretion to make a substitution order in terms of section 8(1) (c) (ii) (aa) of PAJA.

69.5 Is the decision of the Department refusing to condone/waive the Guideline requirement that the Department approval should precede principal photography rational, constitutional or justifiable?

Do the decisions assailed constitute administrative action as defined in PAJA?

[70] The Respondents in the answering affidavit seem to suggest that the decision/s of the incentive unit are not administrative actions falling under the scope of PAJA.

[71] Section 1 of PAJA defines administrative action thus:

“Administrative action means any decision of an administrative nature made . . . under the empowering provisions [and] taken . . . by an organ of state when exercising a power in terms the Constitution or a provisional constitution, or exercising a public power or performing a public function in terms of any legislation, or [taken by] by a natural or juristic person and which has a direct external effect. . .”

Whether particular conduct constitutes administrative action depends primarily on the nature of the power that is being exercised rather than the person who does so. (*Grey’s Marine Hout Bay (Pty) Ltd and others v Minister of Public Works and others* [2005] ZASCA 43, 2005 (6) SA 313 at para 24. The court held that;

“Administrative action is rather in general terms, the conduct of the bureaucracy (whoever the bureaucracy might be) in carrying out the daily functions of the State, which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences the individuals or groups of individuals.”

PAJA defines an ‘administrative decision’ as a decision or action taken by an organ of state or a person exercising a public power or performing a function, in terms of any legislation or empowering provision.

[72] In *Minister of Defence and Military Veterans v Motau and Others* 2014(5)SA 69 (CC) explained thus:

“[33] The concept of ‘administrative action’, as defined s 1(1) of PAJA is the threshold for engaging in administrative-law review. The rather unwieldy definition can be distilled into seven elements: there must be (a) a decision of an administrative nature; (b) by an organ of state or a natural juristic person; (c) exercising a public power or performing a public function; (d) in terms of any legislation or an empowering provision; (e) that adversely affects rights;

(f) that has a direct external effect, and (g) that does not fall under any of the listed exclusions.”

[73] In the matter at hand, the facts establish that the decision of the Incentive Unit, through Mr Kgomo was made in the exercise of a public power, in the ordinary course of considering and assessing applications for incentives and has direct consequences on the Applicants. It therefore is administrative action as defined in PAJA.

Failure to exhaust internal remedies

[74] The Department in the answering affidavit raises the fact that the Applicants have approached this court prematurely as they have failed to pursue internal remedies provided in the Guidelines. It is common cause in this matter that neither HPL nor Indy Pendant made an attempt to appeal the decisions in issue. In seeking an exemption from this requirement it was contended that, first, the issues raised in the review pertain to the proper interpretation of the guidelines and statutory scheme and are legal questions which the Court is appropriately placed to determine. Furthermore, an internal body would not be able to make a final determination of the issues raised in the application. Second, the Guidelines do not provide an effective internal remedy for the purpose of section 7(2) of PAJA.

[75] Section 7(2)(a) of PAJA provides that “*no court or tribunal shall review an administrative decision in terms of this Act unless any internal remedy provided for in any other law has first been exhausted*”. It is well to remind oneself of what was said by the Court in *Nichol and Another v Registrar of Pension Funds and Others* 2008 (1) SA 383 (SCA) in connection with section 7 of PAJA para 15:

“Under the common law, the mere existence of an internal remedy, was not, by itself, sufficient to deter access to judicial review until the remedy had been exhausted. Judicial review would in general only be deferred where the relevant statutory or contractual provision properly construed, required that internal remedies first be exhausted. However, as is pointed out by Ian Currie and Jonathan Klaaren, ‘by imposing a strict duty to exhaust domestic

remedies, [PAJA] has considerably removed common law'. It is now compulsory for the aggrieved party in all cases to exhaust the relevant internal remedies unless exempted from doing so by way of a successful application under section 7(2)(c). Moreover, the person seeking exemption must satisfy the court of two matters, first, that there are exceptional circumstances, and second, that it is in the interest of justice that the exemption be given."

[76] in *Koyabe and others v Minister of Home Affairs and others (Lawyers for Human Rights as amicus curiae)* 2019 (4) SA 327 (CC) at para 35, the Court emphasised the importance of exhaustion of internal remedies and held that:

"[35] . . . [they] are designed to provide immediate and cost-effective relief, giving the executive the opportunity to utilise its own mechanisms, rectifying irregularities first, before aggrieved parties resort to litigation. Although courts play a vital role in providing litigants with access to justice, the importance of more readily available and cost-effective internal remedies cannot be gainsaid."

Regarding the exceptional circumstances in PAJA, it held that:

"[39] What constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue. Thus, where an internal remedy would not be effective and/or where pursuit would be futile, a court may permit a litigant to approach the court directly. So too where an internal tribunal has developed a rigid policy which renders exhaustion futile."

[77] I now turn to consider the Applicants' justification for not pursuing internal remedies entitling them to the granting of the essential exemption. Section 7(2)(a) of PAJA describes the internal remedy that must be exhausted as "*any internal remedy provided for in any other law*". In *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and Others* 2023 (5) BCLR 527 cc at para 218 the Court stated that:

"[218] ... On the other hand, what need be exhausted before a court may entertain a PAJA review are *internal* remedies. Hoexter and Penfold say

“internal” and “any other law” in the phrase “any internal remedy provided for in any other law” must be “read restrictively to include only remedies specifically provided for in the legislation with which the case is concerned and to exclude optional extras”.

Against this backdrop I must assess the adequacy of the internal remedies assailed by the Applicants.

[78] In this matter the Department attached to the answering affidavit a copy of the terms of reference of its Ad Hoc Review Committee (“the Review Committee”) adopted on 19 October 2021. It is explained under the introduction that the Review Committee acknowledges the need for Terms of Reference (ToR) as recommended in the King IV report on Corporate Governance for South Africa – 2018. Clause 2 sets out the Committee’s roles and responsibilities as well as the requirements for its compositions and meeting procedures. Clause 3 relates to composition and states thus:

“(1) The Ad Hoc Decision Review Committee comprises of independent and impartial officials that serve to guarantee the integrity and consistency of an open and transparent funding process.

(2) The Director-General (DG) must appoint members of the Ad Hoc Decision Review Committee, consisting of-

(a) Five (5) representatives of which (3) must be from the Department of Trade, Industry and Competition (the dtic).

(b) Individuals who are qualified and experienced on the Fields of Finance, Accounting, Economics and Law.

(3) The Ad Hoc Decision Review Committee Chairperson will be designated by the DG.

(4) In the absence of the Chairperson, Members of the Committee will nominate one of their members as Acting Chairperson.

(5) The Acting Chairperson shall have the same duties and responsibilities as the Chairperson.”

[79] Clause 4 provides for the term of appointment of members of the Committee as follows:

“(1) Members of the Ad Hoc Decision Review Committee –

(a) May be appointed for a period of 3 years by the DG;

(b) May be eligible for reappointment on expiry of the term.”

Clause 7 sets out the fiduciary duties of members of the Committee. Importantly, in terms of clause 8(1), the Ad Hoc Decision Review Committee serves as an appeal committee on decisions made across all incentive programmes. The Committee may uphold, dismiss or refer back for investigation or to obtain further information to clarify certain issues on the appeal/s concerned.

[80] Counsel for the Respondents contended that given the safeguards provided for in the ToR, the internal remedy is effective, available and adequate, and that the Applicant’s refusal to exhaust internal remedy mechanism in this case was unjustifiable.

[81] Expatiating on the reasons why the remedy in the Guidelines does not provide for an effective internal remedy under PAJA and that the Applicants had no duty to pursue it, it was argued on behalf of the Applicants first, that once the Department made its final decisions not to grant the waiver, it became functus officio and it had no authority to revoke or vary the decisions. That authority can only be granted through enabling legislation. Furthermore, the Guidelines and the ToR of the Review Committee do not in law grant the Department authority to revoke or vary its decision because they are not remedies specifically provided for in the legislation with which this case is concerned. Second, the Guidelines do not specify on what grounds an appeal may be lodged, who the appeal authority is, Third, in light of the fact that ad hoc appeal body provides that officials in the Department may be appointed to it, there is no guarantee that the appeal body would be sufficiently independent to provide an effective remedy.

[82] It was further contended on behalf of the Respondents that the Applicants were obliged to pursue internal remedies. In considering whether the Applicants should be non-suited on the basis that they approached this court without complying with the provisions of section 7 (2) of PAJA, I must place on record that the

Applicants have not, upfront made an application to be exempted from complying with the aforesaid section. Section 7 (2) (c) provides that:

“[a] court or tribunal may, in exceptional circumstances and on application by the person concerned exempt such person from the obligation to exhaust internal remedies if the court deems it in the interest of justice.”

[83] Notwithstanding the fact that the Applicants did not apply for exemption, I must determine, based on the facts, whether such exceptional circumstances have been established, and whether it is in the interest of justice to grant the exemption. I say so because in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (7) BCLR 687 (CC) the court *a quo* granted the applicants leave to pursue the review without first exhausting the internal remedies, however, it must be borne in mind that each case will be considered on its own facts. Furthermore, the Constitutional Court in *Bato Star* at paragraph [17] cautioned that:

“[17] . . . Suffice to say that a court is minded to grant permission to a litigant to pursue the review of a decision before exhausting internal remedies should consider whether the litigant should be permitted simultaneously pursue to pursue those internal remedies. In considering this question a court needs to ensure that the possibility of duplicative or contradictory relief is avoided.”

