



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

Case No.:A196/2022

In the matter between:

VENIOSCOPE (PTY) LTD

Appellant

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 ON 28 AUGUST 2023

MANGCU-LOCKWOOD, J

A. INTRODUCTION

[1] This is an appeal against the judgment of my sister Nziweni AJ (as she then was) in which she dismissed the appellant's review application with costs on the basis that the review was brought outside the time limits prescribed in section 7, read with section 9 of the Promotion of Administrative Justice Act 3 of 2000 ("*PAJA*"). The *court a quo* did not make any findings on the merits of the review application.

[2] Although the appeal was instituted in time, both parties' heads of argument were late. In the case of the appellant, the heads of argument were delivered on 2 June 2023 instead of 1 June 2023, and were accordingly a day late. An application for condonation was delivered on 5 June 2023 explaining that senior counsel needed more time to finalise the heads of argument. Because the delay was negligible and the explanation reasonable, the Court condoned the delay.

[3] As for the heads of argument of the respondents, they were delivered on 11 July 2023 instead of 14 June 2023, and were accordingly almost a month late. The condonation application explained, in essence that the respondents' counsel was engaged in other work. To this the appellant took exception and filed a notice of intention to oppose although no answering affidavit was filed.

[4] It is regrettable that the reason for lateness of the respondents' heads of argument is that senior counsel was otherwise engaged. No reason was given as to why other counsel could not be engaged in the matter, given the extent to which the Uniform Rules of Court and Directives of this Division were transgressed. There is also no reason given for why junior counsel could not be briefed to assist him and thus expedite the drafting of the heads of argument. And alarmingly, it took the registrar of the presiding judge to request the respondents' heads of argument, when it was clear that they had not been delivered in compliance with the Court Directives.

[5] Nevertheless, heads of argument are there for the assistance of the court, and in the circumstances of this case, it was in the interests of justice to fully consider the respondents' case and to not punish the respondents for the conduct of their legal representatives. Accordingly, the lateness of the heads of argument was condoned.

B. THE FACTS

[6] The facts are common cause. The Department of Trade and Industry ("DTI") provisionally approved an application by the appellant in terms of the DTI's South African Film and Television Co-Production Incentive, for production of a film called *Dias Santana*. When the appellant later submitted a claim for work done, the DTI rejected the claim and recalled its provisional approval.

[7] The rejection decision was issued on 31 July 2015. On 22 August 2015 the appellant lodged an internal appeal, apparently in terms of annexure E to the guidelines of DTI's incentive programme. From the time that the appellant's claim was rejected on 31 July 2015, the parties engaged in correspondence and discussions, sometimes through legal representatives.

[8] Amongst the correspondence was a letter from DTI dated 21 August 2015 requesting specified items of information from the appellant, and it ended with an assurance that "*submission of the required proof or documentation will be of material bearing in the consideration of the appeal*".

[9] The appeal hearing was held on 24 August 2015. At the appeal hearing further information was sought from the appellant. It is not disputed in the papers that the appellant submitted some information in a letter dated 25 August 2015, and by hand on 26 August 2015 to Mr. Truter who worked for the DTI at the time.

[10] On 16 September 2015 the appellant, through its legal representatives, Cliffe Dekker Hofmeyr, requested a meeting with Mr. Truter in order to resolve the appeal. The DTI responded by letter dated 21 September 2015, as follows:

“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...wherein the same project disapproval status was discussed and after thoroughly considering all the facts and merits of the application and having taken into account the deliberations of that day; and
2. In the meeting, Mr. Roland [a director of the appellant] was requested to furnish certain information to the DTI to justify his dispute over the findings by the DTI. **The requested information has not been received by the DTI.**

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”. (my emphasis)

[11] The appellant responded by letter dated 25 September 2015 authored by Mr. Roland himself and not Cliffe Dekker, which, in relevant part stated as follows:

- “2. We are in receipt of your 9 September 2015 letter to our attorneys of record, Cliffe Dekker Hofmeyr Inc., indicating that [the appellant] 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 e-mails wherein the documentation and information requested at the above meeting was sent. This, in addition to the detailed documentation presented prior to and at the above meeting.
...
4. To date we have not received a response from the DTI subsequent to our appeal and follow up documentation and requests for clarification.”

[12] Although the letter erroneously stated that it was in response to DTI’s letter of 9 September 2015, it is not disputed, and it is clear from its contents that it was in response to DTI’s letter dated 21 September 2015. What is immediately apparent is that, whereas DTI’s letter of 21 September 2015 stated that the appellant had not furnished the information requested at the meeting of 24 August 2015, the appellant’s letter of 25

September 2015 stated that information had been submitted in four emails, although no date is provided for when the four emails were provided. This was in addition to the information that the appellant states it provided to Truter on 25 and 26 August 2015.

