THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 1293/2019

In the matter between:

THE MINISTER OF TRADE AND INDUSTRY **FIRST APPELLANT**

THE DIRECTOR-GENERAL: DEPARTMENT OF TRADE AND INDUSTRY **SECOND APPELLANT**

and

MURENDI PROPERTIES AND BUILDING SUPPLIES (PTY) LTD **RESPONDENT**

Neutral citation: The Minister of Trade and Industry & Another v Murendi Properties and Building Supplies (Pty) Ltd (1293/2019) [2021] ZASCA 53 (28 April 2021)

Coram: WALLIS, MAKGOKA and MBATHA JJJA and WEINER and ROGERS AJJA

Heard: 1 March 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 09:45 on 28 April 2021.

Summary: Broad-based black economic empowerment – grant payable in terms of the Black Industrialist Scheme in support of manufacturing activities – whether respondent complied with terms of the scheme.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Mavundla J sitting as court of first instance):
The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Mbatha JA (Wallis and Makgoka JJA and Weiner and Rogers AJJA concurring)

[1] The primary issue in this appeal is whether the respondent, Murendi Properties and Building Supplies (Pty) Ltd (Murendi), had met all the qualifying

requirements for the payment of a grant awarded to it in terms of the Black Industrialist Scheme (the BIS) issued under the Black Industrialists Policy (the policy). The high court found that the respondent had met all the requirements, and ordered the appellants, the Minister of Trade and Industry and the Director-General: Department of Trade and Industry, to pay the respondent the grant in the amount of R14 210 953. The appeal is with its leave.

[2] In November 2015, the Department of Trade and Industry (the DTI) issued an incentive scheme, known as the Black Industrialist Scheme (the BIS) for qualifying applicants, issued under the Black Industrialists Policy (the policy). The policy was a key part of the Government's broad industrialisation initiatives to expand the industrial base and inject new entrepreneurial dynamism into the economy. The policy sought to facilitate the inclusion and participation of black industrialists in manufacturing activities, by, among other things, enabling them to have access to finance. The policy was therefore aimed at promoting industrialisation, sustainable economic growth and transformation through the support of Black-owned entities in the manufacturing sector.

[3] For an applicant to access funding from the DTI it has to comply with mandatory requirements of the scheme namely that the applicant must:

'4.1.1 [B]e a registered legal entity in South Africa in terms of the Companies Act, 1973 (as amended) or the Companies Act, 2008 (as amended), the Close Corporations Act, 1984 (as amended) or the Co-operatives Act, 2005 (as amended).

4.1.2 Be a taxpayer in good standing and must provide a valid tax clearance certificate at assessment and before the grant is disbursed.

4.1.3 Be involved in starting a new operation or expanding an existing operation or the acquisition of an existing business/operation.

4.1.4 Be aligned to the productive sectors of the economy within the identified sectors as outlined in section 3.4 above.

4.1.5 Have more than 50% shareholding and management control.

4.1.6 Have a valid B-BBEE certificate of compliance.

4.1.7 Be directly involved in the day-to-day running of the operation and must have requisite expertise in the sector.

4.1.8 Have a projected minimum investment of R30 million; and

4.1.9 Undertake a project that should result in securing or increasing direct employment.'[1]

In addition, an applicant had to score points in the Economic Benefit Criteria and achieve at least a level four Broad Based Black Economic Empowerment (BBBEE) contributor status as per the revised BBBEE Codes of Good Practice published in October 2013, as amended. The grant would not be approved unless these criteria were met. Once the applicant had been approved to receive a grant under the scheme, it became eligible to submit a claim to the DTI for payment of the grant in accordance with the timelines set out by the DTI.