[84] Section 7(2) (a) of PAJA describes the internal remedy that must be exhausted as “*any internal remedy that must be provided for in any other law*” as set out in *Eskom Holdings, supra*. It is common cause that the internal remedy set out in the Guidelines is not provided for in any law. It therefore is a policy. As was restated in *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* 2001 (4) SA 501 (SCA) at para 7:

“I prefer to begin by stating the obvious, namely that laws, regulations and rules are legislative instruments whereas policy determinations are not.

[85] Given the status of the Guidelines, namely that they are not provided for in any other law, it must follow that the PAJA duty to exhaust internal remedies is not

applicable to them. To further explain, by way of comparison and analogy, an example of statutory compliant appeal procedure is found in section 12 of the National Arts Council Act no 56 of 1997.¹

[86] In this matter, it is difficult to find that the internal remedy as reflected in the Guidelines is effective, available and adequate for the following reasons:

86.1 First, the appeal remedy provides no statement of procedure remedial scope, appeal authority and whether that authority is independent or not etc. The Department's adoption of terms of reference for an ad hoc appeal does not address any of these issues. The result is that there is no manner in which the Applicants can assess whether the appeal would provide any form of effective or adequate relief.

86.2 Second, the Guidelines specify the grounds on which an appeal may be lodged. The ToR of the appeal body provide that officials in the Department will be appointed to it. However, they are silent on whether the appeal could be determined by other officials of the Department or externally. The troubling aspect is that there is no guarantee that the appeal body could be perceived to be sufficiently independent, this being the hallmark of fairness of procedures. In *Koyabe*, supra, para 12, the Court held that:

“An internal remedy is effective if offers a prospect of success, and can be “objectively implemented, taking into account relevant principles and values of administrative justice present in the Constitution and in our law”; and available if it can be pursued “without any obstruction, whether systemic or arising from unwarranted administrative conduct”.

[87] Flowing from the foregoing, it stands to reason that the Applicants should be permitted to approach this court directly due to the ineffective appeal remedy. In

¹ It provides thus: (1) Any person feels aggrieved at any action or decision that the Council has taken or made in terms of this Act, may within 30 days from the date on which action or decision was made known by the Council, and after having given notice to the Council as prescribed, appeal to the Minister in the prescribed manner.

(2) The Minister shall appoint one or more independent assessors with the knowledge of the arts to assist him or her.

(3) The Minister may, after consultation with the assessor or assessors, confirm, set aside or amend any action or decision contemplated in subsection (1).”

addition, even if the appeal remedy could be said to be compliant, the issues raised in the review pertain to the proper interpretation of the Guidelines and statutory scheme and are legal questions which the court is appropriately placed to determine. An appeal body would not be able to make final determinations of the issues raised herein. For all these reasons the Applicants are exempted from the requirement to exhaust internal remedies as envisaged in section 7 (2) (a) of PAJA.

Application of the B-BBEE Act

[88] According to argument presented on behalf of the Applicants the BEE Codes of Good Practice are not applicable to the Foreign Film Incentive Scheme, and because it is an incentive, only paragraph (e) of section 10 (1) of the BEE Act is relevant to this issue. Even then, so continues the argument, under section (10)(1) (e), the Department is only required to apply the relevant Codes of Good Practice when it determines criteria for incentives in “*support of broad-based black economic empowerment*”. The Foreign Film Incentive is not a scheme in support of broad-based black economic empowerment as its main purposes do not include or support broad-based black economic empowerment.

[89] This contention necessitates an outline of the B-BBEE Act statutory framework. Section 1 defines broad-based black economic empowerment to mean:

“the viable economic empowerment of all black people, in particular women, workers, youth, people with disabilities and people living in rural areas, through diverse but integrated socio-economic strategies that include but are not limited to the following six listed strategies:

- (a) Increasing the number of black people that own manage, and control enterprises and productive assets;
- (b) Facilitating ownership and management of enterprises and productive assets by communities, workers, co-operatives and other collective enterprises;
- (c) Human resource and skills development;

- (d) Achieving equitable representation of all occupational categories and levels in the workforce;
- (e) Preferential procurement from enterprises that are owned or managed by black people; and
- (f) Investment in enterprises that are owned or managed by black people.”

[90] Section 2 outlines the objectives of the BEE Act as follows:

“The objectives of this Act are to facilitate broad-based black economic empowerment by –

- (a) Promoting economic transformation in order to enable meaningful participation of black people in the economy;
- (b) Achieving a substantial change in the racial composition of ownership and management structures and in the skilled occupations of existing and new enterprises;
- (c) Increasing the extent to which communities, workers, cooperatives and other collective enterprises own and manage existing and new enterprises and increasing their access to economic activities, infrastructure and skills training;
- (d) Increasing the extent to which black women own and manage existing and new enterprises, and increasing access to economic activities, infrastructure and skills training.
- (e) Promoting investment programmes that lead to broad-based and meaningful participation in the economy by black people in order to achieve sustainable development and general prosperity;
- (f) Empowering rural and local communities by enabling access to economic activities, land, infrastructure, ownership and skills;
- (g) Promoting access to finance for black start-ups, small, medium and micro-enterprises, co-operatives and black entrepreneurs, including those in the informal business sector; and
- (h) Increasing effective economic participation and black owned and managed enterprises including small, medium, and micro-enterprises and co-operatives and enhancing their access to financial and non-financial support.

[91] Section 10 relates to the application of Codes of Good Practice. It provides thus:

“Every organ of state and public entity must apply any relevant code of good practice issued in terms of this Act in –

- (a) Determining qualification criteria for the issuing of licences, concessions or other authorisations in respect of economic activity in terms of any law;
- (b) Developing and implementing a preferential procurement policy;
- (c) Determining qualification for the sale of state-owned enterprises;
- (d) Developing criteria for entering into partnerships with the private sector; and
- (e) Determining criteria for the awarding of incentives, grants, and investment schemes in support of broad-based black economic empowerment.”

[92] The Applicants contend that section 10 of the B-BEEE Act which stipulates circumstances under which the BEE Codes should apply does not compel their application to the Foreign Film Incentive.

[93] To recap, the Guidelines require that the holding company must achieve at least three B-BBEE contributor status in terms of the Codes of Good Practice and the SPCV must at least achieve four B-BBEE contributor status. In this matter, Indy, as the holding company is compliant for it is 52% black owned. The status of HPL as the SPCV is considered under the Scorecard analysis. It is undisputed that one of the reasons for the rejection of the Applicants’ application is that DO Productions, the company that sourced the film should have been transformed instead of a new entity being set up. It is common cause that the owners of DO Productions, an established entity in the business are two white women who are minority shareholders in Indy Pendant. has previously benefitted from the incentive and would not qualify under the Guidelines. According to the Department, this is in line with its policy to transform through the restructuring of existing entities. It is clear from the papers that the Respondents is suspicious that the corporate structure of Indy Pendant amounts to a circumvention of the transformation requirements of the Guidelines and BEE Act.

[94] Counsel for the Applicants contended, first, that empowerment credentials of DO Productions were an irrelevant consideration in the Applicants' application for an incentive. Furthermore, the Guidelines on their own terms do not require existing entities in the industry, like DO Productions to be restructured to introduce black shareholders. Moreover, they (the Guidelines) do not preclude shareholders of existing entities from participating as shareholders in new entities that may apply for an incentive. According to the Applicants, if the Department sought to require existing entities to be restructured to include black shareholders – which is one of many ways in which transformation can be achieved – then it had to adopt that as a requirement in the Guidelines. Such a policy cannot be imposed by an official determining an application for an incentive.

[94] Second, the Department's suspicion that Indy and its majority black shareholders, Mr Sikwebu and Mr Gabriel are fronting for DO Productions, and the other shareholders Ms De Mardt and Ms Olen ignores the perfectly legitimate and lawful rationale, for the parties to incorporate a new entity, rather than restructuring DO Productions. It will be recalled that the explanation proffered by Mr Sikwebu is that to be able to acquire *"26% stake of DO Productions"*, he would *"have to attain a debt of millions of Rands"*. According to the Applicants, the Department's suspicion of fronting ignores the fact that the four shareholders were entitled to structure their business in this manner and there is nothing in the Guidelines that either explicitly or implicitly that precluded them from taking this course of action. Besides, so further continues the contention, the Department did not make an outright finding in terms of paragraph 13.1 of the Guidelines which provides that *"Any attempt to circumvent or actual attempt at circumvention of these guidelines, which at the sole discretion of the dti, may allow who would otherwise not have qualified to qualify for this incentive will lead to rejection of the application or claim"*.

[95] Third, the BEE Commission has not indicated any concerns with the structure of Indy and its compliance with the BEE Act as it made no comment in response to an email of Mr Sikwebu wherein he raised the issue. Moreover, it was joined as a party to these proceedings but elected not to participate notwithstanding the fact that it is the primary functionary empowered to investigate such issues of fronting or circumvention by section 13F of the BEE Act. According to the Applicants, its

decision not to participate in the litigation is a good indication that the structure of Indy Pendant does not violate the law or the Guidelines.

[96] Insofar as the application of section 10(1) of the BEE Act, the Applicants contend that the BEE Codes of Good Practice are not automatically applicable to the incentive scheme as a matter of law, contrary to the assertion by the Respondents that they do. This argument is premised on two legs, namely, first that the section 10 of the B-BBEE Act, which stipulates circumstances under which the Codes should apply, does not apply to the Foreign Film Incentive because B-BBEE is not objective of the scheme. According to the Applicants only paragraph (e) of section 10(1) of the BEE Act can be relevant to the issue in dispute. Under section 10(1)(e), the Department is only required to apply the relevant codes of Good Practice when it determines criteria for the awarding of incentives in “*schemes in support of broad-based black economic empowerment*”. Therefore, so continues the contention, if the purpose of the scheme in question is not a scheme in support broad-based black economic empowerment, then the Codes of Good Practice do not apply to the scheme.-they are incidental to the purpose of the scheme. Furthermore, the purpose for the establishment of the scheme is apparent from the Guidelines.

