IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

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

…….. ……

DATE SIGNATURE

Case No: 71808/18

In the matter between:

FREY'S FOOD BRANDS (PTY) LTD Applicant

and

MINISTER OF TRADE AND INDUSTRY First Respondent

CHAIRMAN AD HOC REVIEW COMMITTEE OF THE DTI Second Respondent

Date of Hearing: 25 November 2021

Date of Judgment: 18 August 2022

JUDGMENT

ARNES AJ

roduction

1. This is an application to review and set aside a decision taken by the ad hoc committee of the Department of Trade and Industry ("DTI") to dismiss the applicant's internal appeal against a decision not to approve its application for a capital investment grant under the Manufacturing Competitiveness Enhancement Programme ("the MCEP"), an economic incentive scheme administered by the DTI.

2. The applicant also seeks:

2.1 an order substituting the committee's dismissal of the applicant's appeal with an order upholding the appeal; and

2.2 an order directing the first respondent to pay the applicant the capital investment grant due to it in terms of the MCEP.

3. In addition, the applicant seeks the costs of this application as well as the costs of two earlier applications brought by it against the first respondent, on the attorney and client scale.

4. The application is opposed by the first respondent.

5. The first respondent delivered its answering affidavit out of time and brought an application for condonation for the late filing of thereof. That application was initially opposed by the applicant. However, in argument before me, Adv Pillemer SC, who appeared on behalf of the applicant, indicated that the applicant no longer persisted in its opposition to the application for condonation. In the circumstances, and having satisfied myself that a proper case has been made out, condonation for the late filing of the first respondent's answering affidavit is granted.

6. In what follows below, I shall set out the facts giving rise to this application, the majority of which are not in dispute. I shall thereafter consider whether the applicant has made out a case for the relief it seeks in its notice of motion.

The Material Facts

7. The MCEP was introduced by the first respondent in order to promote enterprise competitiveness and, as a consequence, job creation and retention. The MCEP's main objective was to design and administer

incentive programmes seeking to support and enhance the competitiveness of a variety of manufacturing entities across a range of sectors. This was achieved, *inter alia,* through the payment of capital investment grants to qualifying entities. To qualify for a grant, a business entity was required to apply to the DTI and obtain approval, which would invariably be granted if the criteria prescribed by the DTI were met.[1]

8. Qualifying businesses received a cash grant which was calculated, in terms of a prescribed formula, as a defined percentage of the "Manufacturing Value Added" over a two year period. The maximum amount of the grant was capped in accordance with the size of the participating enterprise.

9. On 3 August 2012 the applicant submitted an application for a capital investment grant under the MCEP.

10. One of the requirements of the MCEP was that an applicant should either have achieved Level 4 B-BBEE contributor status (in terms of the relevant B-BEEE Codes of Good Practice) or was required, if it could, to submit a plan demonstrating how it would progress towards achieving Level 4 B-BBEE contributor status within a certain period of time.

11. The DTI published guidelines to assist applicants in understanding the MCEP. From time to time these guidelines were amended and refined by the DTI. It is common cause that at the time the applicant submitted its

[1] *Minister of Trade and Industry v Sundays River Citrus Company (Pty) Ltd* [2020] 1 ALL SA 635 (SCA) at para 6.

application, the version of the DTI guidelines that was in place was version 2 ("Version 2 of the guidelines" or simply "Version 2").

12. Version 2, insofar as it dealt with the B-BBEE status of applicants, provided as follows in clause 3.1.6:

> "Applicants must achieve at least level four B-BBEE contributor status in terms of the B-BBEE codes of good practice or must submit a plan to demonstrate how they will progress towards achieving level four B-BBEE contributor status within a period of four years. Applicants who are unable to comply with this condition must communicate to the dti at the time of application providing reasons for their inability to comply. Each case will be considered on its own merits."

13. At the time that the applicant submitted its application on 3 August 2012, it had not achieved Level 4 B-BBEE contributor status. It accordingly submitted a plan together with its application, as contemplated in terms of clause 3.1.6 of Version 2 of the guidelines, setting out how it intended to progress to Level 4 B-BBEE contributor status within the stipulated 4 year period. I pause to note that, as is apparent from clause 3.1.6 above, the submission of such a plan was not mandatory and the DTI retained a discretion to approve an application even if such a plan was not submitted.

