IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.: 81785/2017

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

15/12/2022

In the matter between:

MELLOW SHARK PRODUCTIONS (PTY) LTD (Reg. No: 2016/262280/07)	Applicant
And	
THE MINISTER OF TRADE AND INDUSTRY	First Respondent
FRANCOIS TRUTER (DTI CHIEF DIRECTOR: SERVICES SECTOR)	Second Respondent
NELLY MOLOKWANE (DTI DIRECTOR: FILM AND TELEVISION)	Third Respondent
HOLLARD FILM GUARANTORS (DIRECTOR: P M RALEIGH)	Fourth Respondent

JUDGMENT

van der Westhuizen, J

[1] This matter reeks of Alice in Wonderland.[1] Alice representing Joe Soap and Wonderland, epitomising the ultimate bureaucracy and the inevitable labyrinth of approbating and reprobating.

[2] The applicant commenced proceedings against the respondents by way of application. The relief the applicant sought in its application was primarily specific performance in respect of the terms of an alleged agreement entered into by the applicant with the first respondent. After the exchange of pleadings, it became apparent that a major dispute of facts presented. The matter became prone to be case managed. It was allocated to me for that purpose. During the case management process, a directive was issued directing the applicant to file a statement of claim to which the respondents were to plead their case in the form of a response. The matter would then be referred to trial for the receiving of oral evidence.

[3] The matter was subsequently set down for trial during November 2021. However, the trial could not be finalised due to the first respondent's second witness becoming indisposed. Initially the matter stood down for a day or two to enable the witness to recover. Unfortunately that did not occur and the trial was postponed. When the trial recommenced during April this year, it could not be finalised within the allocated time that was set by agreement between the parties. The hearing of closing argument was postponed to enable the record of the oral evidence to be transcribed and the parties to supplement their respective heads of argument that were already prepared and filed. The oral evidence was to be included in those heads of argument. Closing argument was eventually presented during November 2022. Judgement was reserved.

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[11] Written by Lewis Carroll

[4] The applicant led the evidence of two witnesses. One was the director of the applicant and the second witness was led as an expert witness. Due notice of the leading of expert evidence was given as well as a summary of such evidence. A condonation application was launched in respect of the lateness of the tendering of the expert summary. Condonation is to be granted. The respondents had the opportunity to cross-examine the witness and indeed did cross-examine him. They suffered no prejudice.

[5] On behalf of the first respondent two witnesses were called, one of which was the third respondent. The other an employee of the first respondent in the relevant department. Both were employees of the first respondent.

[6] The fourth respondent was the guarantor for the due compliance of the obligations on the part of the applicant, arising from the aforesaid agreement. It is common cause that the purpose of the fourth respondent's participation in the relationship between the applicant and the first respondent arose from the agreement between the applicant and the first respondent, and was to "protect" the interests of the first respondent. No relief was sought against the fourth respondent.

[7] During the leading of oral evidence, and in particular that on behalf of the respondents, the matter evolved from a consideration of the cause of action for specific performance to an apparent review application.

[8] The relief sought in the notice of motion dated 29 November 2017 reads as follows:

> "1. *That the 1st RESPONDENT is ordered to pay to the Applicant the amount of R625 694.60, in respect of the 1st production Milestone of the film "Deadly Ocean" reached on 5 January 2017;*

2. *That the 1st RESPONDENT is ordered to pay to the Applicant the amount of R625 694.60, in respect of the 2nd production Milestone of the film "Deadly Ocean" reached on 5 January 2017;*

3. *That the 1st RESPONDENT is ordered to pay to the Applicant the amount of R625 694.60, in respect of the 3rd production Milestone of the film "Deadly Ocean" expected to be reached by 30 March 2018, as soon as the goal is reached and confirmed by Hollard Film Guarantors;*

4. *That the 1st RESPONDENT is ordered to pay to the Applicant the amount of R625 694.60, in respect of the 4th production Milestone of the film "Deadly Ocean" expected to be reached by 30 March 2018, as soon as the goal is reached and confirmed by Hollard Film Guarantors;*