[97] It is so that the purposes and objectives of the scheme are set out in paragraph 2 of the Guidelines as follows:

“3.1 The South African Film and Television Production Incentive Programme is aimed at strengthening and promoting the country’s film and television industry as well as contributing towards the creation of employment opportunities in South Africa.

3.2 The objectives of the Foreign Film and Television Production and Post Production Incentive, a sub-programme of the South African Film and Television Incentive Programme, is to attract large-budget foreign-based films and television productions and post productions that will contribute towards employment creation, and enhance the international profile of the South African film and television industry whilst increasing the country’s creative and technical skills base.

3.3 The Foreign Film and Television Production and Post-Production Incentive is available to foreign-owned qualifying productions and post-productions as follows:

3.3.1 The Qualifying South African Production Expenditure (QSAPE) should be at least R15 million shooting on location in South Africa.

3.3.2 The Qualifying South African Production Expenditure (QSAPE) should be at least R12 million for level one (1) Broad Based Black Economic Empowerment (B-BBEE) contributor status service companies for shooting on location in South Africa.

3.3.3 The Qualifying South African Post Production Expenditure (QSAPE) should be at least R1.5 million for conducting post-production activities in South Africa.

3.4 The Foreign Film and Television Production and Post-Production Incentive provides an incentive of twenty-five percent (25) of the Qualifying South African Production Expenditure (QSAPE).

3.4.1 An additional incentive of five percent (5%) of QSAPE is provided for productions conducting post-production in South Africa and utilising the services of a black owned service company.”

[98] In contending that the Incentive is not in support of the B-BBEE, as its (the B-BBEE) objectives are not the primary objectives of the scheme, the Applicants emphasise the provisions of paragraph 3.2, of the Guidelines, namely, to attract large budget foreign-based films productions and post-productions that would contribute to employment creation.

[99] Counsel for the Respondents contended that it is not a requirement that B-BBEE would need to be the primary driver/objective of the Incentive for it (the Incentive) to be the one *‘in support of’*, the objectives of the scheme, as argued by the Appellants. According to this contention, on a wider interpretation, section 10 (1)(e) covers any incentive that is at least designed to be a significant contributor to the B-BBEE objectives, even if those be purely secondary to other goals, such as in the present matter.

[100] The crisp question is whether the Incentive is one 'in support of' B-BBEE as required by section 10(1) (e) of the Act. In assessing the competing contentions, I think that it is necessary to recap the principles of interpretation. In *Natal Joint Municipality Pension Fund v Endumeni Municipality* 2012 (4) SA 593 at para 18, the Court restated the modern approach to interpretation thus:

“[18] The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, 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 would in regard to a statute or statutory instrument be 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 for the provision and the background to the preparation and production of the document.”

[101] In order to interpret the Guidelines and section 10(1) (e) of the B-BBEE Act, it is necessary to remind oneself of the objectives of the B-BBEE Act as set out in section 2. It is apparent from certain clauses of the Guidelines that although it has not been expressly stated that the B-BBEE is primary objective of the Incentive scheme, they seem to support B-BBEE objectives. In fact, it is clear from their

provisions that they actively pursue noteworthy B-BBEE goals. The following bear testimony to this:

101.1 Clause 3.3.2 – the qualifying QSAPE (Qualifying SA Production Expenditure) for eligibility to the Incentive is R12 million for BBEE level 1 contributor level status service companies shooting on location in SA, which appears to be lower than the qualifying QSAPE for those shooting in SA locations and that are not at that contributor level (in 3.3.1).

101.2 Clause 9.1.2 provides for an additional 5% incentive of QSAPE for productions conducting post-production in SA and utilising the services of a black-owned service company.

101.3 Clause 4.8 regarding QSAPE, requires that the applicant must procure a minimum of 20% of qualifying goods and services from entities that are 51% black-owned by SA citizens and have been operating for at least one year.

104.4 Clause 4.9.1 states that the service company can apply for additional projects during the year, provided that it procures with regard to QSAPE at least 30% of goods and services from entities which are 51% black-owned by SA citizens and have been operating for at least one year.

101.5 Clause 5.1.1.2 requires the holding company to achieve at least Level 3 BBEEE contributor status in terms of the Codes of Good Practice.

101.6 Clause 5.1.1.3 provides that the SPCV must achieve a level 4 BBEEE contributor status.

[102] The Clauses alluded to above, in my view, show that there is considerable support for the B-BBEE from the Incentive. This stance is bolstered by the uncontroverted evidence in paragraph 152 of the Department's answering affidavit deposed by Mr Kgomo to the following effect:

“[152] I have referred above to the 2016/2017 Annual Incentive Performance Report (page 9) prepared by DTIC Incentive Development and Administrative Division (IDAD), which recorded that:

“the dti promotes transformation through compliance with the Broad-Based Economic Empowerment (BBEEE Act, 2003 (Act 53 of 2003 as amended by Act 46 of 2013.”

[103] What can be discerned from the above statement is that the Incentive programme forms part of the Department's endeavours to promote transformation through the B-BBEE Act, albeit not as a primary objective. In my judgment, whereas the B-BBEE Act contains provisions that actively pursue its objectives, factually the Foreign Film Guidelines likewise contains clauses which facilitate B-BBEE. In my view therefore, an interpretation to the effect that Incentive is one 'in support of' the B-BBEE is sensible and ought to be preferred.

[104] Notwithstanding this finding, the Applicants in further contending that Foreign Film Incentive is not a scheme that was established 'in support of' broad-based black economic empowerment, and that it was established for a different purpose as defined in the Guidelines, placed much reliance on *Afriforum NPC v Minister of Tourism and Others*; *Solidarity Trade Union v Minister of Small Business Development and Others* 2022 (1) SA 359 (SCA); [2022] 1 All SA 1 (SCA). Plasket JA, explained that *"the purposes of the DMA on the one hand and the B-BBEE Act, on the other, are very different and that each statute is directed at achieving different goals; the DMA is aimed at preventing or limiting disasters, mitigating their impact, and enabling post-disaster recovery, while B-BBEE Act is aimed at promoting black economic empowerment in order to enable black people to participate meaningfully in the economy"*. More specifically, the learned judge at para [46] held that since the *"DMA's empowering provisions for the making of the regulations and directions make no mention of B-BBEE objectives"*, it followed that *"the only way in which they could be imported into the Minister's empowerment would be if she was correct that s 10(1)(e) of the B-BBEE Act required her to include them in her direction."* The learned judge further pointed out that absent this, their inclusion *"appears to amount to the pursuit of an improper purpose – one not authorised by the empowering provision – no matter how laudable her intentions."*

[105] The Court, then discussed the "scope" of section 10(1)(e) and explained thus:

"The section requires organs of state and public entities to apply [the relevant Code] when they determine criteria for awarding incentives, grants, investment schemes in support of B-BBEE. The question to be answered is

thus whether the amounts paid from the fund are grants in support of B-BBEE.”

[106] In light of the foregoing, the Applicants submit that there is no explicit or implicit reference in the Guidelines to the incentive scheme being one ‘in support of broad-based black economic empowerment as contemplated in section 10(1)(e). According to the Applicants, this is much clearer when regard is had to the fact that the Department has another Incentive – the Black Emerging Filmmakers Incentive – where empowerment is its purpose as it declares thus:

“The objectives of the South African Emerging Black Filmmakers Incentive is a sub-programme of the South African Film and Television Production and Co-Production Incentive, is to nurture and capacitate emerging black filmmakers to take up productions and contribute towards employment opportunities.”

The B-BBEE Codes, according to this point explicitly apply to the Black Emerging Filmmakers Incentive and not to the Foreign Film Incentive.

[107] It must be stated, and as correctly pointed out by Counsel for the Respondents, that the *Afriforum* case is distinguishable from the facts of the present matter as it dealt with the Disaster Management Act 57 of 2002 which did not include pursuit of B-BBEE objectives at all and was focused purely on Disaster Relief. It is also noteworthy that the Court in *Afriforum* pointed out that the empowering provisions under which the Minister issued her directions makes no mention of B-BBEE objectives, nor do her subsidy directions, whereas in casu, the Guidelines do contain B-BBEE supporting provisions. In *Afriforum* in answering the question whether the amounts paid from the Fund were grants in support of B-BBEE, the Court said that:

“[49] The Minister, in her directions, made no such claim. Instead, she made it clear that the grants were intended to mitigate the impact of Covid-19 on the qualifying businesses. And, in her answering affidavit, she said that they were meant to alleviate, contain and minimise the effects of the economic fallout wrought by the pandemic and the consequent state of disaster. The words

she chose resonate with section 27 (2) of the DMA and regulation 10(8)(c) – the empowering provisions in terms of the DMA for the Minister of Co-operative Governance and Traditional Affairs to make regulations and the applicable empowering provisions that authorised the Minister to issue her direction. In my view, the grants contemplated for the purpose are consequently not grants in support of B-BBEE as contemplated by section 10(1)(e) of the B-BBEE Act but grants to further the purposes of the DMA.”

[49] When a person exercising public power has committed themselves unequivocally to a basis for their authority to exercise that power, they stand or fall by that choice. They are, generally speaking, not free to rely on some other source of empowerment which may enable them to do what they purported to do. “

[108] Based on the foregoing reasoning employed by the Court, the answer in the present case, therefore, lies not on the *Afriforum* dictum.

[109] It will be recalled that section 10(1) of the B-BBEE Act requires that the “...organ of state and public entity must apply any relevant code of good practice issued in terms of this Act...” The Applicants contend that the Code does not apply to the Scheme for the reason that a Code of Good Practice is binding only if it is – in the words of section 10(1) – a “relevant code of good practice issued in terms of the Act.

