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

Case No: 20911/2021

In the matter between:

VENIOSCOPE (PTY) LTD	**Applicant**
and	
DIRECTOR-GENERAL OF THE DEPARTMENT OF TRADE AND INDUSTRY	**First Respondent**
DEPUTY DIRECTOR GENERAL OF THE DEPARTMENT OF TRADE AND INDUSTRY	**Second Respondent**
MINISTER OF THE DEPARTMENT OF TRADE AND INDUSTRY	**Third Respondent**

JUDGMENT DELIVERED ELECTRONICALLY: FRIDAY, 22 APRIL 2022

NZIWENI AJ

Condonation Applications

[1] The Respondents have filed their answering affidavit out of time. They therefore requested the court to grant them an indulgence and condone the late

filing of their answering affidavit. The Applicant does not object to the late filing of the answering affidavit. Equally, the Applicant is asking this court to condone the late filing of its replying affidavit.

[2] Both parties have furnished sufficient reasons for the noncompliance with the Rules. In my view, the reasons provided by the parties are convincing and satisfactory. Consequently, the late filing of the answering affidavit and the replying affidavit is condoned.

Background to the dispute

[3] This is a review brought in terms of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). The Applicant is described as a private company, duly incorporated and registered in terms of the company laws of the Republic of South Africa, with its registered address in Woodstock, Cape Town. The First Respondent, the Department of Trade and Industry ("the DTI"), offers various government incentive grant programmes, inter alia for local and foreign filmmakers. In order for a party to participate as a beneficiary of the incentive programmes, it has to qualify and comply with applicable guidelines or rules. In this matter, it is common cause that the incentive is in the form of a rebate, which is subjected to certain guidelines.

[4] The Applicant was incorporated to satisfy a special purpose requirement of the DTI, that a vehicle should be incorporated for each film in order to receive a rebate incentive, in the amount totalling R3 958 152. The Applicant applied for the local

incentive grant to secure funding for the production of the "Dias Santana Alive" film. On 3 April 2014, the DTI provisionally approved the Applicant's application for the production of the film.

[5] On 29 April 2015 the Applicant submitted a claim to the DTI. Pursuant to the receipt of the Applicant's claim, the DTI raised concerns pertaining to the claim not being compliant with the guidelines. According to the DTI, after they considered the claim together with relevant information furnished by the Applicant, they issued a cancellation letter, on 31 July 2015. Basically, the cancellation letter informed the Applicant that its claim for the production of "Dias Santana Alive" was rejected, and that the provisional letter was recalled. The Applicant was also informed that the DTI's legal department had discovered that the Applicant's application contained misleading information, which led to the DTI's provisional approval of the project.

[6] The Applicant feels aggrieved by the DTI's decision to cancel the approval for the incentive programme, and seeks to challenge this decision.

[7] In this application therefore, the Applicant seeks an order reviewing and setting aside the decision taken by the DTI on 31 July 2015. In particular, the Applicant seeks an order that will set aside the rejection of its claim for the rebate for the production of the film "Dias Santana Alive". Pertinently, the Applicant seeks relief that will direct the DTI to pay the Applicant the sum claimed.

[8] The Applicant avers that the decision was taken in bad faith, arbitrarily or capriciously, as contemplated in section 6 (2) (e) (v) and (vi) of PAJA. The Applicant further avers that there is no merit in the DTI's grounds for rejecting the claim, and that the DTI was at all material times aware of the correct facts when it approved the film grant.

[9] On the other side, it is averred by the Respondents that the incentives are rule based programmes. It is further alleged by the Respondents that, in order for a party to participate in the incentive programmes, it must qualify and comply with stipulated requirements.

Preliminary objections

[10] The DTI has raised two preliminary objections to the Applicant's application, relating to the jurisdiction of this court and the delay in launching this application. The DTI also rejects the claim on its merits.

[11] It is the Applicant's contention that the Respondents are grasping at straws in raising these preliminary points, arguing that the Respondents have raised same merely because they have no defence to the Applicant's claims.

[12] The two preliminary points raised by the DTI relate to the following:

(a) The Respondents are of the view that the whole cause of action arose in Pretoria (the jurisdiction objection).

(b) In terms of PAJA the application is out of time, therefore the Court has no power to hear the matter (the delay objection).