[4] When it applied for a grant Murendi operated nine retail outlets in the Vhembe District in the Limpopo Province and employed a staff of 125. Its sole shareholder was Mr Makhesha. It identified itself as a black industrialist under the policy, being 'a juristic person owned by a Black South African that creates and owns value adding industrial capacity and provides long term strategic and operational leadership to businesses.' On its business profile it is described as a retailer of building supplies, with the majority of its revenue generated from retail of hardware and building materials, sourced from various suppliers and manufacturers. Its income was supplemented by the manufacture and sale of concrete roof tiles. It intended to use the grant to expand its tile manufacturing plant to enable it to supply other districts in the Limpopo Province, in the manufacturing and building supplies sector. To achieve its expansion goal it required an investment of R40 352 000 for the acquisition of a new tile plant and various types of vehicles, including tippers, forklifts, and tractors. The result would be: a creation of an additional 46 jobs, bringing the total

[1] The Department of Trade and Industry: Black Industrialists Scheme, 2015: Programme Guidelines at 5.

employment opportunities in the company to 138 permanent jobs; the manufacturing of South African Bureau of Standards quality branded roof tiles; and an increase in the company's market share, by opening seven more retail outlets in the Limpopo Province.

[5] The approval of the grant by the DTI was subject to approval for co-funding from the Development Funding Institutions (DFIs) to finance the project of manufacturing roof tiles. The respondent sought funding from the Industrial Development Corporation (IDC) in the form of a loan for R31 810 000. The loan was granted subject to the respondent obtaining a grant from the DTI. In line with the prescripts of the scheme, on 14 August 2016, the respondent submitted an application for the grant in terms of the scheme. On 16 March 2017, the Black Industrialist Scheme Funding Adjudication Committee (the adjudication committee) conditionally approved the application. On 19 October 2017, the adjudication committee granted the final approval of the project and a matching grant of R14 210 953 was awarded to the respondent.

[6] The final approval of the grant was granted subject to the following conditions:

'. . . [A]pproval of the co-funding;

The claims disbursement[s] will be based on approved cost sharing percentage of actual cost incurred and performance criteria being met;

Assets purchased from a connected party will be excluded from qualifying costs;

The entity to maintain the 100% black shareholding and management control for the full duration of the project; and

The project must be in line with section 13A of the Broad Based Black Economic Empowerment Act 53 of 2003, as amended by Act of 2013 (the BBBEE Act) which states that:

"Any contract or authorisation awarded on account of false information knowingly furnished by or on behalf of an enterprise in respect of its BBBEE status may be cancelled by the organ

of state or public entity without prejudice to any other remedies that the organ of state or public entity may have".'

The approval letter also provided a schedule, setting out the utilisation of funds in respect of the capital investment, the cost sharing matrix, and the Economic Benefits Point Scoring Criteria.

[7] An addendum to the approval letter set out the commitments made by the applicant against the criteria set out in the scheme itself. Two paragraphs were important. They read:

'10.1 Payments will be based on actual costs incurred and performance criteria being met on approved interventions.

10.2 The final claim for disbursement should be submitted at the completion of the project as approved by **the dti**.

10.3 If part of the funding is sourced from the Development Finance institutions (DFIs), **the dti** may align its disbursement(s) with that of the DFIs.'

These provisions accorded with the Programme Guidelines, save that in the guidelines the additional words '[c]laims for disbursements should be submitted as per the approved milestones and . . .' appeared at the commencement of clause 10.1. On the final page of the addendum the following appeared:

'**The first claim must be submitted within three months after the financial closure has been secured. The final disbursement will be made only when the full investment has been brought into commercial production/implementation, within a two-year (24 months) period.**'

[8] On 9 February 2018, the respondent was notified that it could be in a claimable position under the approved grant agreement. It was requested to submit a claim form for assets which the respondent had purchased and for costs it had incurred, as per the approval granted for the BIS. The documents required for such purposes were dispatched to the respondent. The letter also specified that the claim was to be submitted within five working days of the

communication to the respondent and that the claims could only be submitted on a bi-annual basis to the DTI. In response, the respondent submitted the claim forms and supporting documents to the DTI on 28 February 2018.

[9] It was a condition for making a claim that it be accompanied by a valid BBBEE certificate. Murendi experienced problems with the first two certificates it submitted and an attempt to provide the required information by way of affidavit, but nothing turns on these attempts. On 20 April 2018, it provided a new BBBEE certificate from Muthelo (Pty) Ltd, (Muthelo), a SANAS-accredited agency, and submitted it to the DTI.

[10] On 5 March 2018 the DTI conducted a due diligence investigation in relation to the claim. Mr Leboho, a deputy director of legal services in the employ of the DTI, visited the respondent's premises for the investigation. Mr Leboho subsequently filed a report with the DTI to the effect that the inspection was positive, and that supporting documents of costs incurred were provided and that other relevant parts of the project, were confirmed during the inspection.

