IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case no: 15216/2017

In the matter between:

ZEST POLYURETHANES (PTY) LIMITED Applicant

and

THE MINISTER OF TRADE & INDUSTRY Respondent

Heard: 4 February 2019

Delivered: 20 February 2019

JUDGMENT

MYBURGH AJ:

Introduction

[1] The applicant seeks the following relief:

"*1. That the decision of the dti, dated 20 June 2016, not to pay the applicant the approved grant amount, or any amount at all ("the decision of the dti"), be reviewed and set aside, in terms of section 8(1)(c) of the Promotion of Administrative Justice Act 3 of 2000 ("the PAJA");*

2. That the decision of the dti be remitted to the dti with the following directions, in terms of section 8(1)(c)(i) and (d) of the PAJA:

2.1 the applicant's failure to state the correct number of employees in its application for the MCEP grant (which was subsequently correct) is not in itself fatal to the application;

2.2 the dti erred in finding that the applicant's number of employees in any year of the incentive period was less than the applicant's number of base-year employees at the date of the application;

2.3 the dti is directed to determine and pay within two months of the date of the order the correct amount of the grant that is payable to the applicant in accordance with its claims submitted on 14 March 2014 and 30 April 2015.

3. That the costs of the application be paid by the dti, should it oppose the relief sought".

Preliminary objections

[2] The respondent (the dti) raised three preliminary objections to the application. Firstly, it took issue with the manner in which it was cited, secondly it objected to the application on the basis that it had been instituted in excess of 180 days since the impugned decision, and thirdly it contended that the Manufacturing Competitive Enhancement Programme ('the MCEP') was no longer in operation and hence the dti was not in a position to give effect to the relief sought in the application.

[3] The objections, which are of a technical nature, did not feature prominently when the matter was argued as the respective counsel, quite rightly, remained focused on the merits of the application. However, to the extent necessary:

1. I condone the incorrect citation of the respondent and grant its correction from the *"Department of Trade and Industry"* to the *"Minister of the Department of Trade and Industry"*";

2. I find that the delay was explained, excusable and the 180-day period is accordingly extended and;

3. that the suspension of the programme does not preclude granting the relief sought as the application relates to a decision made at a time when the programme was operative.

The facts

[4] The material facts are, in essence, common cause.

[5] The applicant carries on the business of manufacturing and marketing polyurethane coatings and mesh, and is situated in Montague Garden, Cape Town.

[6] In 2012 (or thereabouts) the dti established the MCEP. In the *'programme guidelines'*, under the heading "*Programme Description*", it is stated that:

> "*The objective of the incentive is to promote enterprise competitiveness and job retention*".

[7] It bears mention, at the outset, that the grant was not dependent on an applicant employing a certain number of people. However, it did require an approved applicant to maintain its level of employment after approval of the grant. The retention of employment levels was thus more akin to a resolutive condition, or a secondary, rather than a primary purpose. However, nothing turns on this nuance.

[8] The grant provided that an applicant could seek the disbursement of the grant in two payments and these claims would be made by way of the submission of a particular claim form, along with certain documents.

[9] The programme guidelines also provided for an appeal process. However, it was agreed by counsel for the parties that the applicant was not precluded from seeking relief on the basis that an internal appeal had not been exhausted.

[10] On 10 April 2013, the applicant submitted its application for the grant, on 28 June 2013 it was approved and on 18 July 2013 the applicant was notified of the approval. On 23 July 2013 the applicant signed and returned the requisite letter of acceptance to the dti.

[11] On 15 September 2013, the applicant commenced with commercial production utilising the first batch of equipment purchased and the following day it notified the dti of the commencement. On 24 February 2014, the applicant paid R1 162 050.00 to the suppliers of the first batch of equipment.