[13] It was agreed that this court should consider the preliminary points simultaneously with a consideration of the merits.

The jurisdiction objection

[14] The DTI is challenging this court's jurisdiction to hear this application, because it maintains that critical acts pertaining to the approval of the project were committed outside the jurisdictional scope of this court. The question thus is whether this court has the necessary jurisdiction to adjudicate the application.

The Supreme Court of Appeal in *Gallo Africa v Sting Music* (40/10) [2010] ZASCA 96 (3 September 2010), at paragraph six, defines 'jurisdiction' as follows:

> '[6] Jurisdiction means the power vested in a court to adjudicate upon, determine and dispose of a matter. Importantly, it is territorial. The disposal of a jurisdictional challenge on exception entails no more than a factual enquiry, with reference to the particulars of claim, and only the particulars of claim, to establish the nature of the right that is being asserted in support of the claim. In other words, jurisdiction depends on either the nature of the proceedings or the nature of the relief claimed or, in some cases, on both. It does not depend on the substantive merits of the case or the defence relied upon by a defendant.' (Internal footnotes omitted.)

[15] The argument on behalf of the DTI suggests that this court has no iota of jurisdictional reach when it comes to the impugned decision. As already stated, it is evident from the submissions made on behalf of the Respondents, that they are objecting to this court's jurisdiction because the Applicant did not follow the Respondents' court, and that the whole cause of action arose out of this court's jurisdiction.

[16] In terms of section (1) of PAJA, a court means, amongst others, a High Court 'within whose area of jurisdiction the administrative action occurred or the administrator has his or her or its principal place of administration or the party whose rights have been affected is domiciled or ordinarily resident or the adverse effect of the administrative action was, is or will be experienced'. (My emphasis.)

[17] In this matter, it is not in dispute that the Applicant's registered address is in Woodstock, Cape Town. According to the Applicant, even though the impugned decision was taken in Pretoria, this court has the necessary jurisdiction to adjudicate this application by virtue of the Applicant's registered address being within this court's jurisdiction.

[18] The question which aptly arises, is whether it can be said that the Applicant has its domicile within the jurisdiction of this court merely because its registered address is within its jurisdiction.

Meaning of domicile

[19] The word domicile connotes the place where the company resides, and not just a place where it receives its correspondence.

[20] It is however significant to note that, in the founding affidavit, it is stated that one of the requirements for an applicant to participate in the incentive programme, is that the Applicant must be a Special Purpose Corporate Vehicle ("SPCV") incorporated in the Republic of South Africa solely for the purpose of the production of the formal television project. The SPCV and the parent company must have a majority of South African shareholders, of whom at least one shareholder must play an active role in the production and be credited in that role. Gleaning from the paper it becomes plain that, in order to satisfy the DTI's special purpose vehicle requirement, the SPCV [the Applicant] had to be incorporated as a vehicle for the production of the film.

[21] The question is thus, can it be said that the SPCV [the Applicant], with its registered offices in Cape Town, is domiciled in Cape Town, or is Cape Town the place where the adverse effect of the administrative action was experienced.

[22] The Respondents did not make out a good, arguable case that this court does not have jurisdiction. The Respondents merely based their objection on the assertion that the whole cause of action arose in Pretoria, and did not address the provisions of PAJA concerning jurisdiction. Clearly, this assertion entirely ignores the other grounds upon which this court can exercise jurisdiction, as contemplated by PAJA.

[23] Surely, if the SPCV for purposes of the administrative act is in Cape Town, then the adverse effect of the administrative action was experienced by that SPCV, in Cape Town.

[24] The Applicant was created to conduct the business of film production. Though the Applicant was created for a specific objective, it does have legal status which is separate from its parent company. Plainly, the Applicant, as an SPCV, plays a vital role in the production of the film. Obviously, a decision involving cancellation of funding for the film would have an adverse impact on the Applicant, as it will affect its liquidity. The corollary of this would be that the Applicant, as an SPCV, would not be able to fulfil its intended purpose. Consequently, it would not be able to meet its obligations or produce the film as planned. The decision to cancel the approval clearly disrupted the Applicant's cash flows. Therefore, production and production costs would have been affected by the cancellation of funds. In the context of this case, the adverse impact would have been felt in Cape Town were the Applicant is domiciled.

[25] Accordingly, I am satisfied that in terms of PAJA this court has jurisdiction to hear this matter.