[11] On 20 November 2018, the respondent received a notice from Muthelo informing the respondent of its intention to recall the BBBEE certificate it had issued in respect of the respondent, referred to in para 9 above. The notice read as follows:

' . . . [F]ollowing an unscheduled SANAS assessment visit emanating from a DTI request/complaint, a finding was made that Murendi Properties & Building Supplies CC was incorrectly verified under the Amended Codes of Good Practice instead of Amended Construction Contractor Sector Codes. As a result, we have taken a decision to recall the certificate and re-issue it under the Amended Construction Sector Charter'.

The respondent was advised that this might lead to a change of its BBBEE status level and it was invited to lodge an appeal within a period of 48 hours of receipt of the notice. In these circumstances, through its attorneys, the respondent lodged an appeal against the decision to withdraw the certificate.

[12] The respondent challenged the recall of the certificate on various grounds, including: (a) the respondent did not engage in construction activities, but was in a retail business, which fell under the Generic Codes; (b) that the Amended Construction Sector Codes, which were relied upon by Muthelo to classify the respondent as a construction business, were non-existent at the time of the lodging of the application and were only published in November 2017; and (c) the Economic Benefit Criteria in the BIS Programme Guidelines issued by the DTI required that a black industrialist applicant, such as the respondent, achieve a level 4 BBBEE contributor status in line with the revised BBBEE Generic Codes published in October 2013. The respondent received no further communication regarding the appeal either from Muthelo or the DTI. It also received no formal response to its claim for payment of the grant.

[13] The delay prompted the respondent to bring an urgent application to the high court seeking the following relief: '[d]eclaring that the applicant has met all the qualifying requirements for the payment of the grant; [and] [d]irecting the respondent to pay the applicant the grant in the amount of R14 210 953'. The claim was expressly based on the contract to provide a grant and was described in the founding affidavit as being one:

'to enforce the provisions of an agreement between Murendi and the DTI in terms of which the DTI agreed to provide a financial grant to Murendi for the sum of R14 210 953 ("the grant agreement"). It is effectively an application for specific performance.'

[14] Although the DTI accepted in its affidavits and argument in the high court that the award of the grant gave rise to a contractual relationship,[2] in its heads of argument it submitted that it was provided in terms of a government scheme and not in terms of a contractual relationship.[3] However, in oral argument, counsel for the DTI accepted that this made no difference to the essential question, which was whether Murendi satisfied the conditions for making a claim on the grant. It is therefore unnecessary to explore the characterisation of the grant any further. The case was brought on the basis of a contract and should be decided on that basis.

[15] As is apparent from the relief sought by the respondent in the high court the issues were: whether the approval of the grant constituted a final conclusion of a contractual relationship between the DTI and the respondent in terms of the incentive scheme; whether the respondent had substantially complied with the requirements of the DTI after furnishing the third certificate on 29 April 2018; and if the objectives of the BBBEE Act 53 of 2003 to level the economic arena were substantively complied with.

[16] The high court held, in reliance on the decision in *KwaZulu-Natal Joint Liaison Committee v MEC Department of Education, KwaZulu Natal*,[4] that where a functionary takes a decision that an applicant, who applies for assistance through a scheme, qualifies for such a benefit, the decision creates a binding undertaking, which cannot be unilaterally withdrawn without approaching the court. The functionary was thereby bound to act within the

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[2] See *Minister of Home Affairs v American Ninja IV Partnership* [1992] ZASCA 164; 1993 (1) SA 257 (A); [1993] 1 All SA 222 (A).

[3] Relying on *Dilokong Chrome Mines Eiendoms Beperk v Direkteur Generaal: Departement van Handel en Nywerheid* 1992 (4) SA 1 (A); 1992 (4) SA 1; *Die Suider-Afrikaanse Kooperatiewe Sitrusbeurs Beperk v Direkteur Generaal: Handel en Nywerheid and another* [1997] 2 All SA 321 (A).