[12] On 14 March 2014, the applicant, through Sasfin, submitted its first claim to the dti. Mr Johann Juan van Tonder ('Van Tonder'), the financial manager of the applicant, explained what transpired:

> "*During the process of preparing the first claim form, Sasfin identified what appeared to be a discrepancy in the applicant's employment numbers and queried whether the applicant's employment numbers had increased. I confirmed that they had not. The difference between the applicant's employment numbers as per its Employment Equity Report (and the original application form), on the one hand, and the formula annexed to the programme guidelines, on the other hand, was identified at this time. I informed the applicant's independent auditors, MGI Bass Gordon GHF of the discrepancy, because they would need to clarify the position in their factual finding report.*
>
> *As required by the programme guidelines, the claim form was signed by both the applicant and the independent auditors, MGI Bass Gordon GHF. It was accompanied by a first factual findings report by MGI Bass Gordon GHF, dated 11 March 2014. It was also accompanied by a letter from MGI Bass Gordon GHF relating to the applicant's employment information, dated 11 March 2014. …*
>
> *The first claim form sets out the employment numbers at the date of the first claim as follows …*. (A schedule states the correct total to be 59.)
>
> *Paragraph 24 of the first factual findings report relates to the applicant's employment numbers at the date of the first claim. In this regard, the report confirms the employment numbers as set out in the (first) claim form as follows:*
>
> > *'The total number of employees differentiating between full-time vs. seasonal employees and total hours worked for the claim period agrees to the underlying wage and payroll records.'*

Paragraph 25 of the first factual findings report relates to the applicant's (base year) employment numbers at the date of the application. In this regard, the report states as follows:

> *'Base employees as per application form: 81*
>
> *Please refer to enclosed letter, '**employment confirmation**' which explains that the employee numbers in the application were overstated and should have been as follows:*
>
> *Permanent employees: 21*
>
> *Full-time equivalent of temporary employees: 28*
>
> ***Corrected base employees: 49***
>
> *The letter, '**Employment confirmation**' set out the reasons for the error highlighted above*".

The letter relating to the applicant's employment numbers (referred to in the factual findings report as the 'employment confirmation' letter) states as follows:

> "*When the Manufacturing Competitiveness Enhancement Programme (MCEP) application for Zest Polyurethanes (Pty) Limited ('the Company') was submitted, an Employee Equity Report was used to determine the number of employees by the Company's external service provider assisting with the application – as opposed to the actual payroll information as at that date.*
>
> *The number of the employees stated as permanent on the Employee Equity Report indicated the total amount of employees employed during the two year period between 01/10/2010 - 30/09/2012 and <u>did not account for employees leaving the company during the period</u>, resulting in the number of permanent employees being significantly overstated in the application.*
>
> *We confirm that based on our review of the payroll records provided to us, that the relevant employee details of the Company were as follows:*

- *As at 28/02/2013 Zest Polyurethanes (Pty) Ltd had a total of 49 full time equivalent employees, being 28 permanent staff and full time equivalent of 21 temporary staff members (54 428 hours at 1920 equivalent hours)*
- *As at 28/02/2014 Zest Polyurethanes (Pty) Ltd had a total of 59 full time equivalent employees.*

We, MGI Bass Gordon GHF, as the Independent Reviewers of Zest Polyurethanes (Pty) Ltd, confirm that the entity currently has more full time equivalent employees than when the application was submitted"'. (Emphasis supplied)

[13] Regarding Van Tonder's setting out of the position and the MGI Bass Gordon GHF letter, the following is significant:

1. The applicant only became aware of what was clearly an inadvertent error, on 11 March 2014 when it was pointed out by Sasfin three days before the submission of the first claim.

2. On submission of the first claim on 14 March 2014, the applicant provided the dti with a full explanation of the error including the reasons why it was made. The applicant also corrected the error.

3. On receipt of the first claim, dti was thus able to consider the claim with reference to the true position (and not the incorrect position) regarding the applicant's retention of employees.

4. In the circumstances, by the time the dti made the impugned decision, any inaccuracy in the employee numbers had been rectified and hence it cannot be said that it was in any way prejudiced by the mistake on the part of the applicant.

5. The error had no impact on the approval of the application for the grant. It was tentatively suggested that, increased employment figures, on application, would advantage an applicant *vis-à-vis* other applicants. However, there was no case made out that it was, in fact, the position and in the absence of that, it remains a speculative proposition.

[14] Regarding the number of employees at the time of the application for the grant, the dti contended that, due to the time lapse, it had no way of verifying that this was indeed the case. This submission does not assist the dti for two reasons:

1. In the first instance, the dti could not conclusively verify the base number of employees at the time of application for the grant by way of an inspection of the premises and a head count of employees after application for the grant had been made. At best and inspection of the premises was one of the things the dti was empowered to do to verify the information provided by the applicant. The base employment figures had to be calculated with reference to a period prior to the submission of the application rather than the position at a particular point in time. The base employment figures could thus only be verified with reference to the company records for this period and there was no indication that the

lapse of time, in this instance, precluded an effective verification by way of an inspection of the premises and the company records.