The delay objection

[26] It is common cause in this matter that the Applicant did not bring any application for an extension of the 180 day period as envisaged in section 9 of PAJA. Section 7 of PAJA provides:

'(1) Any proceedings for judicial review in terms of section 6 (1) must be instituted without unreasonable delay and not later than 180 days after the date—

(a) subject to subsection (2) (c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2) (a) have been concluded; or

(b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.

(2) (a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.

(b) . . .

(c) . . .'

When were the internal remedies exhausted?

[27] In this part of the judgment, I consider it necessary to set out the chronology of events, as stated by both the Applicant and the DTI, since what happened, and when it happened, is at the heart of determining when the clock started to run, in other words, when the relevant 180 day period contemplated in PAJA commenced. I list the time lines below:

Time line or chronology of events as indicated by the Applicant		
a	Application for the SA Film incentive to the DTI	19 March 2014
b	Notification of Approval of the application	03 April 2014
c	Applicant submits a claim form for payment	29 April 2015
d	DTI withdraws approval of the application and rejects the claim lodged on 29 April 2015	31 July 2015

e	Applicant invokes the right to appeal against the DTI's decision	22 August 2015
f	Appeal meeting between the Applicant and the DTI	24 August 2015
g	Applicant provides information requested at the meeting held on 24 August 2015	25 August 2015
h	Applicant urged DTI in a letter to uphold its appeal	16 September 2015
i	The DTI wrote a letter to the Applicant indicating that they did not receive information from the Applicant to justify the Applicant's dispute	21 September 2015
j	Applicant wrote a letter to the DTI, disputing that it did not furnish the information. Indicated that it did not receive response from the DTI subsequent to its appeal and furnishing of information	25 September 2015
k	DTI wrote a letter to the Applicant stating that its request for the conversion of the film from the South African production approval to Foreign production approval was unsuccessful	9 November 2015
l	Applicant in a letter to the DTI demands a decision in respect of the appeal within 28 days	15 February 2018
m	Kgomo from DTI advised Applicant that appeal is being processed	6 April 2018
n	Kgomo informs Applicant that DTI's decision was still pending and he would contact them with outcome by 08 June 2018	29 May 2018
o	Kgomo writes to the Applicant apologising for not honouring his deadline. Informed Applicant that he has reviewed the Applicant's project; waiting for outcome	13 June 2018
p	DTI informs Applicant through a letter that it had already given its decision on the appeal in writing	2 July 2018
q	The Applicant requested a copy of the minutes of the meeting of the DTI's Adjudication Committee held on 3 April 2014	6 June 2019

r	Redacted copy of the minutes was sent to the Applicant's Attorneys	29 July 2019
s	The Applicant gave the DTI seven days to furnish complete and unredacted copy of the summary and the recommendations to the Adjudication Committee	30 August 2019
t	An application to compel the DTI to furnish the Applicant with unredacted copy of the recommendation was launched by the Applicant	15 November 2019
u	The DTI filed a notice of intention to oppose	27 November 2019
v	Application to compel was postponed until 14 February 2020, for the DTI to file an answering affidavit	03 December 2019
w	The DTI answering affidavit was deposed to	20 December 2019
x	The Applicant contacted the secretary of the Adjudication Committee	10 February 2020
y	The Applicant had a Consultation with Siefert to obtain instructions to prepare an affidavit regarding the procedure followed by DTI in preparing documentation for the Adjudication Committee	2 December 2020
z	A draft affidavit in the Anton Piller application was forwarded to Siefert for his approval and to depose thereto	15 January 2021
aa	Siefert informed Applicant that he had sent draft affidavit to the State Attorney for approval	25 January 2021
bb	Siefert informed the Applicant that he had been advised not to sign the affidavit	29 January 2021
cc	Applicant launched an *ex parte* Anton Piller to secure the summary and recommendation document that was prepared for the Adjudication Committee held on 3 April 2014	3 February 2021
dd	Anton Piller order granted by court	4 February 2021
ee	The recommendation document prepared for the Adjudication Committee held on 3 April 2014 could not be located	10 February 2021