[4] *KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal* [2013] ZACC 10; 2013 (4) SA 262 (CC); 2013 (6) BCLR 615 (CC), paras 32 and 48 (*Joint Liaison Committee*).

confines of the scheme. In light thereof, the high court held that the DTI's undertaking to pay the respondent the amount of R14 210 953 was an enforceable undertaking, notwithstanding the fact that there was no chronicled agreement giving effect to the undertaking. The court based its decision on the following factors:

(a) 'the fact that the applicant substantially complied with the terms set out by the respondent;

(b) the objective of [the Broad-Based Black Economic Empowerment] Act 53 of 2003 are to level the economic arena, by eradicating its skewed turf from which the majority of this country were excluded. This aspiration, in my view, can only be achieved by taking robust means. Towards that end substantive compliance, rather than formalism which is not material, is called for;

(c) the respondent, although it was initially not happy with the BBEE certificate submitted by the applicant, it did not immediately seek to resile from the undertaking, instead, afforded the applicant an opportunity to resubmit a compliant certificate, which request was indeed complied with; the respondent's inordinate delay in concluding its investigation, weighs heavily against it, but in favour of the applicant, regard being had to equity and fairness.'

Regrettably this approach overlooked that the claim was based on an admitted contract, a situation to which the *Joint Liaison Committee* judgment did not apply. In the result, the high court failed to address the central issue of whether Murendi satisfied its contractual obligations when making a claim.

[17] The issue of enforcement of a contract raised the question whether the respondent complied with the mandatory conditions when submitting the claim for payment to the DTI. The appellants' reasons for the DTI's refusal to pay were two-fold: first, the respondent's failure to submit a valid BBBEE certificate and, second, that payment was contingent upon the completion of the due diligence investigation by the DTI. The DTI contended that the final BBBEE certificate issued by Muthelo had been reviewed by SANAS and did not contain sufficient information. As a result, Muthelo indicated that it would withdraw the certificate. Counsel for the appellants submitted that the SANAS

review was fatal to the respondent's claim for the payment. Furthermore, it was submitted that the respondent failed to meet the approved milestones for the payment, actual costs had not been incurred, and the performance criteria had not been met by the respondent to entitle it to specific performance. Stress was laid on the fact that the claim was for payment of the entire grant at a time when none of the plants and vehicles had been delivered by the suppliers.

[18] On the other hand, the respondent contended, first, that the alleged misclassification under a wrong code did not make the certificate invalid. It could only have had an impact on the points allocated to the respondent. Second, it maintained that the BBBEE certificate was correctly measured under the Generic Codes. Third, the assertion that the respondent had previously submitted a fraudulent BBBEE certificate was irrelevant as the review was in respect of an incorrect classification, which was disputed by the respondent. Fourth, the checklist reflecting the issues identified by SANAS was an internal document which was never furnished to respondent. The items identified in the checklist were clearly for Muthelo's attention to address and crucially they did not suggest that the Muthelo certificate was invalid or incorrect in certifying Murendi's status as a level 4 BEE contributor.

[19] I highlight a few notes and directions from the SANAS review issued to Muthelo, for example, '(a) no pertinent notes/workings in that they failed to support the scores awarded - no action required; (b) statement of comprehensive income is missing and therefore cannot work out the 5 years average – does not affect calculation, no action required and so forth'. A cursory glance at the checklist reveals that the actions required to be carried out by Muthelo, included: getting confirmation from the local chief; getting a letter of confirmation from the beneficiary; getting supporting documents; establishing correct amounts and so forth. It is clear that this is a working document which

required Muthelo to verify, confirm or get supporting documents and at times not to take any action. These comments were specifically directed to Muthelo and not to the respondent.

[20] The DTI's heads of argument stated that the Muthelo certificate was invalid as it did not contain sufficient information as indicated by SANAS. But the sole purpose of the certificate was to confirm to the DTI that Murendi had maintained at least a level four BBBEE status, which the Muthelo certificate did. The SANAS report did not suggest that this was incorrect. The issues raised by SANAS might have been relevant if the certificate was concerned with the preferential points to be awarded to a tenderer on the basis of its BBBEE status, but that was not the case here. In the absence of any evidence from the DTI as to the issues it asked SANAS to review, or from SANAS or Murendi as to the reasons given for the review, the report had little force in relation to the issues in this case. What is more, the answering affidavit did not go as far as the heads of argument. It went no further than to say that there were discrepancies and inconsistencies in the various certificates and relied solely upon the SANAS report. In the result there was a report from a certified verification agency certifying the very matter that was of concern to the DTI and no substantive factual challenge to it. Applying the established tests for the existence of a *bona fide* and genuine dispute of fact,[5] no real dispute was raised in regard to the validity of the Muthelo certificate.