14. No immediate response was forthcoming from the DTI after the applicant delivered its application.

15. On 9 April 2014, nearly seventeen months after the applicant had submitted

its application, the applicant received a letter from Mr Tsepiso Makgothi, the MCEP programme manager, which stated the following:

15.1 there was pending litigation between the DTI, the applicant and another company forming part of Frey's group of companies (Porcor (Pty) Ltd) in respect of other incentive programmes;

15.2 as a consequence of this pending litigation, the DTI:

> "… referred the Frey's Food Brands MCEP application back until these litigation matters are either finalised by court judgment or formally withdrawn tendering and paying the costs incurred by the dti on a party to (sic) party scale."

15.3 once this had occurred, the applicant's application for MCEP incentives could be re-submitted to the DTI:

> "… for reconsideration depending on the mandate of the said Adjudication Committee at that time."

16. It is not in dispute that the litigation Mr Makgothi was referring to was litigation pending between the applicant and the DTI under the Small and Medium Enterprise Development Programme and between Porcor (Pty) Ltd ("Porcor") and the DTI under the Small and Medium Enterprise Development Programme and the Enterprise Investment Programme. The MCEP was separate and distinct from the aforesaid investment schemes.

17. The applicant took the view that there was no lawful reason for the DTI not to adjudicate its MCEP application and that by adopting the position articulated in Mr Makgothi's letter, the DTI appeared to be attempting to extort some form of benefit for itself rather than simply performing its administrative function to adjudicate the applicant's application as it was obliged to do. The applicant communicated its position to the DTI in correspondence in May 2014 and requested that the DTI adjudicate its MCEP application. When the applicant received no response, it followed up with further correspondence in September 2014. Still no response was forthcoming from the DTI.

18. Accordingly, on 25 September 2014, the applicant launched an application in this Court under case number 70669/2014 in which it sought an order directing the DTI to consider and adjudicate its MCEP application. This will be referred to as "the first application."

19. Thereafter there was correspondence between the applicant and the DTI and the DTI sought a number of extensions for the filing of its answering affidavit, which were granted by the applicant. Ultimately, however, no answering affidavit was filed by the DTI in the first application.

20. While the first application was pending, on 13 November 2014, Mr Sam Sekgoto, the DTI's representative, wrote to the applicant and requested the following pursuant to the applicant's MCEP application:

> "… a more detailed B-BBEE plan reflecting on a high level of

> commitment. Each of the elements in the BBEE (sic) plan should be quantified, time bound and costed."

21. On 26 November 2014 the applicant responded to Mr Sekgoto's request and submitted a new B-BBEE plan under cover of an e-mail which stated the following:

> "We attach hereto our original B-BBEE plan together with a more detailed B-BBEE plan as requested. Please would you let us know whether it is now acceptable to you."

22. The second B-BBEE plan submitted by the applicant will be referred to as "the improved plan".

23. Mr Sekgoto acknowledged receipt of the improved plan.

24. The improved plan:

24.1 adopted a different format to that used in the preparation of the original plan;

24.2 was substantially longer and more detailed – 9 pages as compared to 3 pages; and

24.3 complied with Mr Sekgoto's direction to quantify, time bind and cost each element in the plan.

25. By 30 April 2015, the applicant's MCEP application had not been

adjudicated, nor had the DTI delivered its answering affidavit in the first application. Accordingly, on 30 April 2015, the applicant wrote to the DTI emphasising that the additional information required by the DTI had been provided (the improved plan) and calling upon the DTI to either adjudicate the applicant's MCEP application or deliver its answering affidavit in the first application.

26. A month later, on 29 May 2015, the DTI issued a letter stating that the applicant's MCEP application had not been approved. The letter stated as follows:

> "MCEP Adjudication Committee did not approve the application for Capital Investment due to a non-satisfactory B-BBEE plan. The applicant submitted the same B-BBEE plan as before. The plan is not specific enough and it does not have adequate detail on the skills development, on who is going to be trained, time frames are missing, the costs of activities are at a very high level and there is no detailed breakdown."