Chronology of events by DTI		
a	Provisional approval of the Applicant's incentive application	3 April 2014
b	Applicant submits claim for payment to the DTI	29 April 2015
c	DTI held the view that the claim was non-compliant, a meeting was held *inter alia* with representatives of Applicant	26 June 2015
d	DTI sent an email raising concerns about the non-compliance to the Applicant	13 July 2015
e	DTI after considering information issued a cancellation letter After the cancellation letter was issued the Applicant entered into correspondence and discussion with the DTI.	31 July 2015
f	Applicant wrote a letter to Truter of the DTI explaining that the Applicant has complied with the requirements	17 August 2015
g	Meeting held on request of Hollard (on behalf of the Applicant) and DTI	19 August 2015
h	DTI advises Applicant that the cancellation was based on no-achievement of the requirements DTI requested the Applicant to furnish proof that it has complied with the Incentive requirements.	21 August 2015
i	Applicant without furnishing information lodged an appeal	22 August 2015
j	Meeting between Applicant and DTI was held to ventilate issues raised on the appeal	24 August 2015
k	Applicant made submissions insisting that the Applicant complied with the guidelines	25 August 2015
l	After holding of the meeting and consideration of the meeting outcome the DTI was not satisfied that the Applicant met the requirements.	
m	Applicant requested further meeting with the DTI	16 September 2015

n	DTI informs Applicant that it would be fruitless to hold a meeting as the issues in dispute had already been ventilated	21 September 2015
o	Applicant requested that its claim be considered under Foreign incentive grant	25 September 2015
p	DTI wrote a letter to the Applicant informing the Applicant that its request to have its claim considered under Foreign incentive grant, cannot be approved (NM 13)	9 November 2015
q	The Applicant after over 2 years made enquiries in respect of the appeal	15 February 2018
r	DTI wrote a letter to the Applicant advising same that the DTI had already taken its decision and its decision to reject the claim had been communicated in previous letters. The Applicant was further advised that the DTI decision stands	2 July 2018

When did the clock start ticking for the Applicant?

[28] In the instant case, it is clear that the decision-making process involved more than one decision process. I say this because, after the DTI took the administrative action, the Applicant initiated the appeal processes. The key question which aptly arises, is, when was it made clear that an application for judicial review should be brought.

[29] The Applicant would like the court to believe that it is not out of time, hence, it was submitted that there is no merit in this preliminary objection. It is significant to note in this matter that it is not in dispute that, after the Applicant lodged its appeal, it embarked upon discussions with the DTI. From the time line of events presented by the DTI it emerges that, after the Applicant had lodged its appeal and the parties had held discussions regarding that appeal, on 21 September 2015 the DTI informed the Applicant that it would be fruitless to hold a meeting as the issues in dispute had

already been ventilated. According to the DTI, by the 21 September 2015, the appeal process was already done.

[30] I regard it as essential to fully quote the contents of the letter dated 21 September 2015. The letter, written by the DTI, reads as follows:

'Cliffe Dekker Hofmeyer Inc

11 Buitengracht Street

Cape Town

8000

Dear Mr. Egypt

RE: VENISCOPE (PTY) LTD/ DEPARTMENT OF TRADE AND INDUSTRY ("DEPARTMENT")

We acknowledge receipt of your letter dated 16 September 2015.

Kindly be advised that your request for a meeting to discuss the above mentioned project cannot be entertained due to the following reasons:

1. On 24th August 2015 a subsequent meeting was held at The Department of Trade and Industry which was attended by the following: The Deputy-Director General, The Chief Operations Officer, the Director Legal Services, the Director Film and TV Production Incentive, Mr Chris Roland, Ms Lee-Ann Cotton wherein the same project disapproval status was discussed and after thoroughly considering all the facts and the merits of the application and having taken into account the deliberations of that day; and
2. In the meeting, Mr Roland was requested to furnish certain information to the dtl to justify his dispute over the findings by the dtl.

It is therefore not necessary for another meeting as the issues had already been dealt with. Therefore the application and/or claim remains rejected by the dti.

We trust that you will find this above in order

Yours sincerely signed by Francois Truter

Chief Director: IDAD'

[31] In the circumstances, it is unfathomable that the Applicant would like to create the impression that it was waiting for the appeal decision, that being the reason it did not file the review. In my mind, the letter dated 21 September 2015 made the Applicant aware of the DTI's stance, after it [the Applicant] lodged an appeal.