[5] *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another* [2008] ZASCA 6; 2008 (3) SA 371 (SCA) para 13.

[21] It was common cause that the respondent was obligated to provide a valid certificate each time it lodged a claim for payment with the DTI, because an entity's circumstances might change which might have an impact on the overall BBBEE status of the entity. This could be due to a change of ownership or could be a result of an error uncovered during the verification process and might result in the re-issuing of a new certificate. Clause 10.6 of the Verification Manual,[6] provides that an entity has a right to appeal against any decision of a Verification Agency. In cases where the appeal or complaint is upheld, the verification agency is required to conduct a root cause analysis to ascertain how and why the error occurred. In this case, the appellants have failed to show that these processes were followed after the respondent lodged an appeal. No outcome of the appeal has been submitted by the DTI. This Court is not a proper forum for the determination of the issues raised in the complaint and the appeal. Therefore, the appellants' reliance on the review by Muthelo was based on unproven allegations. The BBBEE certificate issued by Muthelo remained valid until set aside or until it expired on its own terms. This is reinforced by the fact that SANAS did not have the legislative power to dictate to a verification agency to withdraw the certificate.

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[6] Verification Manual, GG 31255 of 18 July 2008 page 19. Clause 10.6 of the Verification Manual states:
'10.6.1 The Verification Agency shall have a documented process for receiving, evaluating and making decisions on appeals.
10.6.2 A description of the process for handling appeals shall be made publicly available.
10.6.3 The Verification Agency shall be responsible for all decisions at all levels of the appeal-handling process.
10.6.4 Investigation of and decisions on appeals shall not result in any discriminatory actions against the appellant.
10.6.5 The appeals-handling process shall include at least the following elements and methods:
10.6.5.1 an outline of the process for receiving, validating and investigating the appeal, and for deciding what actions are to be taken in response to it, and
10.6.5.2 a procedure for tracking and recording appeals, including the actions undertaken to resolve them.
10.6.6 The Verification Agency shall acknowledge receipt of the appeal and provide the appellant with progress reports and outcome.
10.6.7 The decision to be communicated to the appellant shall be made by, or reviewed by, individual(s) not involved in the matter that is the subject of the appeal.
10.6.8 The Verification Agency shall give the appellant formal notice of the end of the appeal-handling process.
10.6.9 All appeals shall be resolved in a timely manner by the Verification Agency.
10.6.10 As a guide, an appeal shall be resolved within a maximum of 30 days of the initial lodging of the appeal.'

[22] It is not for this Court to determine the category under which the respondent falls, as this is a technical assessment that has to be carried out by a SANAS accredited agency. Be that as it may, on the evidence before us it can be accepted that the respondent was assessed in terms of the Generic Codes as per the DTI directives, as the amended Construction Codes were non-existent at the time of lodging of the application by the respondent. The Codes of Good Practice on Broad Based Black Economic Empowerment,[7] published on 5 June 2009 (2009 Construction Sector Codes) defined the application of the Codes. Item 3 of that code provided as follows:

'(a) Any measured entity which conducts any construction-related activities, must determine what percentage of its annual turnover is derived from construction activities;

(b) If the majority of the measured entities turnover is derived as a result of construction related activities, then the Charter will apply to such measured entity;

(c) If the measured entity does not derive the majority of its turnover from the construction sector, then the Charter will not apply to such measured entity and the measured entity will be governed by any other sector code which may be applicable, failing which the generic DTI Codes will apply;

(d) In the event that a measured entity derives an equal percentage of its turnover from construction related activities as well as other industry-related activities, then such measured entity will have the chose as to which sector code will apply.'

The respondent's assertion was that its involvement in the construction industry was only 30% of its business. In that regard Item 3(c) would be applicable to the respondent at the time the grant was approved.