5. *That the 1st RESPONDENT is ordered to pay to the Applicant the amount of R625 694.60, in respect of the 5th production Milestone of the film "Deadly Ocean" expected to be reached by 31 May 2018, as soon as the goal is reached and confirmed by Hollard Film Guarantors;*

6. *That the 1st RESPONDONT is ordered to pay the Applicant the amount of R150 000.00 in respect of repayment for the HOLLARD Completion Bond;*

7. *That the 1st RESPONDENT is ordered to, in terms of Prayers 1, 2, 3 and 6 to pay interest at a rate of 10% per annum on the amounts form the date of the order to the date of payment.*

8. *Costs of Suit on a scale as per Attorney and Client."*

[9] From the foregoing passage it is clear that specific performance was sought. This was restated in the statement of case that was subsequently filed. There was no change in the applicant's approach in respect of its cause of action.

[10] However, the first respondent in its initial answering affidavit (which was only filed during December 2018) took the stance that:

(a) The application was premature in view thereof that the Department of Trade and Industry (dti) had not made a final determination on the applicant's incentive claim;

(b) That on 29 October 2018 the provisional incentive grant was cancelled due to alleged non-compliance with the requirements stipulated in respect thereof;

(c) That the claim by the applicant was rejected in terms of a letter dated 19 November 2018;

(d) That the applicant could have recourse to appeal the decision of the DTI.

[11] In its response to the applicant's statement of claim, the first respondent defined the issue in dispute as follows:

> "*The issue in dispute centres on whether the Department of Trade and Industry ("dti") justifiably terminated the incentive grant, which the applicant had applied for (the grant).*" (My emphasis)

[12] At best for the respondents, their definition of the dispute amounted to an allegation that they had the right to renege on their obligations in terms of the agreement.

[13] The applicant gave notice of an intention to amend its notice of motion by the deletion of all the prayers and the substitution thereof with new prayers. The effect of the intended amendment was the addition of five new prayers to the initial prayers that were to be reinserted: the first two new prayers related to declaratory orders; the third prayer was an order for the amendment of the timeframe to 6 months from the date of compliance by the respondents to make payment of milestones 1, 2, 3, and 4 for completion of the film; the fourth related to an order that all the parties should perform fully in terms of the agreement; and the fifth order was an alternative to prayers, 2, 3, 4 and 9, wherein an order was sought that the agreement was fulfilled after performance of and compliance to all parties obligation as contained in prayers 5, 6, 7, 8, 10 and 11 in terms of milestone 4.

[14] There was no objection nor opposition by the respondents to the intended amendment. From the papers filed on CaseLines, it did not appear whether an application for the amendment was moved, or whether an amendment to the notice of motion was effected in the prescribed manner. In any event, none of the intended new prayers made provision for the matter to be reviewed in terms of Promotion of Administrative Justice Act, 3 of 2000 (PAJA). It remained a contractual dispute.

[15] There is no merit in the respondents view, and submissions, that this matter related to a review application. It is trite law that an Organ of State, or other juristic entity, could not review its own decision, and could only do so in specific circumstances, none of which were present in this instance. The respondents did not take the point that the applicant should have applied for a review of the first respondent's "decisions" referred to in its response to the applicant's statement of case.

[16] This matter solely relates to the agreement and the first respondent's alleged reneging thereon. It remained a contractual dispute, despite the first respondent's protestations that no agreement or contract was

concluded. The first respondent in terms conceded the conclusion of an agreement by the language it used in its correspondence with the applicant, in its affidavit evidence and written response to the statement of claim. In that regard, in its letter of 29 October 2018, the applicant was informed that the "provisional approval" was cancelled. An approval can only be withdrawn, or not made final. An agreement or contract is cancelled. Furthermore, in its initial answering affidavit the first respondent repeated that the "provisional approval" was cancelled. Again, and in its written response to the statement of claim, the first respondent defined the issue of dispute as quoted above. The word "terminated" is used. Again, a "provisional approval" is either withdrawn, or not made final. It is not terminated. That concession puts paid to the issue of whether an agreement or contract was concluded between the applicant and the first respondent. I shall deal with the issue of "provisional approval" later.