2. In the second instance, the lapse of time cannot be laid at the door of the applicant. It was of the dti's making. The dti knew of the correct position on 14 March 2014, eight months after the approval of the grant and on receipt of the first claim. After that the dti took more than two years to make the impugned decision despite a concerted effort by the applicant to engage with it regarding the matter. The question must be asked what the applicant was to do in the face of an unresponsive dti.

[15] The first claim was not paid, and neither was the second claim, which was submitted on 30 April 2015. By the time of the second claim, the applicant had spent another R1 235 180.00 for the rest of the equipment which brought its expenditure to the full R2 250 000.00 it had committed to invest. However, it did not have the benefit of the grant of R900 000.00 for which it had applied and which had been approved by the dti.

[16] A further but very minor error, in paragraph 25 of the Second Factual Findings Report of MGI Bass Gordon GHF, was identified when preparing the application. However, this has no impact on the determination of this matter.

[17] On 28 October 2015 the dti suspended the MCEP with immediate effect. However, the suspension specified that "*the Department will continue to honour all*

approved applications" and hence the suspension has no relevance when deciding this matter.

[18] Following the submission of the two claims:

1. On 24 February 2016, 10 months after the submission of the second claim Van Tonder emailed the dti requesting feedback as to the status of the claims. The dti did not respond.

2. On 1 March 2016, Angelique Massey of Sasfin sent a follow-up email to the dti and on the same day, Phololo Morolo of the dti responded stating that "*The client received a letter sometime last year regarding the project. I will try locate a copy to that effect*".

3. On 25 April 2016, a month later and nothing heard of the dti, Angelique Massey sent a follow-up email to Phololo Morolo and then on 4 May 2016 she sent a further follow-up email. Nothing was forthcoming.

4. On the same date, Van Tonder addressed an email to Phololo Morolo. In this email he recorded that the applicant had not received any payment or explanation from the dti. At this stage it was already more than a year since the submission of the second claim.

5. On 10 May 2016, Angelique Massey addressed another email to Phololo Morolo asking if the dti had found the letter the latter she had referred to in her email of 1 March 2016. Phololo Morolo did not reply.

6. On 11 May 2016, Magedeline Thwala of the dti responded to Angelique Massey. Her response contained nothing of consequence.

7. On 14 June 2016, more than a month later, Angelique Massey addressed a letter to Hawie Viljoen of the dti, again seeking feedback as to the non-payment of the claims.

8. On 15 June 2016 Hawie Viljoen replied. However, his email is little more than a request for more time.

9. On 1 July 2016, Angelique Massey, having heard nothing despite the many assurances that the applicant's query was being attended to, emailed the dti again.

10. Finally, on 11 July 2016, Minah Sihlangu of the dti replied, stating that: "*As per our records claims were not paid due to a reduction in employment. Please see attached letter which was sent to Johann Van Tonder (johannvt@duran.co.za) on the 28th June 2016*" ('the letter'). On the same day, Angelique Massey pointed out that the email address had been spelt incorrectly, and in all likelihood this is the reason why the email, with its attachment, had not been received.

[19] The decision under review is encapsulated in the letter that reads as follows:

"***RE: MANUFACTURING COMPETITIVENESS ENHANCEMENT PROGRAMME (MECP)***

We are in receipt of your claim dated 14/03/2014. Please note that your claim does not meet the requirements of the Manufacturing Competitive Enhancement Programme (MCEP) and is therefore not considered for payment since the [should read there] *was a reduction in number of jobs:*

1. *Any reduction in total number of employees, as compared to average employment levels for a twelve (12) month period prior to the date of application, will disqualify the applicant. Any claims not yet evaluated or paid will immediately lapse and no obligation will accrue to the dti on such claims. Para 3.3.3.2*".

[20] The letter was sent to the applicant two years and three months after the submission of the first claim and one year and three months after the dti inspected the applicant's premises.

[21] The indifference of the dti in dealing with the queries of the applicant was unfortunate, given that the applicant had expended a substantial amount of money and geared up its operations expecting that 40% of its capital expenditure would be covered by the grant.