27. It is apparent from the above that the sole reason for the rejection of the applicant's MCEP application was the inadequacy of the applicant's B-BBEE plan. It also appears from the above, and in particular from the reference to the applicant having submitted "the same B-BBEE plan as before," that the improved plan submitted by the applicant had not been considered by the adjudication committee.

28. The applicant appealed against the DTI's refusal to approve its MCEP application. The applicant's appeal was submitted, within the stipulated time

period, on 29 June 2015.

29. In its appeal, the applicant stated the following:

29.1 It was not correct that the applicant had submitted the same B-BBEE plan twice.

29.2 The applicant had in fact submitted an improved B-BBEE plan in response to Mr Sekgoto's request for more information and it appeared that this had not been considered by the adjudication committee.

29.3 The applicant, when it submitted its improved plan, had asked Mr Sekgoto to indicate whether it was now acceptable. Mr Sekgoto had not indicated that the plan was not acceptable, nor had he indicated that it lacked adequate detail on skills development or on who was going to be trained or that timeframes were missing or that there was any difficulty with the manner in which the cost of activities had been dealt with.

29.4 Had Mr Sekgoto indicated that these features were required, the applicant would have furnished them.

29.5 Moreover, the above features were not specifically required by Version 2, which was the applicable guideline.

29.6 In the absence of these features being stipulated in the applicable guideline or requested by Mr Sekgoto, the applicant had no way of knowing that they were required.

29.7 In the circumstances, the applicant submitted a document which included the above features, as Annexure E to its appeal, for the appeal committee's consideration.

30. On 20 January 2016, more than six months after the submission of its appeal, the applicant received correspondence from the DTI which stated that:

> "The MCEP programme was discontinued in October 2015 due to the funds allocated being exhausted. All applications and appeals that ever served before the adjudication committee were advised to re-apply should the programme be allocated additional funds in the new financial year."

31. The applicant had heard some months before that the MCEP programme had been suspended, but never that it had been discontinued. However, this was the first communication that the applicant received from the DTI which was directed specifically at the applicant and which appeared to indicate that the applicant's appeal would now not be heard as a consequence of the "discontinuation" of the programme.

32. The applicant took the view that there was no reason why appeals pending at the time of the suspension/discontinuation of the programme could not

and should not be adjudicated upon. The applicant communicated its position in this regard to the DTI and requested that its appeal be adjudicated. The DTI simply ignored the applicant's correspondence.

33. Accordingly, on 20 April 2016, the applicant brought a further court application to direct the DTI to consider and adjudicate its appeal. This application was launched in this Court under case number 32694/2016. It will be referred to as "the second application".

34. In the second application, the applicant sought the following relief:

34.1 a declaratory order that the MCEP had not been terminated but had been temporarily suspended;

34.2 that the DTI's decision not to deal further with appeals already lodged with it under the MCEP but not finalised by the date of the temporary suspension of the MCEP be reviewed and set aside; and

34.3 that the DTI be directed to consider and determine the applicant's appeal

35. Again, the DTI prevaricated in filing an answering affidavit in response to the second application and ultimately did not do so. On 4 October 2016, six months after the second application had been launched, the DTI advised the applicant that the first respondent had decided to approve the appointment of a committee to adjudicate the applicant's appeal.

36. Between 4 October 2016 and 25 October 2017, the applicant wrote to the DTI on an almost monthly basis to enquire as to the status of its appeal. Other than a single vague response from the DTI on 16 January 2017 to the effect that *"an ad hoc review committee has been constituted and a sitting will shortly be scheduled"* the applicant received no response to these letters.

37. On 25 October 2017, over two and a quarter years after the applicant submitted its appeal, the DTI advised the applicant that its appeal had been dismissed. The reasons for the dismissal of the appeal were stated to be the following:

> "The Ad Hoc Review Committee rejected your client's Appeal due to their failure to comply with the Guidelines of the MCEP, which includes but is not limited to insufficient BBBEE plans that were submitted."

38. Further and better reasons for the refusal of the appeal were requested and supplied. It is not necessary, for present purposes, to set out the reasons given by the ad hoc committee in detail. Of importance for present purposes is that it emerged from the reasons provided by the ad hoc committee that:

38.1 the ad hoc committee paid no regard to Annexure E submitted by the applicant in support of its appeal; and

38.2 the ad hoc committee used Version 4 of the guidelines to adjudicate the

applicant's appeal.