[17] It may be prudent at this stage to interpolate and consider the response by the first respondent that the applicant had recourse to appeal proceedings. This application relates to a claim for specific performance in the form of payment of monies due in terms of the agreement, not to a "dispute" relating to a "decision" by the first respondent. The non-compliance by the first respondent of its obligations did not constitute a "decision" that could form the subject of an internal appeal. That approach was a red herring. An apparent attempt at contriving a defence to the claims for payment. It failed.

[18] During or about 2015/2016, a plan was developed to create a three part television series with a working title "Deadly Ocean". It would relate to the sharks in the ocean and the obvious menace they present. In that regard, an application was submitted in terms of the South African Film & Television Production and Co-Productions Incentive established by the South African Government for the granting of a rebate in terms of that Incentive. The total production budget of the intended production was expected to be upwards of an amount of R2.5 million.

[19] The purpose of the said Incentive was to grow the Film and Television Production industry in an effort to stimulate economic development, job creation and its role in facilitating dialogue for national building as stated in the Programme Guidelines under the heading: Description of the South African Film and Television Production Incentive. The following was stated:

> *"The South African Film and Television Production Incentive provide for financial assistance to local productions in the form of a rebate of up to 35% of the Qualifying South African Production Expenditure (QSAPE). No cap will apply for this rebate."*

[20] The Incentive was to be administered for a period of 3 years, until 2017.

[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 Guidelines were cast in stone and could not be deviated from. This view is gainsaid by the disclaimer included in the said document which reads as follows:

> *"This 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 incentives programme the dti reserves the right to amend the guidelines as it deems appropriate."*

[22] The word "guideline" is defined in the South African Concise Oxford Dictionary as follows;

> *"guideline n. general rule, principle or piece of advice"*

[23] None of the terms defined above provide any support for something being cast in stone. It was a mere guide to the application: what it should include and how it is to be assessed. The fact, as indicated in the aforesaid disclaimer, that the dti reserved the right to amend the programme guidelines as it deemed appropriate, is indicative of nothing being fixed or set. In terms of the Guidelines an amendment thereto could have retrospective effect. It was pliable. A deviation, within the appropriate bounds, from the guideline may be appropriate depending on the circumstances. The respondents approached the applicant's application on that basis. This was evidenced by the various meetings and discussions that followed on the "provisional" approval of the applicant's application and the first respondent's requests for further documentation, redrafting of others or amendment of others. If the Guidelines were rigid as advocated for, non-compliance would result in refusal of the application for the grant of the Incentive.

[24] If the Guidelines were not guidelines proper, the document would in all probability have read: "Requirements for the Grant of the Inventive". Non-compliance with the requirements would result in non-approval.

[25] Further in this regard, if the "final" approval would only occur after payment of all the milestones as testified on behalf of the first respondent, the dti could at any stage "withdraw" approval resulting in a production failing with enormous financial repercussions, job losses and the like. That could never have been the intention with the Programme Incentive. This is borne out in note 3 of form A which was prescribed for an application for the grant of the Incentive. That note reads as follows"

"*The provisional approval is subject to the availability of funds.*"

[26] The respondents made heavy weather of the "provisional approval" of the applicant's application. The respondents submitted in evidence that the "provisional approval" only became "final" once all claims were processed and paid. There is no merit in that approach. Insofar as the

approval of the application is "provisional", it is at best a conditional approval depending on the availability of funds as per note 3 quoted above.

[27] That is further borne out under the rubric: Eligibility Criteria, sub-heading: Commencement. The first bullet point reads as follows:

> *"Principal photography should not commence until an approval letter has been received from the dti."* (My emphasis)

[28] What stood to be determined was whether there was compliance with the guidelines, or at least substantial compliance therewith.

[29] Furthermore, the Guidelines do not provide for a "final approval" to be granted or obtained. This was a further indication that the "provisional approval" related to the availability of funds and nothing more.