[110] Code Series 000 Statement 000 specifies entities to which the Code applies. It provides as follows:

“3. APPLICATION OF THE CODES

3.1 The following entities are measurable under the Codes:

3.1.1 all Organs of State and Public Entities;

3.1.2 all Measured Entities that undertake any economic activity with all Organs of State and Public Entities;

3.1.3 any other Measured Entity that undertakes any economic activity, whether direct or indirect, with any other Measure Entity that is subject to

measurement under paragraph 3.1.1 to 3.1.2 and which is seeking to establish its own B-BBEE compliance.

[111] Accordingly, so contend the Applicants the Code is only of application, and therefore a “relevant” Code, if the applicant is an entity that “*undertake(s) economic activity with an organ of state or a public entity*”. It is further argued that the Applicants do not undertake any “*economic activity*” with the Department when applying for a Foreign Film Incentive. The result thereof is that Code 000 is therefore not a “*relevant*” Code and binding under the B-BBEE Act. Thus, as a matter of law, the BEE Act and Codes of Good Practice have no application to an application for an incentive. In other words, Incentive does not constitute undertaking of an economic activity with the DTI.

[112] The issue turns on whether the application to the Department for the Incentive constitutes undertaking of any economic activity with the Department. In order to determine the meaning of the phrase “*any economic activity*”, in the context of the present proceedings, I think it is necessary to first outline its ordinary dictionary meaning. The *Concise Oxford Dictionary* 10th ed, (2001) defines the adjective ‘economic’:

1. of or relating to economics or the economy;
2. justified in terms of profitability.

It defines “activity” thus:

1. a condition in which things are happening or being done.
2. an action taken in pursuit in pursuit of an objective.

[113] In *Standard Bank Investment Corporation v The Competition Commission and Others; Liberty Life Association of Africa Ltd v Competition Commission and Others* 2000(2) SA 797 (SCA) at para 9, the Court said the following about the meaning of “economic activity”, which appears in the following phrase of the Competition Act (“This Act applies to all economic activity within, or having an effect within, the Republic...)

“These words of great generality extend its operation to the countless forms of activity which people undertake in order to earn a living.”

[114] As discernible from the foregoing, it is clear that the matter turns on the interpretation of the phrase “economic activity”. Counsel for the Respondents referred to an interpretation of economic activity in the context of VAT proffered by the *Constitutional Court in Road Traffic Management Corporation v Tasima (Pty) Ltd and a related matter* [2020] JOL 48028 (CC) (quoting from *Institute of Chartered Accountants in England and Wales v Customs and Excise Commissioners* [1997] STC 115 5 (CA) (“Institute of Chartered Accountants”) at 1166c thus:

“From these cases I conclude that the concept of an economic activity is an activity which typically is performed for a consideration and is connected with economic life in some way or another. But it is not an essential characteristic that it should be carried on with a view to profit or for commercial reasons but must an activity which is analogous to activities so carried on. An activity which consists in the performance of a public service to which the idea of commercial exploitation with a view to profit or gain is alien is not of an economic nature particularly where the activity is one typically of a public authority.

Applying these criteria to the activities of the institute I find that they are not activities of an economic nature. They are activities which Parliament has decreed should be carried out for the protection of the public and are regarded as the exercise of public control over those who engage in financial services, auditing and insolvency practice. The fact that the institute generates revenue from the issue of licences, certification or maintenance of the register to cover overheads does not of itself mean that it is an economic activity. In carrying out this activity the institute is performing public services to which the very idea of exploitation with a view to profit is alien. Further they are typical of the activity of a public authority. Though connected with the activity of the profession of accountancy, the activity of the institute does not consist in supply of such services for consideration but in ensuring that those in the profession who provide such services do so in accordance with the law’s requirements.”

[115] Counsel for the Respondent argued that within the key phrase “*undertake any economic activity with*”, the words “*any economic activity*” could be of quite varying expansiveness depending heavily on the surrounding context. For example, so continued the contention, the wider meaning would extend to comprising any transaction that forms part of the economy. Such an extension would include transactions forming part of the administration of the wealth and resources of a community/State. Put in another way, the subsidy/incentive transaction would be part of the distributive aspect of the production, distribution, and consumption of goods and services within the economy. Accordingly, so concludes the argument, undertaking an economic activity with a state organ might include the undertaking of a subsidy/incentive transaction with them.

[116] The phrase “*economic activity*” must also be assessed in the context in which it has been used in the Code. Clause 7.6 states that:

“Despite paragraph 7.4, a Start-up Enterprise must submit a QSE scorecard when tendering for any contract or seeking any other economic activity covered by Section 10 of the Act, with a value of higher than R10 million or more they should submit the Generic scorecard. The preparation of such scorecards must use annualised data.”

[117] The Applicants contend that clause 7.6 is only referring to section 10(1)(a) of the B-BBEE Act because this is the only sub-paragraph of section 10 expressly mentioning “economic activities”.

[118] The phrase “economic activity” appears several times in the B-BBEE Act, including in the objectives, where it expresses the objectives that various disadvantaged communities may increase “*their access to economic activities, infrastructure and skills training*”. This immediately suggests that the phrase is used in a wider sense. To my mind, “economic activity” is wide enough to include an Incentive. In the context of the present case, an incentive is also an activity undertaken to achieve economic ideal, be it in the form of production or distribution and consumption of goods or services within the economy. It cannot be limited to

conducting some form of business with the State only. In essence, it, in its generality, in my view extends to comprising any transaction relating to the distributive aspect of the production, distribution, and consumption of goods and services within the economy.

[119] In *Oceana Group Ltd & another v Minister of Water and Environmental Affairs & others*, [2012] 2 All SA 602 SCA the Supreme Court of Appeal considered the applicability of provisions of Code (“namely: “*any enterprise that undertakes business with any organ of state or public entity*”) which was interpreted by the court a quo (Cleaver J) to include such a regulatory transaction between a state organ and an entity to allocate fishing rights, and held thus:

“[31] The codes were published by the Minister of Trade and Industry in the Government Gazette on 9 February 2007, after the long-term rights allocation process, but before the adoption of the TP. In terms of s 10(a) of the BBEE Act, the provisions of which appear in paragraph 14 above, every state and public entity is obliged to take into account as far as reasonably possible “any relevant code of good practice” issued in terms of that Act. The immediate question that arises is whether a relevant code of good practice exists which the minister and her department are obliged to apply.

[32] It is clear from a reading of paragraph 3 of the Codes that what was intended by paragraphs 3.1.2 to 3.1.4 is that specified public entities and enterprises that “undertake business” with, inter alia, any organ of state or public entity should be measurable entities to which the codes apply. It is understandable that government would be intent on ensuring that those to with whom it engaged in commercial activity would government transformative objectives. The reward for complying with government’s transformation targets would be eligibility for government contracts. Paragraph 3.1.2 applies to public entities. When they “undertake any business” with any other “enterprise in accordance with paragraph 3.1.2, it must be taken to mean commercial interaction between the two entities. Where the same or essentially similar words or phrases or expressions are used in various places throughout a legislative instrument, they are presumed to bear the same meaning throughout. In my view, a purposive interpretation leads ineluctably

to the conclusion that the entities considered measurable in terms of paragraphs 3.1.3 to 3.1.4 are enterprises that engage in commercial activity with, inter alia, any organ of state or public entity.”

[120] Counsel for the Respondents stated that soon after this decision (*Oceana*) in 2012, and in around 2013, the Code was revised to put in place the new phrasing at issue in the present case. More specifically, the prior phrase “*undertakes any business with*” was replaced with the wider phrase “economic activity”. According to this contention, this is an indicator of an intent to drive a wider interpretation of the type that the Respondents sought to pursue in this case.

[121] In my judgment, an interpretation of “*economic activity*” that excludes an application for an incentive or subsidy is unjustifiably restrictive as the Applicants by applying for an incentive undertake an economic activity. I do not think that the meaning of “economic activity” should be rigidified. The economic activity associated with the Incentive, in my view falls squarely within the economic activity with a state organ. This much is clear from the objectives set out in the guidelines.

The Scorecard requirement

[122] The Applicants further contend that even if it is found that the Codes apply to the Incentive, the Department erred in deciding that HPL had to use a QSE scorecard. Instead, the Applicants were still permitted to make use of sworn affidavit.

[123] First, it is undisputed that HPL is a Start-up Enterprise. Schedule 1 of the Codes of Good Practice defines a start-up enterprise as follows:

“a recently formed or incorporated Entity that has been in operation for less than 1 year. A start-up enterprise does not include any newly constituted enterprise which merely is continuation of a pre-existing enterprise.”

[124] In paragraph 4 of the relevant Code Series 000, Statement 000 the qualifying status of Start-up Enterprises on the same basis as the Exempt Micro Enterprises (“EMEs”) is set out in the following manner.

“10.1 Paragraph 4.2 provides that *“Start-Up Enterprises are ordinarily regarded as Exempted Micro Enterprises, unless tendering for a contract in excess of the threshold for EMEs, in which case the corresponding scorecard will apply.”*

10.2 In terms of paragraph 4.1, the threshold for EMEs is an annual Total Revenue of R10 million or less.

10.3 Paragraph 4.4.2 stated ... *“an EME is at least 51% Black Owned, measured using the flow-through principle, qualifies for elevation to ‘Level Two Contributor’ having a B-BBEE recognition level of 125%.”*

10.4 Paragraph 4.5 permits but does not require EMEs to measure empowerment using a QSE scorecard *“should it so choose”*.