[13] In addition to the above, the appellant's letter of 25 September 2015 made a proposal for its claim to be considered in terms of a foreign qualification rebate, instead of the local South African rebate, and suggested timeframes for consideration of the proposal, claim and payment in terms thereof.

[14] The DTI responded to the letter of 25 September 2015 by letter dated 9 November 2015, which was authored by the Director-General of the DTI. It specifically referenced the letter of 25 September 2015, and stated as follows:

“Regrettably, the final claim of the above production cannot be changed and be classified under the Foreign Production and Post-Production Incentive as the approval was granted under the South African Production and Co-Production Incentive. **The provisional approval letter given to the above Production is thus recalled.** It is therefore with regret I inform you that the DTI currently cannot approve your request”.
(my emphasis)

[15] The letter of 9 November 2015 did not at all address the remainder of the letter of 25 September 2015 in which the appellant claimed to have provided the DTI with four emails worth of documentation and information and was awaiting a response from the DTI in respect thereof. That was the end of the correspondence between the parties in 2015.

[16] On 15 February 2018, the appellant, through new attorneys, demanded an outcome of its appeal. After some delays, the DTI sent correspondence dated 2 July 2018 stating that *“the DTI has already given its decision on this appeal, in writing and the letters are attached hereto as: annexure “B” dated 9 November 2015; annexure “C” dated 21 August*

2015; and annexure “D” dated 21 September 2015... annexure “E” dated 31 June [2015]¹”.

[17] I have already referred to all the letters referred to as annexures in the letter of 2 July 2018. It remains to be added that the letter of 21 August 2015 was a request for information prior to the appeal hearing, although, according to the DTI contains the information that has still not been submitted by the appellant.

C. THE APPEAL

[18] At the heart of this appeal is the question of when the 180 days prescribed in section 7 of the PAJA started to run², or as the court *a quo* put it, when the clock started ticking. According to the court *a quo*, that was on 21 September 2015 when the DTI sent the letter declining an invitation to meet the appellant’s attorneys. The letter, according to the court *a quo*, signalled finality and that the DTI was not going to change its decision of 31 July 2015. And the court’s view was that the appellant’s grounds for review arose on that date because it was in possession of the reasons for the cancellation of the approval, and could not have been awaiting a decision on its appeal thereafter.

¹ Annexure “E” was erroneously referred to as a letter dated 31 June 2015 instead of 31 July 2015.

² The relevant parts of section 7 of PAJA provide as follows:

“(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.”

[19] In reaching that conclusion, the *court a quo* deemed it essential to fully quote the contents of the DTI's letter of 21 September 2015. However, the full contents of the letter were not set out in the quote, and omitted the very issue that has become the bone of contention between the parties, namely the statement by the DTI that it had not received the information requested from the appellant.

[20] As a result of this omission, it is difficult to accept that the *court a quo* considered this aspect because a reading of the letter of 21 September 2015 when it includes the omitted portion, is that, had the requested information been received by the DTI, it may have acquiesced to the meeting requested by the appellant's lawyers or at least supplied a decision based on such information. Seen in this way, the letter did not present finality as the court opined.

[21] Put differently, a question that may be posed is of what significance was the DTI's statement - that it had not received the information requested from the appellant - in its letter of 21 September 2015. The answer appears from the letter, namely that it was a reason for declining the requested meeting with the appellant's legal representatives, the purpose of which, it must be remembered, was to resolve the appellant's lodged appeal which was under consideration.

[22] Such was the significance of the alleged failure to submit the required information that the appellant responded by letter of 25 September 2015, denying that it had failed to submit the requested information and requesting a response to that specific issue at paragraph 4 of its letter. The *court a quo* held that paragraph 4 was "*clearly incorrect*" because the applicant did receive a response from DTI subsequent to its appeal. However, paragraph 4, also dealt with what the appellant referred to as "*follow-up documentation*", in respect of which it was awaiting a response. That is the only conclusion that may be reached if one reads paragraphs 2, 3 and 4 of that letter conjunctively. The *court a quo* did not deal with the issue of the alleged failure to submit information, and I am of the view that on this aspect the *court a quo* misdirected itself.