[22] Counsel for the dti mentioned that the grant was gratuitous and that this is a relevant consideration. In my view it is not.

[23] Cachalia, JA, in the *National Lotteries Board* case[1], which involved a denial of an application for a grant, held as follows:

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[1] *National Lotteries Board v SA Education and Environment Project* 2012 (4) SA 504 at 516H-517A.

> "*[39] I mentioned at the outset that the funds of the board are aimed at supporting socially worthy projects and, that for the years under review, the board failed to disburse R6 billion. The rigid and inconsistent application of the guidelines, at least partly, explains why this has happened. Equally distressing is that the board does not appear to understand its mandate properly. Mr Nevhutanda, the chairperson of the board and the deponent to its answering affidavit, seems to hold the view that grants given by the board are 'gratuities,' which are allocated at the board's discretion. He is wrong. The board holds public funds in trust for the purpose of allocating them to deserving projects. And it must ensure that these funds are allocated to those projects, provided of course that they meet the necessary requirements. The funds do not belong to the board to be disbursed as its largesse*".

[24] The grant is not gratuitous. The MECP programme is an initiative of the executive, with a statutory underpinning that serves a national imperative to enhance competitiveness. The applicant at all stages of the process, and particularly after approval of its application, acquired rights to be treated in an administratively fair manner.

Error not fatal

[25] The applicant's inadvertent error, when applying for the grant, had no impact on the approval (or otherwise) of the grant. A case was not made, that overstating the employment numbers advantaged the applicant. It was not required of an applicant for a grant to employ a certain minimum number of people. The error was thus not material as the purpose of the grant was achieved despite its making.

[26] Regarding the making of the error, the facts of the *National Lotteries Board* case[2] are similar.

[27] It is significant that the case involved an application for a grant, rather than (for example) an application for a fishing quota where the making of an error on application has ramifications *vis-à-vis* the other applicants. In a fishing quota matter, different applications are weighed up against each other and applicants (who compete *inter se*) are allocated a percentage of a finite total catch. Thus, by making a mistake an applicant can steal a march on the competing applicants. Furthermore, any subsequent adjustment of one applicant's quota means that the quotas of other successful applicants need to be adjusted. This situation, which is different to that of the present matter, calls for a strict approach to mistakes.

[28] It is instructive to refer to *National Lotteries* case in some measure of detail. Cachalia, JA, discussing the correct approach to the application of guidelines states the following:

> "*[7] As I mentioned at the beginning, the disputes over the three applications all concern how the DAs applied the guidelines when declining them. The board submits that its guidelines are clear, not unduly burdensome and must be complied with to the letter. Counsel for the board urged us to have regard to the fact that because the board processes large numbers of applications, which is an onerous administrative responsibility, it cannot be expected to investigate every application that does not adhere strictly to the guidelines. Moreover, counsel for the board submitted, the board's staff establishment is limited and its employees are constrained to apply the guidelines strictly. The board thus*

[2] *National Lotteries Board* (*supra*).

contends that by refusing to consider the three applications here in issue, it was merely applying the guidelines. It is therefore necessary to consider the status of the guidelines issued by the DAs and how they are meant to be applied within the context of the Act's statutory framework. …

[9] So, the Act and the applicable regulations make it clear that the requirements for applications are to be found in the regulations. This does not mean that DAs may not develop guidelines of the sort here in issue to assist them in making their decisions. Indeed, because the grant or refusal of an application involves the exercise of a discretion, our courts have recognised that it is prudent for decision-makers to apply guidelines or general criteria to assist them with this task. And, provided that these criteria are compatible with the enabling legislation, the only constraint is that they may not be applied rigidly or inflexibly in a particular case. (The reference here is to *MEC for Agriculture, Conservation, Environment & Land Affairs v Sasol Oil (Pty) Ltd* 2006 (5) SA 483 (SCA) [2006] 2 All SA 17, para 19.) *For if they are applied in this manner the decision-maker elevates the guideline to an immutable rule and thereby fetters its discretion, which it may not do.* (The reference here is to *Foodcorp (Pty) Ltd v Deputy Director-General, Department of Environmental Affairs & Tourism: Branch Marine & Coastal Management* 2006 (2) SA 191 (SCA) [2005] 1 All SA 531, para 9.)