[32] That then signalled that grounds existed to bring the judicial review. Clearly, the grounds for review arose on 21 September 2015. Before 21 September 2015 the Applicant was already in possession of information informing it of the reasons for the cancellation of the approval. Therefore, by 21 September 2015, the Applicant was in possession of information which should have made it conclude that the DTI's decision to reject the Applicant's claim had been taken in bad faith, arbitrarily or capriciously, as contemplated in section 6 (2) (e) (v) and (vi) of PAJA.

[33] One of the inevitabilities in this matter is that when the DTI sent the letter, dated 21 September 2015, setting out its position, ex facie the letter it is plain that it was reaffirming its previous consistent stance. On that date, there was thus certainty that the DTI was not going to change its decision, notwithstanding the fact that the appeal had been lodged. Little wonder the Applicant requested a conversion of its claim.

[34] Against this background, it should have been clear to the Applicant, or any member of the public for that matter, that the DTI was not willing to change its decision. Consequently, the matter was ripe for judicial review immediately after the Applicant was informed that the DTI was unwavering on its decision.

[35] After the DTI had communicated its stance to the Applicant, a letter was written on behalf of the Applicant, dated 25 September 2015. It is rather odd that in this letter, the authors thereof do not make reference to the DTI's letter of 21 September 2015. The letter dated 25 September 2015 [CR12] reads as follows:

'ZENHQ FILMS - DIAS SANTANA REVISED QUALIFICATION TO FOREIGN FILM

1. I refer to the above matter and our previous correspondence herein.
2. We are in receipt of your 9 September 2015 letter to our attorneys of record, Cliffe Dekker Hofmeyer Inc., indicating that ZenHQ Films has not sent the documentation and information requested at the meeting held 24 August 2015.
3. We advise that we have provided you with 4 emails wherein the documentation and the information requested at the above meeting was sent. This, in addition to the detailed documentation presented prior to and at the above meeting, demonstrating that our original approved application and subsequent claim fully complied with the DTI's South African Film and Television Production and Co Production Incentive Guidelines.
4. To date we have not received a response from DTI subsequent to our appeal and follow up documentation and requests for clarification.
5. ZenHQ Films, and our attorneys, maintain that our approval Form A and Form D payment claim are mirror images of each other, and that we can find no reasonable and/or rational cause for DTI's rejection of Dias Santana as a South African film.

6. Due to the above, coupled with substantially increasing interest from SAMCAP, our inability to operate our company under the current duress, and stress currently placed on our family, we are faced with the difficult choice of requesting and accepting the foreign qualification rebate proposed by yourselves under the following conditions:

6.1 That DTI's claim that it was misled by ZenHQ Films be retracted.

6.2 That the issue of permanent residence be clarified so that we may accurately calculate the DTI Foreign rebate claim. We doubt that such an unconstitutional decision will withstand judicial scrutiny, if such a decision was in fact reached.

6.3 That by end of business day Tuesday 29 September, or alternate date requested by DTI, DTI will respond that it approves our change to Foreign rebate.

6.4 That the review of our revised Form D for the Foreign rebate be expedited and paid on or about 31 October 2015, the fixed date to be advised by DTI.

6.5 Upon acceptance on 29 September 2015 as noted above, ZenHQ Films will provide DTI with a revised Form D for the Foreign rebate.

6.6 That by 5 October 2015, in order for ZenHQ Films to meet the requirement of a lender which will fund the shortfall between the DTI SA Rebate and the revised Foreign Rebate, DTI will provide ZenHQ Films with a letter notifying ZenHQ Films of the revised amount of the rebate.

6.7 Due to the previous delays in the resolution of this matter, we have had no choice but to be prescriptive with respect to fixing dates, and thank you in advance for consideration of same.

6.8 Your response to this compromise is requested.

6.9 Kindly note that this request and acceptance of a Foreign qualification rebate is made without prejudice and with full reservation of rights.' (Own emphasis supplied.)

[36] Clearly, paragraph 4 of the Applicant's letter is incorrect, because the Applicant did receive a response from the DTI subsequent to its appeal. Similarly, the letter written on behalf of the Applicant, dated 15 February 2018 [CR 13], is also wrong when it states that it is clear that a decision on the Applicant's appeal had not been made, notwithstanding that the appeal process commenced on 24 August 2015.