[23] At paragraphs 52 to 54 of the founding affidavit, the appellant stated as follows:

- “52. The DTI responded in a letter dated 21 September 2015, sent by Mr Truter, a copy of which is annexed hereto as “CR11”. In the letter the DTI incorrectly stated that it had not received certain information from the applicant to justify its dispute over the DIT’s findings. This information had been furnished in the applicant’s letter dated 25 August 2015, annexure “CR9” hereto. The DTI also stated that it was not necessary for another meeting “*as the issues had already been dealt with*”. The letter ended with the statement that “*the application and/or claim remains rejected...*”.
- 53. I responded to Mr Truter’s letter in a letter from Zen HQ on 25 September 2015 wherein *inter alia* I refuted Mr Truter’s contention that the DTI had not received certain information from the applicant to justify its dispute over the DTI’s findings. A copy of my letter is annexed hereto as “CR12”.
- 54. Significantly, in paragraph 4 of the letter I placed on record that the applicant had not received a response from the DTI subsequent to its appeal, follow up documentation and requests for clarification.

[24] The DTI responded as follows to these paragraphs in its answering affidavit:

- “94.1 The contents of these paragraphs are denied. The applicant has been unable to furnish proof or information that demonstrates the following, namely that:
 - 94.1.1 the majority of the intellectual property is owned by South African citizens;
 - 94.1.2 the directors are South African citizens;
 - 94.1.3 the top writer and producer credits include South African citizens; and
 - 94.1.4 the majority of highest paid performers are South African citizens;
- 94.2 **The applicant merely furnished explanations on the information it had already submitted in its application and claim.** Such explanations were not in accordance with the interpretations of the Guidelines. The applicant attempts to circumvent the provisions of the Guidelines by proffering explanations to suit itself and its circumstances.” (my emphasis)

[25] The highlighted portion at paragraph 94.2 of the answering affidavit, is not supported by the correspondence between the parties. Nowhere in the correspondence did the DTI acknowledge receipt of information from the appellant and issue a decision rejecting the information as being inadequate or a repetition of what had already been submitted to it. Instead, the letter of 21 September 2015 stated that the appellant had not furnished information requested of it.

[26] The court *a quo* held that by 21 September 2015 the appellant was in possession of information regarding the reasons for cancellation of the approval. Although that is true, it is also correct that an internal appeal had been lodged in terms of the guidelines of the DTI's programme. And, as part of that appeal, the DTI had requested further information from the appellant. That being so, the relevant inquiry, for purposes of determining the calculation of the 180 days, was whether the appeal had been concluded by 21 September 2015. After all, in terms of section 7 of PAJA, proceedings for judicial review in terms of section 6(1) may only be instituted after conclusion of proceedings instituted in terms of internal remedies.

[27] On that score, it is clear from the DTI's later correspondence and pleadings in the court *a quo*, that it too was not convinced that an appeal decision had been rendered by that date. One such indication is DTI's letter of 2 July 2018, which annexed 3 letters - annexures B to D - referring to them as its decision on the appeal. Thus, even in the DTI's mind, there is no single document that may be referred to as the appeal outcome in this matter. Apart from that observation, the annexures referred to as the appeal decision included the letter of 9 November 2015, which immediately dispels the idea that a decision had been taken prior to that date. And the contents of that letter support that view because, similar to the previous letters, it stated that "[t]he provisional approval letter given to the above [p]roduction is thus recalled". It did not speak of a decision that had previously been taken.

[28] It is also relevant that, when the appellant demanded an appeal outcome in early 2018, it was not immediately apparent to the DTI staff member allocated to the matter that an appeal decision had already been issued three years previously. This is also the reason it took three annexed letters to explain that an appeal outcome had already been rendered - precisely because it was not immediately apparent.

[29] If there was still any doubt, the DTI's state of mind is made compellingly clear when regard is had to its response in the papers on the issue of when the 180 days started to run. At paragraphs 69 to 71 of the founding affidavit the appellant stated as follows:

- "69. ...the stance now adopted by the DTI in contending that the decision was made on appeal can only be described as absurd.
- 70. For the purposes of this review application, the applicant has treated the date of 2 July 2018 as the date upon which it was informed by the DTI that its appeal was unsuccessful. The 180 days within which the applicant is entitled to apply to this Honourable Court to review the decision in terms of PAJA therefore runs from 2 July 2018. The applicant has accordingly brought this application within the prescribed time limits.
- 71. The applicant maintains, however, that the DTI has not made a decision on appeal and that its stance is contrived, disingenuous and *mala fide*."

[30] The response to paragraphs 69 to 71 in the answering affidavit was as follows:

"The contents of these paragraphs are denied. The applicant was advised of the DTI's decision on appeal in the letter dated 2 July 2018."

[31] Thus, it was common cause on the papers that the appellant had not been advised of a decision regarding its appeal prior to 2 July 2018.