[23] At the time the grant to the respondent was finally approved on 19 October 2017, the new Construction Sector Codes were not yet promulgated. The applicable 2009 Construction Sector Codes, until December 2017, were the 2009 Construction Sector Codes promulgated in June 2009, and it appears that

[7] Codes of Good Practice on Broad Based Black Economic Empowerment GG 32305, GN 862 of 2009.

the retailing of building supplies was not within the scope of that code. It may well be that the amended Construction Sector Codes promulgated in December 2017 did apply to the retailing of building supplies, but the DTI did not, in the high court, positively assert that this was so. The BIS Programme Guidelines referred only to the BEE Codes of Good Practice published in October 2013 ie the Generic Codes, and it was the Generic Codes which the appellants in the high court attached to their opposing papers. It was only the investigation by members of this Court which brought to light the terms of the Original and amended Construction Sector Codes. Their applicability was never debated in the high court. The DTI's point in the high court was that the Muthelo certificate had been withdrawn so the respondent lacked a BEE certificate. However, this ignored the pending and unresolved appeal which the respondent lodged against the threatened withdrawal of the certificate.

[24] The Economic Benefit Criteria requirements, specifically required that Murendi had to achieve at least a level 4 BBBEE contributor status as per revised BBBEE Codes of Good Practice published in October 2013. The DTI did not claim that the respondent failed to achieve this. And even if the Amended Construction Sector Codes were to be applicable, the appellants have never alleged that the respondent would have failed to meet the minimum BBBEE contributor status. More significantly it was grossly unfair on the respondent to be told midway the project and after having incurred substantial costs, that it no longer qualified for funds because it now had to be assessed under a different code. In regard to the validity of assessing the respondent under the generic codes the DTI did not positively assert that the generic codes did not apply, that Muthelo had been required to determine the appropriate sector when doing the April 2018 certification and there was no evidence from Muthelo that it failed to do so.

[25] It is an important public policy consideration that the BBBEE contribution of an entity is properly rewarded as held by Constitutional Court in *Allpay 2*.[8] In *South African Natural Roads Agency Ltd v Toll Collect Consortium* [2013] ZASCA 102; [2013] 4 All SA 393 (SCA); 2013 (6) SA 356 (SCA) at para 27, this Court held that:

'[t]he invitation to re-score the Consortium's tender for quality must be declined. Once again it must be stressed that this is not the function of a court . . . Nor will it interfere because it disagrees with the assessment of the evaluator as to the relative importance of different factors and the weight to be attached to them. The court is only concerned with the legality of the tender process and not with its outcome.'

I find these principles applicable to this case.

[26] In considering whether the respondent failed to comply with the qualifying requirements for payment, in *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Security Agency and Others* (*Allpay 1*),[9] the Constitutional Court dealt with the failure to comply with a mandatory condition of a tender. It ruled that the tender could not simply be discarded. It held that the materiality of irregularities should be determined primarily by assessing whether the purposes of the tender requirements have been substantially achieved.[10] Similarly, in this case I find that the mandatory requirements were substantially complied with by the respondent.

[27] In interpreting the provisions of the policy, the scheme and the letter of grant the principles enunciated in *Natal Joint Municipal Pension Fund v*

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[8] *Allpay Consolidated Investment Holdings (Pty) Ltd & Others v CEO, SASSA & 7 Others* (*Allpay 2)* [2014] ZACC 12; 2014 (6) BCLR 641 (CC); 2014 (4) SA 179 (CC).

[9] *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Security Agency and Others (Allpay 1)* [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC).

[10] Ibid, paras 30 & 58.

Endumeni Municipality[11] find application. *Endumeni* supports the position that a holistic approach should be uniformly applied to the interpretation of all legal documents. It discourages superficial interpretation of legal documents. In that regard in the interpretation of the policy and the scheme we have to take into consideration the background, history, purpose and objectives of the policy. Most importantly, as explained in *Endumeni* a sensible approach which avoids anomalies must be adopted.[12] Similarly in *Panamo Properties (Pty) Ltd & Another v Nel N O & Others* [2015] ZASCA 76; 2015 (5) SA 63 (SCA); [2015] All SA 274 (SCA) this Court endorsed, at para 27, that this is the proper approach to adopt in the interpretation of the requirements of the policy.