[37] For that matter it is common cause that, within days after the communiqué of 21 September 2015, the letter written on behalf of the Applicant sought a compromise by converting the incentive – the Applicant requested a conversion of its claim from a Local incentive grant to a Foreign incentive grant. The Applicant's request for a conversion, on its own, is very illuminating.

[38] It may be so that the Applicant sought further documentation from the DTI, but that does not mean that the 180 day period did not commence to run. Demonstrably, the application for judicial review could have been made very shortly after the DTI refused to entertain the issues any further.

[39] For all intents and purposes, the time started to run when the DTI informed the Applicant that it would be fruitless to hold a meeting, as the issues in dispute had already been ventilated. When the DTI issued that statement, it took a determinative step, as it essentially closed the doors of any internal remedy to the Applicant. It is clear from the contents of the letter dated 21 September 2015, that when that decision was taken, no other possibilities were under active consideration. The Applicant should have challenged the decision at that time.

[40] The evidence in this matter not only demonstrates that the Applicant was aware all along of the reasons for the cancellation of the approval, but also that the Applicant was aware that the appeal had been unsuccessful. The fact that the Applicant sought the unredacted minutes does not constitute fresh grounds of review and the time did not start to run all over again.

[41] Properly analysed in the context of this case, in my view, the alleged failure to furnish the unredacted minutes of the Adjudication Committee simply appears to be a red herring. What is more, the letter dated 25 September 2015 also did not stop the clock from running. Similarly, neither did the letter dated 15 February 2018.

[42] Inasmuch as it can be suggested by the Applicant that the letter on 15 February 2018 demanded that the DTI make a decision in respect of the appeal, it should however be noted that the DTI's letter on 21 September 2015, almost two and a half years prior, categorically stated the DTI's position after the appeal had been lodged.

[43] The DTI had already taken a final decision concerning the cancellation of the approval in 2015. That being so, it seems to me that the Applicant, in the letter dated 15 February 2018, was asking for the obvious, or deliberately chose to ignore the reality.

[44] From the previously mentioned, there has been delay on the part of the Applicant in lodging an application for judicial review. PAJA requires that the

proceedings for judicial review must be brought promptly, and not later than 180 days after internal remedies, as contemplated in subsection (2) (a), have been exhausted.

[45] This court has already found that, immediately after the Applicant was made aware of the DTI's stance, the clock started ticking. The necessary implication of this, is that these proceedings were not instituted within the 180 day period mentioned in section 7.

[46] In *Mostert NO v The Registrar of Pension Funds* (986/2016) [2017] ZASCA 108 (15 September 2017), the following is stated in paragraphs 29,36 and 38:

> '[29] When the matter came before the court a quo the appellant did not apply for leave to deliver a further affidavit in order to deal with the alleged delay, or with the question when the 180 day period started to run. Nor was there an application for an extension of the period in terms of s 9, or a request for an opportunity to make one. . . .
>
> [36] This brings me to the question whether the court a quo erred in allowing the Minister to raise the point when he had not done so in his papers. Where it appears from the applicant's papers that there had been a delay of more than 180 days, and there is no application for an extension of the period, a respondent is in my view entitled to raise the point in argument that the court has no power to hear the review. This is not raising a defence – it is a submission that, on the applicant's own papers, the court has no power to entertain the review. If the court is entitled to raise the point *mero motu* then there can be no reason why the respondent should not be allowed to raise it. It was in any event dealt with by both parties in their heads of argument, and the appellant elected not to seek leave to file a further affidavit.

. . .

[38] I do not consider that in those circumstances the learned judge erred in allowing argument on the s 7 point. It does not follow that every applicant for judicial review in terms of PAJA has to demonstrate in the founding papers that there has been no unreasonable delay. If there is no indication in the papers that there may have been such a delay the position may well be that it is then up to the respondent to raise the point in its answering affidavit. This does not arise in this case and we need not decide that point.'