[10] At the same time decision-makers must be consistent, particularly when dealing with large numbers of applications, as the board does. There is therefore a tension between having to apply a guideline strictly and consistently when making multiple decisions, and applying it flexibly in a particular case. It is this anxiety that motivates the litigation on the board's part – a point counsel for the board sought to drive home by insisting that a strict application of the guidelines is unavoidable. But this problem is inherent with multiple decisions, and does not relieve an administrator of the duty to consider each application individually and justify every decision. The law requires nothing less. And it is no defence for the board to attempt to relieve

itself of this duty by complaining that it has insufficient or inadequately trained staff to do this.

[11] That the guidelines in issue here in the main serve a useful purpose, and generally accord with the regulations, is not disputed. Their object is to ensure that moneys are disbursed only to grantees that are demonstrably capable of administering them for their intended purpose and also that applicants for funding are treated similarly. In addition they minimize the danger of fraud. When receiving an application for funding the decision-maker's mind must be directed to these purposes. In doing so, it is entitled to treat some aspects of the guidelines as peremptory requirements, such as that the financial statements of grantees be audited. For it would be untenable to insist on this requirement for some organisations, but not for others. However, it is not entitled to treat every departure from its literal prescriptions as fatal. Not even statutory formalities are approached in this way. The real question a decision-maker must ask itself is whether the object of the guidelines has been achieved. (The reference here is to *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) [2005] 2 All SA 108, para 22.) *If it has, then insignificant or technical instances of non-compliance should generally be condoned*".

[29] Thus, the making of the error was not fatal to the application for the following reasons:

1. The grant was of an uncompetitive nature and thus the correction of the mistake had no impact on other applicants for grants both at the approval stage and thereafter.
2. Base-employment level had no effect on the approval (or otherwise) of the grant.
3. The making of the mistake and its subsequent correction did not undermine the purpose of the grant.

4. The inflexibility of the dti in failing to consider the correction of the error amounted to a failure to exercise its discretion or an impermissible fettering of its discretion.

[30] It must be borne in mind that by the time the decision was made on 20 June 2016, the dti had known, for well over two years, that the true employment level at the time the applicant applied for the grant, was not 81 employees, but 49 employees. At all relevant times the dti was able to decide on the true facts, but for reasons not known, it appears to have elected not to do so. Thus, it cannot be said that the making of the error informed the decision. Rather, it was the failure, on the part of the dti, to work with what it had been told were the correct figures.

The law and its application to the facts

[31] The grounds upon which the applicant seeks to review and set aside the decision are that irrelevant considerations were considered, relevant considerations were not considered, and hence that the decision was so unreasonable that no reasonable person could have made it.

[32] The provisions the applicant relies on are sections 6(2)(e)(iii) and 6(2)(h) of the Promotion of Administrative Justice Act, 3 of 2000 ('PAJA') which read as follows:

"*(2) A court or tribunal has the power to judicially review an administrative action if –*

...

(e) the action was taken –

...

(iii) because irrelevant considerations were taken into account or relevant considerations were not considered.

...

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

[33] It was argued on behalf of the dti that this ground of review fails at the level of fact because the applicant had no automatic right to amend its base figures and that the dti was given a discretion to accept such correction or not.

[34] In my view, this submission does not have merit, for two reasons:

1. It is clear that the dti failed to exercise its discretion at all regarding the mistake. It did not consider the amendment or correction and did not decide to accept it or not. The dti cannot, after the fact, rely on new reasons.[3]

2. The dti simply ignored the correction, worked with the initial incorrect base figures (despite knowing that these figures were incorrect) and concluded that there had been a reduction in the number of employees.

[3] National Lotteries Board *supra* at 513 C
Jicama 17 (Pty LTD v West Coast District Municipality 2006 (1) SA 116 at 121 E – 122 D (where reference was made to Westminster City Council, Ex parte Ermakov [1996] 2 All ER (CA) at 315*h* – 316*d*)

3. If the dti had exercised its discretion regarding the correction, it would have said so when communicating its decision. It did not do so.

[35] In the circumstances, when the dti took the impugned decision, it did so with on the basis of irrelevant considerations (the incorrect figures) and failed to consider relevant considerations (the correct figures). It could also be said that the impugned decision was not rationally connected to the information before the decision-maker.