[30] The rubric: Application Process, refers to four forms, namely a Form A, in respect of an application for provisional approval; a Form B, in respect of Confirmation of Commencement of Principal Photography; a Form C, in respect of a Revised Completion Date; and a Form D, in respect of Claim (Application for Payment). Those forms relate to different issues:

(a) Form A - deals with the documents to be submitted to support an application for the grant of the Incentive;

(b) Form B – deals with the documents to be submitted to confirm commencement of principal photography (Specific forms to accompany the claim are listed. None relating to expenditure);

(c) Form C – deals with where there would be a revised completion date where that date would differ from the initial indicated date;

(d) Form D – deals with when a claim is submitted in respect of completion of the production with an end product and the documents to support such claim for payment.

[31] In terms of clause 4.2 of the Guidelines, it is a formal requirement that the applicant for the grant of the Incentive is a Special Purpose Vehicle (SPV) specifically incorporated for the purpose of the production of the film or television project. It was common cause that the present applicant was such incorporated SPV.

[32] Further, in terms of clause 14 of the Guidelines, the Incentive rebate is disbursed on completion of the production or it may be paid after reaching certain milestones. Where an applicant wished to make use of the payment method after the completion of certain milestones, there was a formal requirement that a completion bond must be acquired. In particular, the applicant's expert witness, Mr Raleigh, who was the head of the fourth respondent, testified that the requirement of a completion bond was included in the Guidelines on his insistence, in order to protect the first respondent. He further testified that he assisted in drafting the Guidelines. That evidence was not seriously disputed by the respondents. The fourth respondent was established for the very purpose of providing the requisite completion bond. The fourth respondent was one of six entities listed in the Guidelines from which the first respondent would accept completion bonds.

[33] Further in that regard, the applicant entered into a completion bond with the fourth respondent and acquired the requisite bond. This occurred on 28 November 2016. This was not disputed by the respondents. It was common cause that the applicant obtained a completion bond. The respondents sought to quibble about the issue of the payment of the premium. The completion bond was entered into between the applicant and the fourth respondent. The first respondent was not a party to that bond agreement, and would never be. Whatever agreement was concluded between the applicant and the fourth respondent in respect

of the payment of the premium, whether it was to be deferred, or whether a loan would be granted in that regard, in no way affected the first respondent. The fourth respondent confirmed that a completion bond was concluded and that it existed. That was confirmed in writing by the fourth respondent on 5 January 2017.

[34] The Guidelines stipulate that where use was made of the milestone payment method, the cost of the completion bond, which could be as high as R300 000.00, would be subsidised as follows:

(a) 70% of the cost of the completion bond will be subsidised for productions between R2.5 million and R6 million;

(b) 50% of the cost of the completion bond will be subsidised for productions between R6 million and R10 million;

(c) For productions over R10 million there would be no subsidy.

In the present instance, the production cost fell within the second category mentioned above. Accordingly, a subsidy was payable in the amount of R150 000.00

[35] Further in respect of the disbursement of the rebate, the Guidelines stipulate that the dti will verify the completeness of the claim/expenditure before payment is made. That stipulation does not permit the dti to revisit the approval once that was granted. All that was required was that the claim or expenditure has to be complete. I have already dealt with the issue of "provisional".

[36] Where, as in the present instance, claims were submitted after the reaching of certain milestones, all that was required was that the dti was to verify the completeness of the claim for that specific milestone. The Guidelines provided for the following milestones:

(a) First milestone - Confirmation of completion bond: 20% payment;

(b) Second milestone – Start of principal photography: 20% payment;

(c) Third milestone – Completion of principal photography: 20% payment;

(d) Fourth milestone – Start of post-production "picture lock": 20% payment;

(e) Fifth milestone – Submission of form D "clean form": 20% payment.