10.5 Paragraph 4.6 states that an EME “is only required to obtain a sworn affidavit or Certificate issued by the Companies and Intellectual Property Commission” confirming its revenue and levels of Black ownership.”

[125] Against this backdrop, the Applicants contend that HPL, being a Start-up Enterprise which had applied for an incentive and not *“tendered for a contract”* is permitted to provide a sworn statement confirming its revenue and Black ownership. Even if that may not be the case, paragraph 5 of the Statement which deals with “Qualified Small Enterprises (“QSEs”) based on the provisions of paragraph 5 of the Statement states that:

“11.1 Measured Entity with an annual Total Revenue of between R10 million and R50 million qualifies as a Qualifying Small Enterprise.” (Paragraph 5.1)

11.2 Paragraph 5.3.2 provides that *“a Qualifying Small Enterprise which is at least 51% Black Owned, measured using the flow-through principle, qualifies for elevation to a B-BBEE Level Two Contributor’ having a B-BBEE recognition level of 125%”*.

11.3 Paragraph 5.3.3 states that *“a Black Owned QSE in terms of paragraph 5.3 above, is only required to obtain a sworn affidavit”* confirming its revenue and level of Black ownership.

11.4 Paragraph 5.4 permits but does not require a black-owned QSE to measure empowerment in terms of the scorecard *“should it so choose”*.

[126] Applying these provisions to HPL, the Applicants argue that HPL is a QSE. This is so because it is applying for an incentive that exceeds R10 million. Once it receives it, its annual Total Revenue will exceed R10 million but be less R50 million. In addition, HPL is a 51% Black Owned QSE. Thus, in terms of paragraph 5.3.3 HPL is required to provide a sworn statement and is not required to use the scorecard.

[127] The Applicants further argue that notwithstanding the arguments already advanced, there is yet another basis upon which the Department erred in its decision to the effect that HPL was required to produce a scorecard. This is based on the provisions 7 of the Statement which deals with “*Eligibility of Joint Ventures and Start-Up Enterprises*”. Paragraph 7.4 provides that Start-up Enterprises are deemed to have qualifying B-BBEE Status in accordance with the principles of paragraph 4 of the Statement.” The Applicants reiterate that paragraph 7.5 does not require QSEs to measure empowerment using a scorecard. However, Paragraph 7.6 of the Statement provides as follows:

“Despite paragraph 7.4, a Start-up Enterprise must submit a QSE scorecard when tendering for any contract, or seeking any other economic activity covered by section 10 of the Act, with a value higher than R10 million but less than R50 million. ...”

[128] To recap, to this end, the Department in its answering affidavit states the following:

“In terms of the B-BBEE Act, a Start-up Enterprise must submit a Qualifying Small Enterprise (“QSE”) scorecard when tendering for any contract, or seeking any other economic activity covered in terms of Section 10 (1) of the B-BBEE Act, which have a value higher than R10 million but less than R50 million ...”

“Qualifying Small Enterprise (“QSE”) scorecard when tendering for any contract, or seeking any other economic activity covered in terms of Section 10 (1) of the B-BBEE Act, which have a value higher than R10 million but less

than R50 Million ...”, this affects SPCV’s which are classified as a start-up applying for incentives greater than R10 million ...”

[129] The BEE Commission made a similar statement to the following effect:

“... a start-up enterprise must submit a B-BBEE certificate issued against the QSE scorecard when tendering for any contract, or seeking any other economic activity covered in terms of Section 10 (1) of the B-BBEE Act which have a [value] of between R10 million and R50 million.”

[130] With this background in mind, the Applicants, contend that it was not “seeking any other economic activity covered in Section 10 (1) of the BEE Act. But I have already found that seeking an incentive constitutes “economic activity”.

[131] Finally, the Applicants insist that the interpretation of the Codes of Good Practise, more particularly paragraph 5.1.1.4 makes it clear that HPL was permitted to provide an affidavit. It states: *“The SPCV and holding company must submit a valid B-BBEE certificate of compliance issued by an accredited agency or an affidavit at application stage.”*

[132] The above then turns to the interpretation of clause 5.1.14. It states that: *“The SPCV and the holding company must submit a valid B-BBEE certificate of compliance issued by an accredited verification agency or an affidavit at application stage.”* The provisions are clear, and I see no need to resort to extensive tools of interpretation as the wording itself is plain that HPL was at application stage entitled to submit an affidavit. Nonetheless, Counsel for the Respondents contend that the Clause should not be read in isolation, for its proper context, it ought to be read together with clause 5.1.1.1 which requires that the SPCV and holding company must be in compliance with the B-BBEE Codes. In my view this contention is vague and unmeritorious. The following common cause facts support the interpretation that a newly formed entity may at application stage make use of an affidavit as, because of its newness, it may be impossible to measure certain elements of the scorecard:

132.1 Paragraph 4.2 of the Guidelines require an applicant to register a SPCV “*solely dedicated for the production and/or post-production activities of the film*” which “*must be utilised for (1) production and/or postproduction*”. Accordingly, the Guidelines require either the incorporation of an entirely new entity or the use of a dormant entity that has no previous trading history. It is undisputed that HPL is a freshly incorporated entity.

132.2 A freshly incorporated or previously dormant SPCV can only be measured in respect of ownership. It cannot be measured in respect of the four other elements – management control, skills development, enterprise and supplier development, and socio-economic development. This is because a freshly incorporated entity has no trading history in respect of those elements on which it could be assessed.

132.3 It is undisputed that to acquire a level four (4) B-BBEE contributor status using a QSE scorecard, an entity requires at least 65 points. In the case of a new SPCV, the only effective element that can be measured is ownership, which accounts for only 25%. Accordingly, a new SPCV can only realistically acquire a maximum of 25% points. Thus, it is virtually impossible for a SPCV required by the guidelines to achieve level four (4) contributor status.

132.4 The Respondents’ suggestion that the other elements of the scorecard can be measured using “annualised data” does not hold water because they do not explain how a company with no trading history can ever have data which can be “*annualised*”.

[133] The Applicants contend, without a murmur from the Respondents, that in the past the Department has in the past avoided this dilemma by accepting sworn statements. It follows from the foregoing that the most sensible way to interpret the Guideline requirements is that the use of a sworn statement is permissible at application stage. Therefore, in my judgment, the intention manifest in the Guidelines is to permit use of sworn statement at application stage and does not require the use of scorecard. I find that HPL ought to have been permitted to produce a sworn statement at the stage when it launched the application. The finding is fortified by the Interpretation Note issued by the Respondents permitting use of a sworn statement at application stage.

[134] The Respondents suggest that the Interpretation Note cannot aid in the interpretation of the Guidelines as it was issued after the present application was launched and its effect is not retrospective. The Applicants in retort state that the Department misunderstands the nature of interpretation because when one interprets a document, one is not amending it, but is merely ascertaining its objective meaning, and the meaning does not change from one day to the next. Accordingly, as a matter of objective interpretation, the Guidelines, much the same as in the interpretation of statutes by the courts, have the same meaning since inception in 2018. By way of analogy, Counsel for the Applicants referred the court to a judgment of the House of Lords in *National Westminster Bank plc v Spectrum Plus Limited* [2005] 2 AC 680 (HL) at para 6-7 where the following was said:

“... [F] from time to time decisions on points of law represent a change in what until the law in question was thought generally to be. This happens most obviously when a court departs from, or an appellate court overrules, a previous decision on the same point of law. The point of law may concern the interpretation of a statute or it may relate to the principles of ‘judge-made’ law, that is, the common law (which for this purpose includes equity). A change of this nature does not always involve departing from or overruling a previous court decision. Sometimes a court may give a statute, until then free from judicial interpretation, a different meaning from that commonly held.

... A court ruling which changes the law from what it was previously thought to be operates retrospectively as well as prospectively. The ruling will have a retrospective effect so far as the parties to the particular dispute are concerned...”

[135] It indeed is so that in a myriad of cases our courts have limited the retrospective effect of legislative provisions to avoid uncertainty. I agree with Counsel for the Applicants that the Interpretation Note elucidates the proper meaning of the Guidelines as they always have been and does not purport to amend them. In this judgment I have not found it necessary to resort to the aid of Interpretation Note as the Guidelines themselves are very clear in setting out that a QSE scorecard is not necessary but an affidavit will suffice at application stage.

[136] I do not deem it expedient to deal in detail with the Applicants' challenge on the rationality of the Guidelines on the scorecard issue. It is obvious from the interpretation of the Guidelines I have proffered above that any other interpretation requiring use of a scorecard for the Applicants at application stage would be irrational and therefore unconstitutional.

[137] It remains to be said that the Applicants raised a further point, namely, that the Respondents acted on the dictates of the BEE Commission in adopting the stance that a scorecard was necessary. This is not disputed by the Respondents. More specifically, Mr Kgomo does not deny that he informed Mr Sikwebu and Ms de Mardt in a telephone call that the Department "*stopped processing all applications for incentives in excess of R10 million as they believe themselves bound by the views expressed by the BEE Commission*". Paraphrased, the decision of the Department to the effect that a scorecard was necessary was informed by the views expressed by another entity, the BEE Commission. As evident from the interpretation of the Guidelines in this judgment, the interpretation proffered by the Commission was obviously erroneous. The Department therefore acted unlawful in taking the view that it was bound by the Commission's erroneous interpretation of the Guidelines. Support for this finding is found in *Genesis Medical Aid v Registrar of Medical Schemes* 2017 (6) SA 1 (CC) at para 20-22 thus:

"[20] Genesis's review of the Registrar's decision was based on the assertion that, since Omnihealth was incorrectly decided, the rejection of Genesis's financial statements was materially influenced by an error of law. This review ground traditionally finds application where an administrator wrongly misconstrues or misinterprets a legislative provision. The second judgment suggests:

'It follows that the error of law relied on by Genesis must arise from the misinterpretation or misapplication of the MSA provisions by the Registrar which relate to the submission of annual financial statements.'