[36] The question that then remains is whether doing so was *'so unreasonable that no reasonable person could have so exercised the power'*.

[37] Counsel for the dti referred to the *Bato Star Fishing (Pty) Limited v Minister of Environmental Affairs and Tourism and Others* case[4],where the following was held*:*

"*[44] There was some debate in the supplementary heads filed by the parties as to the precise meaning of s 6(2)(h) of PAJA, which provides that, if a decision 'is so unreasonable that no reasonable person could have so exercised the power', it will be reviewable .... In determining the proper meaning of s 6(2)(h) of PAJA in the light of the overall constitutional obligation upon administrative decision-makers to act 'reasonably', the approach of Lord Cooke provides sound guidance. Even if it may be thought that the language of s 6(2)(h), if taken literally, might set a standard such that a decision would rarely if ever be found unreasonable, that is not the proper constitutional meaning which should be attached to the subsection. The subsection must be construed*

[4] 2004 (4) SA 490 (CC).

consistently with the Constitution and in particular s 33 which requires administrative action to be 'reasonable'. Section 6(2)(h) should then be understood to require a simple test, namely that an administrative decision will be reviewable if, in Lord Cooke's words, it is one that a reasonable decision-maker could not reach.

[45] What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend of the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of competing interests involved and the impact of the decision on the lives and well-being of those affected. Although the review functions of the Court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The Court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by the administrative agencies fall within the bounds of reasonableness as required by the Constitution. ...

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

person or institution with specific expertise in that area must be shown respect by the Courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a Court should pay due respect to the route selected by the decision-maker. This does not mean, however, that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a Court will not review that decision. A Court should not rubber stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker".

[38] Reference was also made to *Dumani v Naire and Another*[5], where the Supreme Court of Appeal held that:

"*The enquiry before this court is not whether the presiding officer was correct in his conclusion that Dumani was guilty on three of the charges. The main enquiry before this court is whether the presiding officer's decision is so unreasonable that no reasonable person could have reached it*".

[39] Applying the considerations enumerated above:

1. The touchstone is whether a reasonable decision-maker could reach the impugned decision.

2. Whether this is so or not depends on the peculiar facts, considering, *inter alia*, the nature of the decision and its impact on the lives and well-being of the people involved.

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[5] (144/2012) [2012] ZASCA 196; 2013 2 (SA) 274 (SCA); 2013 [2] All SA 125 (SCA).

3. The decision reject and not pay the claims of the applicant impacted severely on the applicant, which had made investments on the basis of the grant approval.

4. The decision had very real financial consequences for the applicant as a business and the people involved in the applicant in various capacities such as employees and owners.

5. All this called for a well-considered measured approach by the decision-maker. In this matter there is little evidence of that.

6. While a court must attain a balance and be careful not to usurp the powers of the decision-maker and arbitrate to itself superior wisdom, there is no danger of that in this case given the degree of unreasonableness on the part of the dti.

7. The decision speaks of a good degree of indifference as to its consequences. It was also based, at best, on an incomplete consideration of the facts. It was, in the words of Lord Cooke "*one that a reasonable decision-maker could not reach".*

Conclusion

[37] In the circumstances I find for the applicant and order as follows:

1. the decision of the dti, dated 20 June 2016, not to pay the applicant the approved grant amount, or any amount at all, is hereby set aside, in terms of section 8(1)(c) of the Promotion of Administrative Justice Act 3 of 2000 ("the PAJA");

2. the decision is remitted to the dti with the following directions, in terms of section 8(1)(c)(i) and (d) of the PAJA:

    2.1 the applicant's failure to state the correct number of employees in its application for the MCEP is not fatal to the application;

    2.2 the dti erred in finding that the applicant's number of employees in any year of the incentive period was less than the applicant's number of base-year employees at the date of the application;

    2.3 the dti is directed to determine and pay within two months of the date of the order the correct amount of the grant that is payable to the applicant in accordance with its claims submitted on 14 March 2014 and 30 April 2015.

3. The costs of the application are to be paid by the dti, such costs to include the costs of two counsel.

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P A MYBURGH
Acting Judge of the High Court
21 February 2019

Appearances:

For the applicant:	Advocate D Mitchell SC Advocate M Townsend Instructed by Chennells Albertyn Attorneys
For the respondent:	Advocate K Pillay Instructed by the State Attorney