[32] Given the DTI's own ambivalence regarding when exactly the appeal outcome was conveyed to the appellant, and the fact that it was common cause on the papers that an appeal decision had not been conveyed prior to 2 July 2018, it is difficult to support the view that the 180 days prescribed by the PAJA started to run on 21 September 2015.

[33] In this respect the facts of this case are distinguishable from those that confronted the court in *Mostert NO v The Registrar of Pension Funds*³. There, the issue of whether the review proceedings were instituted within the 180-day period mentioned in s 7(1) of PAJA was not raised at all in the papers – whether by the applicant or respondent, and only arose for the first time in the heads of argument.⁴ Here, the issue was raised by the appellant in its papers, and the DTI agreed with the appellant’s calculation of when the 180 days started to run, namely on 2 July 2018, but thereafter changed its stance in the heads of argument. Had the DTI taken issue with the 180 days in its answering affidavit, the appellant would at least have had an opportunity to deal with it in reply.

[34] There is no doubt, as was stated in *Camps Bay Ratepayers’ and Residents’ Association & another v Harrison & Another*,⁵ that even if the DTI had not raised the issue in their heads of argument, the court *a quo* would have been entitled to raise the issue *mero motu*.⁶ But, as the SCA and Constitutional Court have held⁷, in those circumstances, the appellant should have been given an opportunity to deliver a further affidavit to explain the apparent delay.

[35] This issue was brought home during our proceedings when the DTI’s counsel sought to criticise and rely upon the appellant’s alleged delay between 2015 and 2018, despite the fact that this issue is not at all ventilated in the papers. There was no evidence in the papers regarding why the appellant waited until February 2018 before demanding an appeal outcome. The mere fact of the delay cannot, without more, be equated with an acceptance that an appeal decision had already previously been rendered.

³ *Mostert NO v Registrar of Pension Funds and Others* (986/2016) [2017] ZASCA 108; 2018 (2) SA 53 (SCA) (15 September 2017).

⁴ See *Mostert v Registrar of Pension Funds and Others* para [25].

⁵ *Camps Bay Ratepayers’ and Residents’ Association & another v Harrison & Another* 2011 (4) SA 42 (CC) para 53. See also *Mostert* at paras [33] and [35].

⁶ *Mostert NO v Registrar of Pension Funds and Others*.

⁷ *Mostert* para 35, *Camps Bay Ratepayers’ and Residents’ Association & another v Harrison & Another* para 54; *Mamabolo v Rustenburg Regional Local Council* [2000] ZASCA 133; 2001 (1) SA 135 (SCA) para 10.

[36] For all these reasons, I am of the view that the decision of the court *a quo* that the review was brought outside the 180 days prescribed in section 7(1) of the PAJA should be set aside. The next question is what remedy should be granted. In the heads of argument, the appellant sought substituted relief as a primary remedy. Presumably, this was because it had belatedly sought, though later withdrew, an appeal on the merits of the review. The belated appeal was correctly withdrawn because, at the very least, no leave to appeal was granted on the merits of the matter.

[37] Although the normal relief would be to remit the matter for the court *a quo* to determine the merits of the review⁸, the real problem is that there remains no decision in which the DTI rendered an outcome regarding the appeal lodged by the appellant. The matter should accordingly be remitted to the DTI to render such a decision, including a decision regarding the further information that the appellant claims to have submitted to it.

D. ORDER

[38] In the premises, I would grant the following order:

- a. The appeal is upheld with costs, including costs of two counsel where so employed.
- b. The judgment of the court *a quo* is set aside and replaced with the following:
“The respondents are ordered to deliver a decision regarding the appellant’s appeal which was lodged on 22 August 2015 and supplemented with further information, within 30 days of this order”.

⁸ See *A Penglides (Pty) Ltd and Another v Minister of Agriculture, Forestry and Fisheries and Another* (298/2021) [2022] ZASCA 74; 2022 (5) SA 401 (SCA) (26 May 2022) paras 18 and 34; *Premier, Gauteng and Others v Democratic Alliance and Others; All Tshwane Councillors who are Members of the Economic Freedom Fighters and Another v Democratic Alliance and Others; African National Congress v Democratic Alliance and Others* [2021] ZACC 34; 2021 (12) BCLR 1406 (CC) ; 2022 (1) SA 16 (CC) paras 217 -219.

N. MANGCU-LOCKWOOD
Judge of the High Court

I agree and it is so ordered.

R. ALLIE
Judge of the High Court

I agree.

G. SALIE
Judge of the High Court

APPEARANCES

For the appellant : **Adv G. Elliott SC**
Instructed by : **D. Williams-Ashman**
Ashman Attorneys Inc.

For the respondents : **Adv E. De Villiers-Jansen SC**
Instructed by : **A. Marsh-Scott**
State Attorney