This seems an inappropriate rigid characterisation of both the ground of review and of what happened between the parties here. Constitutional

precepts caution against adopting so rigid an approach. By explicitly affording the right to just administrative action, the Constitution bestows on courts the power to review every error of law, provided of course it is “material”. PAJA embodies this right, in explicit terms. There is nothing in the statute that narrows or stifles it.”

The Registrar’ decision to reject Genesis’s financial statements was not merely influenced by *Omnihealth*. That decision was what caused, created and drove the rejection. *Omnihealth* was effectively the be-all and end-all of the Registrar’ s decision. Without *Omnihealth*, the Registrar would not have taken it. The parties would never have been at odds. In lawyer’s language *Omnihealth* was “material” to the disputed decision. And if *Omnihealth* was wrong, that means the Registrar’s decision was wrong then – and that is wrong now.”

[138] So too in the present matter, because the BEE Commission interpretation of the Guidelines is wrong, so is the Department’ decision.

The Constitutional challenge

[139] The Applicants have raised several constitutional issues on the basis of which they allege the decisions of the Department are vitiated by irrationality, arbitrariness and are therefore unconstitutional.

Arbitrary not to treat like cases alike

[140] Counsel for the Applicants contended that it had been an accepted way for applicants to submit sworn statements when lodging an application for a film incentive. Of note is that the Respondents do not deny that for film incentive applications made before HPL and Indy’s application, the Department accepted a sworn statement in lieu of the QSE scorecard and paid out the incentive. And for the film incentives made after HPL and Indy’s application, the Department confirmed in its affidavit that it will accept a sworn statement. Yet, the Applicants’ application was rejected because the QSE scorecard was not used to assess it. It is therefore clear

that HPL and Indy have been treated differently. Put in another way, the Department arbitrarily failed to treat like cases alike.

[141] In *Pharmaceuticals Manufacturers Association of South Africa and Another: In Ex Parte President of the Republic of South Africa and Others* 2002 (2) SA 674 (CC) para 85 the Court said the following:

“[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 the Constitution for such action.”

[142] The Respondents’ arbitrary failure to treat HPL and Indy the same as other applicants transgresses the constitutional principle of equality. No reasons have been advanced for the different treatment. The Department’s decision therefore violated this elementary requirement of the rule of law.

Unlawful frustration of the applicants’ expectation

[143] Counsel for the Applicants raised yet another ground of a constitutional violation by the Respondents, namely, that flowing from the manner in which other applicants had been treated by the Department in accepting a sworn affidavit in lieu of a scorecard, the Applicants’ legitimate expectation had been violated. In *Premier, Province of Mpumalanga and Another v Executive Committee of the Association of Governing Bodies of State Aided Schools: Eastern Transvaal* 1999 (2) SA 91 (CC, the Court (O’Regan J) confirmed that a party has the protection of procedural fairness where organs of state breach a legitimate expectation that the party had, based on the existence of a regular practice which it could be reasonably expected to continue and para 36 held thus:

“Citizens are entitled to expect that government policy will ordinarily not be altered in way which would threaten or harm their rights to legitimate expectations without being given reasonable notice of the proposed change or an opportunity to make representations to the decision-maker.”

[144] It has been firmly established in our law that for a practice to constitute a legitimate expectation there are four requirements: (a) a reasonable expectation (b) that was induced by the decision-maker (c) based on a clear, unambiguous representation (d) which it was competent and lawful for the decision-maker to make. (*Premier Mpumalanga* at para 21). The representation in (c) can “*arise from an express promise or a regular practice*” (*Walele v City of Cape Town and Others* 2008 (6) (CC) at para 42). Whether a departmental practice constitutes a legitimate expectation depends on “*whether what happened was an isolated event or a procedure designed to lay a basis for planning future conduct and arrangements*”. (*MEC for Education, Northern Cape v Bateleur Books (Pty) Ltd* 2009 (4) SA 639 (SCA) at para 18. At para 20, the Court held that a practice of decentralised procurement of text books in place for at least two years met that hurdle because it was a “*fairly settled way of doing things*.”

[145] I have already indicated that in the answering affidavit, the Respondents do not deny that before 30 May 2022, the Applicants and the entire film industry understood that submitting a sworn statement to demonstrate the Level 4 contributor status of the SPCV complied with the requirements of the Guidelines, including where the rebate applied for exceeded R10 million. The Applicants submit that on this basis, the HPL and Indy had a legitimate expectation that applications in future would be assessed on the same basis. Furthermore, acting on this expectation, they compiled their application in accordance with the requirements of the Guidelines as they had previously understood them and applied by the Department in accepting applications for the foreign film incentive.

[147] The Applicants allege in their papers that only on 30 May 2022 were they informed of the Department’s change of view, viz, that the QSE scorecard was required, less than a month before the principal photography was set to begin, and at a stage where it was impossible for them to satisfy the new view expressed by the

Department. Moreover, the Department in failing to the Applicants any notice of its changed view concerning the requirements or an opportunity to make representations concerning the change before it was adopted and applied in their case unlawfully frustrated the Applicants' legitimate expectations and acted unfairly.

[148] It is my judgment that flowing from the foregoing, the Department's decision is vitiated by arbitrariness and an unlawful frustration of a legitimate expectation and is therefore liable to be reviewed and set aside.

Waiver of the commencement of principal photography

[149] The Applicants seek a review and setting aside of the Department's refusal to grant a waiver of the requirement in paragraph 4.3 of the Guidelines, that principal photography must not commence before it has provided an acceptance letter. According to the Applicants, the Department not only has the power to grant the waiver, it ought to have granted it. This is so because paragraph 13.8 of the Guidelines grants the Department a discretion to relax any of the "*minimum requirements, conditions or terms in these guidelines*".

[150] It is not in dispute that the Department has previously granted waivers of this nature. In the founding affidavit, the Applicants aver that in a telephone call with Ms De Mardt, Mr Kgomo made this admission. Ms de Mardt states that: "*He was unequivocal that the Department would not provide a waiver to commence principal photography on 28 June 2022. He said that whilst the Department had done so previously, this would no longer happen. He gave no reasons for this change in approach*".

[151] The Respondents readily and correctly acknowledge that the Department has the power to relax the minimum requirements of the Guidelines. However, they contend that any such relaxation will be based on merit, which strongly signals the need to apply it on the individual merits and facts of the case. They further contend that Ms de Mardt's request to waive the peremptory requirement not to commence principal photography until after an approval letter is received, was made subsequent to the final decision to refuse the incentive application. Accordingly, the

application had by this time been disposed of, and Mr Kgomo was then functus officio and was not authorised to change his mind, and revoke, withdraw or revisit the decision unless specifically authorised to do so. Furthermore, the application was no longer live and had the waiver been granted, Mr Kgomo would committed the Department to a liability of some R12,5 million without regard to the responsibilities of accounting officer in section 38 of the Public Finance Management Act 1 of 1999 (PFMA), responsibilities of other officials in section 45 of the PFMA, Regulations 8.2.1 of the Treasury Regulations.

[151] Retorting to these contentions, Counsel for the Applicants argued that whether or not a request for waive was made before or after the final decision (which the Respondents contend was made on 30 May 2022), there is no reason to conclude that a waiver could not be granted retrospectively. In addition, the only reason advanced by the Department when it refused the waiver was simply that it “cannot” and “do[es] not” do so.

[152] To determine whether the Department should have granted waiver, the following facts are relevant:

152.1 The Guidelines specify time-frames by when an application should be made. It must be made “not earlier than forty-five (45) calendar days prior to the commencement of principal photography. In terms of the Interpretation Note Applicants are encouraged to apply for the incentive at least three months prior to commencement of principal photography.

152.2 Indy and HPL made the application on 10 March 2022 – more than three months before the principal photography was set to commence on 28 June 2022.

152.3 The Department only communicated its view that HPL required a scorecard for the first time on 30 May 2022 – that is eleven (11) weeks after the application was made, and less than a month before principal photography would commence.

152.4 In the founding affidavit, the Applicants by that time they had already taken all the steps necessary to ensure that principal photography could start

at the intended date. This included contracting with actors and service providers.

[153] It must be stated from the outset that the reasons for refusing the application for waiver advanced in the answering affidavit relating to Public Finance Management and Treasury instructions are not the reasons initially furnished by the Department. Thus, they constitute *ex post facto* justification. Therefore, the main question for determination is whether the Department's assertion that it "cannot" or "do[es] not" grant waivers is premised on a material misrepresentation of the Guidelines as alleged by the Applicants. Linked to this question is the consideration of whether, in terms of the Guidelines provision it was no longer open to the Department after it had issued the decision to consider the application for waiver.

[154] The above issues should be considered in the proper context of the events pertaining to the application as they unfolded. First, the Applicants aver that they only needed to apply for the waiver after they had been advised of the outcome of the application by the Department. It is undisputed that on 30 May 2022 the Applicants learned for the first time that a scorecard was required and the application would be rejected for failure to produce it. I have already found that the requirement to produce a scorecard is irrational and arbitrary. It then follows that the advice issued to the Applicants was misguided. The issue that then arises is whether the decision emailed by Mr Kgomo on 30 May 2022 was a final decision and the one issued on 24 June 2022 was an affirmation of the final decision. In my view, it is clear from the language in the 30 May decision, to the effect that the application "*will be refused*", that it was not a final decision. Mr Kgomo's explanation to the effect that this must be attributed to the fact that English is not his first language or semantics is unconvincing. This is so because it is inconsistent with his obvious command of the language in other correspondence. In my judgment, it is not simply a matter of "inelegance", it conveyed a clear message that that was not yet a final decision. This much is clear from the fact that a final decision was then issued on 24 June 2022.