[47] In *Opposition to Urban Tolling Alliance v The South African National Roads Agency Ltd* (90/2013) [2013] ZASCA 148 (9 October 2013), at paragraph 26, the Supreme Court of Appeal opined as follows:

'At common law application of the undue delay rule required a two stage enquiry. First, whether there was an unreasonable delay and, second, if so, whether the delay should in all the circumstances be condoned (see eg *Associated Institutions Pension Fund and others v Van Zyl and others* 2005 (2) SA 302 (SCA) para 47). Up to a point, I think, s 7(1) of PAJA requires the same two stage approach. The difference lies, as I see it, in the legislature's determination of a delay exceeding 180 days as *per se* unreasonable. Before the effluxion of 180 days, the first enquiry in applying s 7(1) is still whether the delay (if any) was unreasonable. But after the 180 day period the issue of unreasonableness is pre-determined by the legislature; it is unreasonable *per se*. It follows that the court is only empowered to entertain the review application if the interest of justice dictates an extension in terms of s 9. Absent such extension the court has no authority to entertain the review application at all. Whether or not the decision was unlawful no longer matters. The decision has been "validated" by the delay (see eg *Associated Institutions Pension Fund* para 46). That of course does not

mean that, after the 180 day period, an enquiry into the reasonableness of the applicant's conduct becomes entirely irrelevant. Whether or not the delay was unreasonable and, if so, the extent of that unreasonableness is still a factor to be taken into account in determining whether an extension should be granted or not (see eg *Camps Bay Ratepayers' and Residents' Association v Harrison* [2010] 2 All SA 519 (SCA) para 54).' (Own emphasis supplied.)

[48] In *Registrar of Pension Funds* (supra) the Supreme Court of Appeal, further opined, at paragraphs 52-53:

'[52] It seems to me that, in the circumstances of the case, the manifest delay between the promulgation of the regulation and the institution of the review proceedings, which was some 12 years, and the challenge in the respondent's heads of argument to the court's power to entertain the matter, required of the appellant to satisfy the court that the proceedings were instituted within the period of 180 days referred to in s 7. It made no attempt to do so, nor did it apply for an extension of the period in terms of s 9.

[53] The regulation in question was promulgated on 22 April 2003. The application for it to be reviewed was brought nearly 12 years later. In the absence of any evidence to the contrary I think it can safely be accepted that this was well outside a period of 180 days after the date on which the public at large (as described in para 44 above) might reasonably have been expected to have become aware of the regulation. I come to this conclusion on the facts set out in the founding papers in the court a quo, and not on the basis of a failure to discharge an onus.'

[49] The Applicant in the present case has challenged the impugned decision well out of time, as the delay exceeds 180 days. The Applicant is late not by a few months,

but by more than three years. Therefore, the delay is *per se* unreasonable. The Applicant should have asked for condonation in terms of section 9 of PAJA, which it did not.

[50] In *Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others* 2008 (2) 638 (SCA) ,at paragraphs 28-29, the court stated:

> '. . . But the object of the rule is not to punish the party seeking the review. Its *raison d'être* was said by Brand JA in *Associated Institutions Pension Fund and Others v Van Zyl and Others* 2005 (2) SA 302 (SCA) . . . in para 46 to be twofold:
>
> "First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions."
>
> Under the rubric of the second I would add considerations of pragmatism and practicality.
>
> [29] In my view the circumstances of the present case as outlined above, are such that it falls within the category of those cases where by reason of the effluxion of time (and intervening events) an invalid administrative act must be permitted to stand. . . .'

[51] The provisions of section 7 of PAJA are peremptory. Thus, time limits are critical in PAJA reviews. This court is well aware that section 7 has a potential to deny a litigant the right to challenge an administrative decision. However, section 9 is there to ameliorate the harshness of section 7.

[52] In the context of this case, it is without doubt that if this court condones the unreasonable delay, there would be prejudice to the DTI. For instance, it is not in dispute that some of the DTI's employees have since left its employ. It is also common cause that the Applicant could not execute the Anton Piller order, as the document in question could not be found.

[53] In the circumstances of this case, I do not see any reason why I should condone the unreasonable delay; there is no good reason to extend the time period. Particularly in light of the fact that the question of prejudice to the DTI needs to be considered. Accordingly, the application for judicial review stands to be dismissed.

[54] **The following order is made:**

(1) The application is dismissed.

(2) The Applicant is ordered to pay the Respondents' costs.

[redacted]

CN NZIWENI
Acting Judge of the High Court

Appearances

Counsel for the Applicant :	G Elliot
	S Rapaport
Instructed by	Ashman Attorneys
	D Williams –Ashman
Counsel for the Respondents:	Adv E De Villiers-Jansen SC
Instructed by	State Attorney
	A Marsh-Scott