[37] As recorded earlier, the completion bond was entered into and confirmation thereof was provided by the fourth respondent. The applicant subsequently submitted a claim for the payment of the first tranche relating to the first milestone. The fourth respondent confirmed that the milestone was achieved and that payment in respect thereof could be made. In that regard, all that the first respondent was required to do, was to verify whether the completion bond existed. That was confirmed and certified by the fourth respondent. There was no reason why the first payment of 20% of the Incentive could not be made. Yet the first respondent did not make the particular payment. Long after the fact, the first respondent sought to quibble that the payment could not be effected, as there was no "proof of payment of the premium". In my view, that was not a legitimate excuse not to make the payment - confirmation of the existence of the completion bond was provided. That could easily be verified.

[38] The second milestone, that of commencement of the principal photography, was achieved and in that regard, confirmation thereof was provided on 5 January 2017. The fourth respondent certified that the principle photography had commenced and that the completion bond had been concluded. The claim for payment of the second milestone was submitted by the applicant also on 5 January 2017. There existed

no reason for not making payment of the second tranche. Also in this regard, the first respondent sought to escape its obligation to make payment for other spurious reasons.

[39] In view thereof that both the first and second milestones were achieved and confirmed, the verification of the "completeness" could therefor easily be ascertained, simply by considering the fourth respondent's certification thereof. No legitimate excuse befell the first respondent not to comply with its obligations in respect thereof. The fourth respondent was in effect the agent of the first respondent and no reasons were advanced on behalf of the first respondent that it should or could doubt the fourth respondent's *bona fides* in certifying the achievement of the first two milestones. The achievement of the first two milestones were factual in nature and easily verifiable. Although the first respondent committed to payment in respect of milestones 1 and 2 on 2 May 2017, no payment was forthcoming.

[40] The first respondent sought to rely on the documentation required to be supplied in respect of a claim, as per form D. As recorded earlier the claims in respect of milestones 1 and 2 required no expenditure report. Those milestones related clearly to factual issues, i.e. the conclusion of a completion bond, and the commencement of principal photography – no "proof" of expenditure was required in that regard. None of the other documents listed in clause 13.4 of the Guidelines find any application in respect of milestones 1 and 2.

[41] It follows that the first respondent was obliged to make the two payments on the submission of the respective claims in regard thereto. It failed to comply with its obligations resulting in the entitlement to claim specific performance for payment thereof.

[42] The parties were involved in many discussions and meetings following on the applicant's request for payment of milestones 1 and 2, and after the commencement of litigation in that regard. During one of those

discussions and/or meetings, post the commencement of litigation, the first respondent requested the applicant to submit the claims for milestones 3 and 4 and to resubmit the claims for milestones 1 and 2. The applicant obliged and submitted the requested claims for those milestones. Unsurprisingly, the first respondent did not react positively thereon.

[43] As recorded earlier, milestone 3 related to the completion of Principle Photography. That milestone was reached on or about 30 March 2018 - a circumstance of factual nature and easily verifiable. No report of expenditure in that regard was required. Nor did any of the other documents listed in Form D apply.

[44] Likewise, milestone 4 related to the Start of Post-production. This milestone was achieved on or about 30 March 2018. A fact easily verifiable. It did not involve the requirement of an expenditure report, nor did any of the other documents listed on Form D apply.

[45] It is to be noted that the submission of Form D was required only in respect on achieving milestone 5, as recorded earlier. The Guidelines clearly stipulate that on achieving milestone 5, Form D was to be submitted. Only then was an expenditure report and other documents listed on form D required.

[46] It follows that the first respondent was obliged to "verify" the completeness of milestones 3 and 4 and which was easily verifiable as those two milestones were factual in nature.

[47] The first respondent was consequently obliged to make payment in respect of the achieving of milestones 1, 2, 3 and 4 on the submission of the claims therefor. However, the first respondent sought to reject the claims on 19 November 2018 – more than a year after commencement of the litigation and a month after the "cancellation" of the grant of the Incentive on 29 October 2018. None of the "reasons" advanced for the

rejection and cancellation were valid, as none of those "reasons" applied in respect of the claims for achieving milestones 1, 2, 3 and 4 as found earlier in this judgment.