[155] Turning to the actual reason for the refusal, namely that the Department "*cannot*" and "*do[es] not*" grant waivers, the undisputed facts establish that the

Department this statement is incorrect. It is inconsistent with the admitted facts. This leads to the inevitable conclusion that the decision is irrational as the facts demonstrate that the Department in fact “*can*” and in fact “*does*” grant waivers.

[156] With regard to the functus officio defence raised by the Department, it is plain that in light of the finding to the effect that the final decision to refuse the foreign incentive application was made on 24 June 2022, the Department was between 20 May and 24 June 2022 not yet functus officio. The waiver application was made as soon as the 30 May 2022 provisional decision relating to the use of the scorecard was delivered. There therefore was a window period before the final decision within which the waiver application could have been considered by the Department before the final decision was issued on 24 June 2022. Furthermore, it is clear that it would have been nigh impossible for the Applicants to make a new application or challenge the decision and have a decision issued within the four days before the commencement of the principal photography on 28 June 2022.

[157] Further regarding the functus officio reason proffered by the Department, Counsel for the Applicants contended that there is no reason why the waiver could not be granted retrospectively. According to the Applicants, as De Wille explains in contrast to “*an exercise of powers which affect rights and/or legitimate expectations, it would in principle be objectionable for an exercise of which is purely be retrospective in nature*”, waiving the principal photography requirement is “*purely beneficial*”. (De Wille *Judicial Review of Administrative Action in South Africa* [2003] at 193).

[158] In my view, because of the flexibility of the Guidelines as recognised in *Mellow Shark Productions (Pty) Ltd v Minister of Trade and Industry and Others* (81785/2017) [2022], there is no reason why the waiver application could not be considered granted between the period of the two decisions. This is particularly so because the Applicants lodged their application three months before the anticipated date of commencement of the principal photography and the delay in processing it falls squarely on the shoulders of the Department. The following passages in *Mellow Shark Productions* relating to the Guidelines relating to the Foreign Film Incentive, resonate with my reasoning:

“[21] Programme Guidelines were set for applications under the Incentive. The respondents made much of the fact of the Programme Guidelines. Their approach was that those Guideline were cast in stone and could not be deviated from. This view is gainsaid by the included in in the said document which reads as follows:

‘The guidelines document provides the criteria to assess proposals from potential film and television projects and the process of applying for the incentive. The guidelines are approved and issued by the Minister of Trade and Industry for the purpose of ensuring clarity on the aim and requirements of the incentive programme the dti reserves the right to amend the guidelines as it deems appropriate.

[22] ...

[23] None of the terms defined above provide any support for something being cast in stone. It was a mere guide to the application.”

[159] It must be accepted that after the Department had made its final decision on waiver and to reject the film incentive application, it had effectively discharged its function and therefore its autonomy had ceased. It had no authority to vary revoke or vary the decisions. Thus, I make no finding with regard to the retrospectivity theory. As I have already indicated, in the matter at hand, the Department’s delay in issuing a decision after HPL and Indy had lodged the application timeously gave rise to the situation where the waiver had to be sought at a late hour.

[160] In concluding this issue of waiver, I reaffirm that the Department had the power to depart from its requirements in appropriate circumstances as envisaged in paragraph 13.8 of the Guidelines which grants it a discretion to relax any of “the minimum requirements of these guidelines”. This would include, as contended by Counsel for the Applicants the requirement that principal photography commence only after approval. However, the only reason for the decision provided by the Department that it “cannot” and “do[es] not” grant waiver is contrary to the Guidelines I have already found are flexible and is inconsistent with the admitted facts. Thus it must be reviewed and set aside.

Circumvention/Fronting allegations

[161] In light of the finding that it is apparent from the Guidelines that the Department has accorded transformation prominence, thus the BEE Codes are applicable to Foreign Film Incentive applications, I must consider the issue of circumvention raised by the Department on the papers.

[162] To recap, the issue of fronting arose when Mr Kgomo who had previously dealt with DO Productions in regard to its past applications for the film incentive programmes, queried why the company having been involved in the Incentive application could not transform from within rather than effecting transformation through Indy, a newly established and unknown entity. The context to this query is that DO Productions is a well-known established white-owned company through which Ms de Maridt, a shareholder launched the Incentive application. It had a level 4 BEE status. It is undisputed that without improving its transformation score, DO Productions would not meet the eligibility criteria set out in the guidelines. The same shareholders and directors in DO Productions also hold shareholding and directorship in Indy, together with newly introduced 52% Black shareholders and directors, which then gives Indy level 1 BEE status. The nub of the Department's objection was that transformation was being effected through Indy instead of DO Productions. Mr Kgomo indicated in the email of 30 May 2022 that the aim of the aim of the Incentive was to drive existing beneficiaries (DO Productions) within the industry to transform towards meaningful transformation.

[163] I have already held that the BEE Codes are applicant herein. That immediately suggests that the Department correctly raised the issue of transformation within the DO Productions. Had it not done so, it would have been remiss. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC), Ngcobo J (as he then was), writing separately to emphasise the importance of transformation in the fishing industry within the meaning of the Marine Living Resources said the following at para 104:

“[104] . . . The transformation can take place in various ways: by allocating quotas to new companies controlled by historically disadvantaged groups, by insisting on internal transformation of existing companies, by insisting upon employment policies that bring historically disadvantaged groups into senior administrative positions, possibly by schemes designed to build capacity in other fishing activities until the new entrants have the financial and operational stability necessary for the deep-sea hake industry, to mention some. Exactly how this is to be done is complex and difficult and ultimately a matter of policy. What is essential as far as fishing rights are concerned is that the policy should meet the requirement of section 2(j), that is, it must in a meaningful way address the need to restructure the fishing industry to address historical imbalances and to achieve equity within “all the branches of the fishing industry”.

[164] Ms de Maridt fully explained the reasons why Indy, a new corporate entity was formed rather than the restructuring of DO Productions. She said that DO Productions has a trading history and a value in a linked to both her and Brigid Olen and if it were to be transformed there would be a huge financial cost to the new entrants. This is affirmed by Mr Sikwebu in a letter wherein he states that where he to acquire “*26% stake of DO Productions*” he would “*have to acquire a loan and attain a debt of million of rands*” and this was undesirable.

[165] It is not in dispute that Indy is 52% black-owned. The manner of restructuring is as envisaged by Ngcobo J, when the learned that judge said that “*The transformation can take place in various ways: by allocating quotas to new companies controlled by historically disadvantaged groups*”.

[166] Much was made of the fact that the Department’s fronting or circumventing were referred to the BEE Commission which remained silent and did not make any finding with regard thereto. That said, Mr Sikwebu’s letter to the Commission did not set out the entire history of the Applicants with DO Productions, but nothing much turns on that as the Commission is a party to these proceedings and must therefore have received the papers wherein the whole history of how the fronting or circumventing allegations emanated. Yet the Commission elected not to participate

in these proceedings. More specifically, it has made no comment at all with regard to the possibility of fronting on the part of Indy.

[167] It is well to record that in this matter no outright finding of fronting was made by the Department that Indy sought to circumvent the law. In the email of 24 June 2022, conveying the Department's final decision, the latter simply deferred the matter to the Commission. And as I have said, the Commission has not proffered any opposition to the application, and neither did it raise any issue with the constitution of Indy in light of the DO Productions history.

[168] It remains to be said that Paragraph 13.1 of the Guidelines provides that: *"Any attempt to circumvent or actual circumvention of these guidelines, which, at the sole discretion of the DTI may allow an applicant who would otherwise not have qualified to qualify for this incentive will lead to the rejection of the application"*. Counsel for the Applicants contended, correctly in my view, that the Department's reliance on paragraph 13.1 of the Guidelines in the answering affidavit is misplaced because this requires a finding of fact that there was either *"an attempt to circumvent"* or *"actual circumvention"* of the Guidelines, not a mere suspicion. I reiterate that no such finding was made by the Department. Besides, the Department never invoked paragraph 13.1 to reject the Applicants' application. Additionally, it is noteworthy that the Department did not rely on paragraph 13.1 of the Guidelines when it rejected the application.

[169] Finally, in light of the fact that the BEE Commission did not raise any concern with structure of Indy and its compliance with the BEE Act, it must be accepted that there truly was no issue to raise. After all, it is the primary function empowered to investigate such issues by section 13F of the BEE Act. Accordingly, it is difficult to find that the structure violated any law.

Substitution

[170] The Applicants seek substitution relief in terms of section 8(1) (c) (ii) (aa) of PAJA and sections 38 and 172(b) of the Constitution on the following terms:

170.1 an order substituting the Department's refusal to waive the requirement of not commencing with principal photography before approval, with a decision waiving the requirement with retrospective effect from 29 June 2022 (when the principal photography commenced); and

170.2 an order substituting the Department's decision to refuse the film incentive application, with a decision accepting the application.

[171] The Respondents oppose substitution basis primarily on the basis that based on the Department's budgetary considerations render it inappropriate for this court to substitute the Department's decision as set out in the answering affidavit.

[172] Before considering the parties' competing contentions on this score, I think it makes sense to outline the general principles applicable to this exceptional remedy. The test for exceptional circumstances is formulated in *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* 2015 (5) SA 245 (CC), 2015 (10) BCLR1199 (CC) as follows:

“[47] To my mind, given the doctrine of separation of powers in conducting this enquiry there are certain factors that should inevitably hold greater weight. The first is whether a court is in as good a position, as the administrator to make the decision. The second is whether the decision of the administrator is a foregone conclusion. These two factors must be considered cumulatively. Thereafter a court should still consider other relevant factors. These may include delay, bias or the incompetence of an administrator. The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all parties. It is prudent to emphasise that the exceptional circumstances enquiry requires an examination of the matter on a case-by-case basis that accounts for all relevant facts and circumstances.”