39. Version 4 of the guidelines differs significantly from Version 2. Moreover, it imposes a higher standard on applicants insofar as their Level 4 B-BBEE contributor status is concerned. This is so in a least three respects.

39.1 Firstly, it will be recalled that paragraph 3.1.6 of Version 2 of the guidelines provided that if applicants were unable to produce a plan to demonstrate how they would achieve Level 4 B -BBEE contributor status within 4 years, they should communicate this to the DTI and "*each case will be considered on its own merits*". In other words, such a B-BBEE plan was not a mandatory requirement. This provision has however been excised from Version 4, with the consequence that the production of a B-BBEE plan is now a mandatory requirement.

39.2 Secondly, in terms of Version 4 of the guidelines, if an applicant had not achieved Level 4 B -BBEE contributor status, it now had to submit a plan demonstrating how it would achieve this in <u>two years</u>. Thus paragraph 3.1.6 of Version 4 replaced the same clause of Version 2 of the guidelines with the following:

> "Applicants must achieve at least a level 4 for B-BBEE contributor status in terms of the B-BBEE Codes of Good Practice or must submit a plan to demonstrate how they will progress towards achieving level 4 B-BBEE contributor status <u>within a period of two years</u>." (emphasis added)

39.3 Thirdly, while Version 2 of the guidelines contained no specifics as to what was to be included in the B-BBEE plan, Version 4 stipulates as follows:

> "The B-BBEE plan must be aligned to the dti B-BBEE Codes and must include activities, time frames and costs associated with the plan to achieve level 4 contributor status."

Review

40. It was common cause in argument before me both that: (1) the new information submitted by the applicant on appeal (Annexure E) was not considered by the committee; and (2) the committee used Version 4 and not Version 2 of the guidelines to adjudicate the applicant's appeal.

41. These formed the two central grounds of review relied upon by the applicant in argument. In my view, the second ground, viz the committee's use of Version 4 to adjudicate the applicant's appeal, is decisive of the matter.

42. It was common cause that the applicable guideline in place at the time that the applicant submitted its MCEP application was Version 2. Notably and importantly, Version 4 did not exist at the time that the applicant submitted its application. The applicant therefore did not and could not have complied with the requirements of Version 4 of the guidelines in its MCEP application.

43. It follows that the appeal committee's assessment of whether the applicant's

application was correctly refused had to have taken place with reference to the applicable guidelines at the time, viz Version 2. Instead, what the appeal committee did was to use guidelines not in place at the time of the submission of the applicant's application, to determine whether the applicant's application had been correctly refused. Not only were those guidelines not in existence at the relevant time, but they imposed a higher standard than the guidelines in place at the time, a standard which could obviously not be met by the applicant in the circumstances.

44. What the appeal committee effectively did in this case was to impose new guidelines, which imposed a higher standard, retrospectively to refuse the applicant's appeal. That is impermissible.

45. I am of the view that the ad hoc committee's dismissal of the applicant's appeal stands to be reviewed and set aside for this reason alone.

Substitution

46. As noted above, the applicant seeks the substitution of the committee's decision with one upholding the appeal and directing the first respondent to pay the applicant the capital investment grant due to it in terms of the MCEP.

47. It was submitted on behalf of the applicant that if Version 2 had been applied in adjudicating the applicant's appeal then the logical result would have been that the appeal would have been upheld. I agree. It will be recalled that all

that Version 2 of the guidelines required was that an applicant who was not Level 4 B-BBEE compliant, put up a plan, if it could, demonstrating how it intended to achieve this level of compliance over the next 4 years. Notably, the production of such a plan was not mandatory and the DTI retained the discretion to grant an application in the absence of such a pan. There were also no specific stipulations as to what was required to be included in such a plan. The applicant put up the plan contemplated in clause 3.1.6 of Version 2 of the guidelines. It follows in my view, that if the applicant's appeal had been adjudicated in terms of Version 2 of the guidelines, as it ought to have been, the appeal would have succeeded.