[48] It is further to be noted that during the cross-examination of Mr Raleigh, it was conceded on behalf of the first respondent that the achievement of the said milestones was not in issue, but that a particular aspect of the application for the Incentive, i.e. the issue of "connected party expenditure" was the real issue. There is no merit in that "dispute" as already indicated earlier in the judgment. It was totally irrelevant to those claims.

[49] Accordingly, the first respondent has no defence in respect of the payment of the achieving of milestones 1, 2, 3 and 4, either in terms of the Guidelines, or in law. It follows that the applicant was entitled to orders for the payment of the amounts due in respect of the first four milestones.

[50] The claim for the 50% subsidy in respect of the costs of the completion bond refers consideration. As recorded earlier, the said production fell within the range of between R6 million and R10 million. The cost of the completion bond in the present instance was R300 000.00 and was common cause. The first respondent was obliged to refund the applicant in the amount of R150 000.00. It failed to do so.

[51] It was testified on behalf of the applicant that due to the dilly-dallying of the first respondent, it was obliged to complete the production of the film at its own cost. Only the first episode reached a raw post-production level. That was offered to the first respondent. It was further testified on behalf of the applicant that due to the conduct of the first respondent, another production, by other producers in the USA, that related to the similar topic of the present intended production reached the marketing stage thereof and consequently the present production was overtaken by events. The horse had bolted. Accordingly, the fifth and final

milestone could not be achieved, i.e. the release to the first respondent of a final product. The applicant sought that payment of this milestone be allowed and that the amount be paid into the trust account of the applicant's attorney, pending finalisation of the end product and subsequent approval. There was no merit in this request in view thereof that other considerations would apply when considering such claim. This milestone has clearly not been reached and no claim lay in that regard. Accordingly, the applicant is not entitled to any relief in that regard.

[52] It is to recorded that most of the evidence presented, in the initial application and during the trial, related to issues that were irrelevant to the relevant considerations of this matter. Both the applicant and the respondents were at fault. On a purposive reading of the Guidelines, and in particular in respect of where there is a reliance on the milestone payment method, both parties missed the relevant and applicable principles that were to be considered by the court. Consequently, much court time and resources were wasted. Furthermore, as found earlier, no "decision" by the first respondent existed that could form the subject of an internal appeal. Valuable time, effort and resources were wasted in that regard for which the first respondent was to blame. It was a contrived exercise to circumvent its obligations in respect of the payment for milestones 1, 2, 3 and 4.

[53] There remains the issue of costs. On behalf of the applicant it was submitted that the first respondent should be mulct with an adverse costs order, in view of it reneging on its obligations in the manner as evidenced earlier. On behalf of the respondents a costs order was sought against the applicant. The applicant was substantially successful against the respondents and no reason exists why the costs should not follow the event. In my view, the applicant is entitled to a punitive costs order.

I grant the following order:

1. The first respondent is ordered to pay to the applicant the amount of R625 694.60 in respect of claim 1;

2. The first respondent is ordered to pay to the applicant the amount of R625 694.60 in respect of claim 2;

3. The first respondent is ordered to pay to the applicant the amount of R625 694.60 in respect of claim 3;

4. The first respondent is ordered to pay to the applicant the amount of R625 694.60 in respect of claim 4;

5. The first respondent is ordered to pay to the applicant the amount of R625 694.60 in respect of claim 6;

6. The first respondent is ordered to pay interest at the rate off 10% per annum on the amounts appearing in prayers 1, 2, 3, 4, and 5 above;

7. The first respondent is to pay the costs of this application, including any costs that may have been reserved, on the scale as between attorney and client.

C J VAN DER WESTHUIZEN
JUDGE OF THE HIGH COURT

Heard on:	1 - 9 November 2021 11 & 12 April 2022 24 November 2022
On behalf of Applicant:	J Brenkman
Instructed by:	Eugene Kruger Attorneys
On behalf of Respondent:	Ms L Mboweni M Tjiana
Instructed by:	The State Attorney
Judgment delivered:	15 December 2022