In similar vein, in *Gambling Board v Silver Star* 2005 (4) SA the Court emphasised that:

“[29] [a]n administrative functionary ... is generally best equipped by the variety of its composition, by experience and its access to sources of relevant information and expertise to make the right decision. The court typically has

none of these advantages and is required to recognise its own limitations. Remittal is thus the general rule 'almost always the prudent and proper course'. However, sometimes rules need to be broken and our courts have long since recognised that there may be instances in which substitution is the appropriate remedy. On a big picture level, this determination has essentially required the court to ask the question whether a decision to exercise a power should not be left to a designated functionary."

[172] The Applicants advance the following reasons for invoking the substitution remedy:

172.1 Regarding the substitution of the waiver decision, the Applicants had to commence with the principal photography even though the application was refused as the problem was caused by the Department's erroneous interpretation of both the requirements of the guidelines and its discretion to waive the pre-commencement requirement; and

172.2 Had the Department correctly applied the Guidelines and statutory scheme under the BEE Act and acted promptly (having had more than three months to process and decide the application before the commencement of the principal photography):(a) the application would have been accepted and (b) there would have been no need for the applicants to require a waiver of the pre-commencement requirement.

[173] Insofar as substitution vis-à-vis the merits of the review is concerned, the Applicants contend that this court is in as good (if not better) position as the Department to make the decision because:

173.1 The decision on both issues – as to whether Indy and HPL complied with the BEE requirements of the Guidelines, and whether a sworn statement was sufficient - turns primarily on the proper interpretation of the Guidelines. The court is better placed than the Department to make that determination as it is the ultimate arbiter of the legal issues in dispute, including the interpretation of the Guidelines.

173.2 No other reasons were provided by the Department for refusing the application. Thus the Court is well-placed to determine these issues.

173.3 The Court is well-placed to decide whether it would be irrational and arbitrary to refuse to waive the requirement, as that would effectively preclude the applicants from being able to claim the incentive.

[174] It must be stated from the outset that it is well-established that budgetary considerations on their own do not preclude a Court from granting just and equitable relief. In *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) 2002 (5) SA 721 (CC) at para 99 the Constitutional Court said the following:

“[99] . . . Even simple declaratory orders against government or organs of State can affect their policy and may well have budgetary implications. Government is constitutionally bound to give effect to such orders whether or not they affect its policy and has to find the resources to do so..”

The Court then referred to its decision in *Premier, Mpumalanga and Another v Executive Committee Association of State-Aided Schools, Eastern Transvaal* [1998] ZACC20; 1999 (2) SA 91 (CC) where it set aside a provincial government’s policy decision to terminate the payment of subsidies to certain schools and ordered that payments should continue for several months. It also referred to *August and Another v Electoral Commission and Others* [1999] ZACC 3; 1990 (3) SA 1 (CC) where the Court in order to afford prisoners the right to vote directed the Electoral Commission to alter its election policy, planning and regulations, with manifest cost implications.

[175] Besides the fact that budgetary constraints on their own, as evidenced by the foregoing judgments, do not preclude the granting of a just and equitable order, the other fundamental difficulty in the defence of the Respondents is that they have failed to advance any evidence as to what budgetary constraints the Department may or may not be operating under. In *Lawyers for Human Rights v Minister of Home Affairs and Others* 2017 (5) SA 480 (CC) at para 61, reaffirmed that vague reference to lack of resources or budgetary constraints are inadequate to sustain a contention such as the one raised by the Department.

[176] In the present matter, did not give any information relating to its budget or how the budget would be affected by the granting of the film incentive to the Applicants through an order of the court. This court has no idea of what the precise financial position of the Department is. In *Rail Commuters Action Group v Transnet t/a Metrorail* 2005 (2) SA 359 CC, at para 88, the Court explained in the context of relief declaring the State's failure to take reasonable measures to protect rail commuters thus:

“[88] A final consideration will be the relevant human and financial resource constraints that may hamper the Organ of State in meeting its obligation. This last criterion will require careful consideration raised when raised. In particular, any Organ of State will not be held to have reasonably performed a duty simply on the basis of a bald assertion of resource constraints. Details of the precise character of the resource constraints, whether human or financial, in the context of the overall resourcing of the organ of State will need to be provided.”

[177] As I have said, in the present matter, the court has not been presented with a “*scrupulously calculated and conscientiously propounded*” costs considerations. (See *Gelyke Kanse and Others v Chairperson of the Senate of the University of Stellenbosch* 2020 (1) SA 368 (CC) at para 44). Besides a fleeting reference to resource constraints, it remains unclear whether, in the context of the overall resourcing of the Department, there are other issues which hamper the latter's ability to meet its obligations. It follows that the Department's contention of budgetary constraint constitutes no bar to substitution. But that is not the end of the matter as the matter must be dealt with applying principles set out in *Trencon*.

[178] Insofar as substitution of the waiver decision is concerned, it will be recalled that it is undisputed that the Applicants had to commence with the principal photography even though the application was refused as there was a delay on the part of the Department with issuing a decision notwithstanding the fact that the application was timeously presented to it. In light of the finding I have already made, namely, that the Department erroneously interpreted the requirements of the requirements of the guidelines and its discretion to waive the pre-commencement

requirement, however, this does not place this court in a position to substitute the decision of the Department refusing the waiver. Notwithstanding the findings, the Department's greater expertise is still required to make this decision.

[179] I turn now to consider whether this court in a good position or equipped as the Department to consider the Applicants' application for an incentive and whether that decision is a foregone conclusion. The answer to this question is a resounding "no". It will be recalled that the present application was rejected at the screening stage, therefore the actual merits were never considered by the Department. If this court were to substitute the decision of the Department and grant the incentive, it would effectively be usurping its function. That said, I am mindful of the prejudice to the Applicants caused by the delay of the matter but I am not convinced that it is of such a nature as to warrant substitution on the merits. Neither can it be said that the outcome is inevitable on the facts. In light of the findings made in this judgment, the Department has some discretion left – if the matter were to be remitted to it.

Conclusion

[180] In summary, in this judgment I have held that the decision of the Department refusing the Applicants' foreign incentive film application constitutes administrative action as envisaged in PAJA. Furthermore, the Applicants are exempted from the requirement to exhaust internal remedies as the remedy afforded by the Guidelines is not effective. As to the decision to refuse the Applicants an incentive under the Foreign Film Guidelines and the reasons thereof, communicated to them by an email dated 30 May 2022, and an SMS of even date, as well as another email dated 24 June 2022, is arbitrary and unlawful and must be set aside. Regarding the interpretation of the Guidelines relating to the use of the scorecard, I have found that a sworn statement may be used to establish the SPCV's level 4 B-BBEE status. Thus, the decision of the Department requiring production of a scorecard at application stage is vitiated by arbitrariness. I have also found that the BEE Codes of Good Practice are applicable to the Foreign Film Incentive Scheme. Insofar as the Department's refusal to grant waiver of the requirement that principal photography must not commence before it has provided an acceptance letter in order for the Applicant to qualify for the incentive is unlawful. It must also be mentioned that Mr

Kgomo's averment that Mr Sikwebu "*was quibbling with the DTIC and government policies on the transformation in Film and television Production Industry*" (to which Mr Sikwebu strongly objected) is unfortunate and should never have formed part of his answering affidavits as it adds no value to the adjudication of the matter.

[181] In the circumstances, the following order is issued:

181.1 It is declared that:

181.1.1 the decision of the First Respondent not to waive the requirement in paragraph 4.3 of the Foreign Film and Television Production and Post-Production Incentive Programme Guidelines ("Guidelines") not to commence principal photograph of the film "*Hammarskjold*" prior to the approval of the Applicants' claim for a foreign film incentive is unconstitutional and invalid;

181.1.2 the decision of the First Respondent to reject the Applicants' claim for a foreign film incentive under the Guidelines is unconstitutional and invalid.

181.2 The First Respondent's decisions referred to in paragraph 181.1.1 and 181.1.2 above, are hereby reviewed and set aside.

181.3 It is further declared that:

181.3.1 paragraph 5.1.1.3 of the Guidelines is irrational, unconstitutional and invalid;

181.3.2 it is directed that paragraph 5.1.1.3 of the Guidelines is to be read as though the words "*which may be demonstrated by use of an affidavit in terms of paragraph 5.1.1.4*" appear after the word "*Practice*" at the end of the paragraph;

181.3.3 in terms of section 9(1) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"), the period in which the Applicants are entitled to institute the review of paragraph 5.1.1.3 of the Guidelines is hereby extended;

181.3.4 the Applicants are, terms of section 7(2)(c) of PAJA, exempted from filing an appeal in paragraph 14.1 of the Guidelines.

181.4 It is declared that the BEE Codes of Good Practice are applicable to applications for foreign film incentives.

181.5 The matter is remitted to the First Respondent to reconsider the decisions that have been reviewed and set aside in terms of paragraph 171.2 of this judgment.

181.6 The First and Second and Third Respondents are ordered to pay the Applicants' costs, jointly and severally, including the costs of two counsel on Scale C.

NDITA, J

Appearances

For the Applicants

Advocate Geoff Budlender SC

Advocate Mitchell De Beer

Instructed by

Barry Adams Attorneys (Barry Adams)

For the Respondent

Advocate Thembalihle Sidaki

Instructed by

State Attorney (T Lombard)