48. It was submitted, in argument for the first time, that if I found against the first respondent on the merits of the review application, it would be inappropriate to order payment of the grant to the applicant because of certain mandatory processes and approvals that are required to be obtained before such a grant can properly be authorised and paid out. It was not entirely clear to me what these processes were or why they would, as a matter of principle, preclude an order for the payment of the grant. Moreover, and in any event, the first respondent did not articulate these processes and alleged attendant difficulties in its answering affidavit (or even in its heads of argument) and the applicant has had no opportunity to answer thereto. Simply put, the first respondent has not made out a case in its papers for the court to exercise its discretion against granting an order for the payment of the grant and cannot purport to do so in argument from the Bar.

49. Adv Pillemer SC submitted that allowance can be made for any mandatory processes that are required to be followed prior to the payment of the grant to the applicant by the removal of the 30 day time period stipulated in prayer 4 of the Notice of Motion. I agree. This will be reflected in the order I make.

Costs

50. As noted above, the applicant seeks the costs not just of this application but also of the first and second applications. The applicant seeks such costs on the attorney and client scale.

51. The facts giving rise to the first and second applications have been set out above. They were necessitated by the DTI's refusals to adjudicate, first the applicant's MCEP application, and then the applicant's appeal. On the face of it, these refusals were unreasonable. This is borne out by the DTI's prevarication in relation to the filing of answering papers and its ultimate capitulation in the face of the relief sought in both applications. In the circumstances, the applicant is certainly entitled to the costs of these applications. It is also entitled to the costs of this application, having succeeded in obtaining the relief sought in its notice of motion.

52. The question is whether the first respondent ought to mulcted in these costs on a punitive scale, as between attorney and client.

53. The applicant made the following submission in this regard in its founding

affidavit:

> "… the dilatory and unresponsive manner in which the DTI in general has dealt with the applicant's application and what followed after its rejection is nothing short of disgraceful and is worthy of censure. Such censure should manifest in a punitive order for costs as claimed in the Notice of Motion."

54. I agree. The facts set out above demonstrate extraordinary and unjustifiable prevarication on the part of the DTI, both in adjudicating the applicant's original application and in adjudicating the subsequent appeal. Throughout this period, correspondence from the applicant to the DTI routinely went unanswered and ignored. The applicant was constrained to bring two court applications in order to compel the DTI to perform its basic administrative duties in terms of the MCEP, a programme designed to serve the public interest through promoting enterprise competitiveness and as a consequence, job creation and retention. Ultimately the applicant had to wait in excess of five years to get a decision on a standard form application for a capital investment grant, only to be faced with a second refusal on spurious grounds.

55. The entire manner in which the applicant's application and subsequent appeal was handled by the DTI was unreasonable and unjustified and in my view warrants the award of costs on the attorney and client scale in respect of all three applications.[2] Moreover, the applicant was constrained to bring all three applications in order, effectively, to hold the DTI accountable for the

[2] See Erasmus *Superior Court Practice* (Juta) E 12- 20, footnote 6 and the cases cited there.

proper performance of its administrative duties in terms of the MCEP.

56. In the circumstances, I make the following order:

1. The decision of the second respondent communicated to the applicant on 25 October 2017, to reject the applicant's appeal, dated 29 June 2015, against the first respondent's decision not to approve the applicant's application for a capital investment grant under the Manufacturing Competitiveness Enhancement Programme is reviewed and set aside.

2. The applicant's appeal against the decision referred to in paragraph 1 above is upheld.

3. It is declared that the applicant's grant falls to be paid notwithstanding the suspension of the MCEP.

4. The first respondent is directed to pay to the applicant the capital investment grant due to it in terms of the MCEP.

5. The first respondent is directed to pay the applicant's costs of suit on the scale as between attorney and client:

    a. in the motion proceedings under case number 70669/14 launched on 25 September 2014; and

b. in the review proceedings under case number 32694/2016 launched on 20 April 2016; and

c. of this application, including the costs of two counsel where so employed.

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BARNES AJ

Appearances:

For the Applicant: Adv M Pillemer SC (heads of argument prepared by Adv R Mossop SC) instructed by Grant Mitchley Attorney

For the First Respondent: Adv H Kooverjie SC instructed by Rudman and Associates Inc