[28] The respondent had substantially satisfied the objects of the policy, which was to empower and assist financially Black Industrialists that have a potential to become major industrialists in line with the prescripts of the BIS. In *Allpay 1*, the Constitutional Court held that 'substantive empowerment, not mere formal compliance, is what matters'.[13] Counsel for the respondent submitted that the most important part of the mandatory conditions is that the ownership of the business remained 100% black, which would be in line with the purpose of the scheme. We agree. The respondent maintained the 100% black ownership and management profile. Having found that the criticisms of the certificate issued by Muthelo lacked any proper factual basis and that it remained valid until set aside or until it expired on its own terms, there was compliance with the terms of the grant. I am satisfied that the respondent discharged the onus of proof in regard to the provision of a valid BBBEE certificate.

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[11] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA).
[12] Ibid, paras 17-24.
[13] *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Security Agency and Other*, fn 10 above, para 55.

[29] The appellants raised two points in their opposing papers in support of a contention that the claim was premature. They were that first, grant money is paid out ‘per the approved milestones’, based on actual costs incurred and performance criteria being met. When Murendi submitted its claim in February 2018, the actual costs had not yet been incurred as the plant and commercial vehicles had not been delivered. Second, a final claim for disbursements should be submitted at the completion of the project as approved by DTI, whereas Murendi’s February 2018 claim was for the full grant amount. As at February 2018, the estimated completion date was August 2018.

[30] The DTI failed to complete the investigation, which it alleged payment depended upon. It did not pay regard to the positive report completed by Mr Leboho. Under the IDC loan, drawdowns against the loan could be made against pro forma invoices. This was important as the invoices produced and attached to the replying affidavit showed that all the suppliers required payment in advance of the delivery of the goods. The IDC loan was used to pay these suppliers. The DTI contended that when the claim was submitted by Murendi the actual cost had not been incurred because neither the tile plant nor the commercial vehicles had been delivered. However, they had been ordered and the upfront payments required by the suppliers had been funded from the IDC loan. The costs had been incurred and it is impossible to believe that the DTI was unaware that it would be necessary to pay – at least in part – for the plant and vehicles before installation and commissioning. In fairness, the DTI did not suggest otherwise.

[31] In accordance with para 10.1 of the Guidelines, the addendum to the grant stated that payments of claims would be ‘based on actual costs incurred and performance criteria being met’. The grant did not require that the assets or services on which costs were incurred should actually have been delivered or

rendered, or even that Murendi should already have made payment to the suppliers of the assets and services. The only requirement was that the cost should have been incurred, ie the obligation to make payment. This is entirely understandable. Counsel were asked whether any performance criteria had been identified and accepted that there were none. In those circumstances, it seems to me that payment of an appropriate portion of the grant could be claimed when costs had been incurred. It may be that the DTI had decided to align its disbursements with those of the IDC, but in the absence of any evidence, documentary or otherwise, to suggest that such a decision was made, I am not prepared to conclude that this was the case. But the proposition that no costs had been incurred when the claim was made is unsupportable. This ground of defence must also be rejected.

[32] The third defence raised by the DTI was that the claim could not be submitted for payment because the project was not complete as required by the provisions set out above in para 7. The respondent was criticised for submitting a claim for items where delivery had not taken place, despite the production of invoices. This failed to take into account that the purchases were partly paid for from the IDC loan, which attracted interest and that some of the ordered items were specifically being manufactured for the respondent and not readily available. Whilst the project was not complete when the claim was lodged, the suggestion that this was required was based on a construction of the provisions of the letter of grant that was not sensible or practical. The money from the grant and most of the money from the IDC loan was intended to be used to acquire the plant and vehicles for the extension. When the suppliers required payment in advance of the fulfilment of the orders, the funds needed to be available to enable the project to be undertaken at all. It was not feasible and could not have been intended that nothing would be disbursed until everything had been acquired and the new plant was up and running. How then was the

project to be funded? Given the purpose of the project and the inevitable requirement for at least the payment of interim amounts as costs were incurred the correct interpretation was that claims could be made once costs were incurred in accordance with the specified cost sharing proportion of forty per cent. The defence that the claim was premature must also fail.

[33] In the result, all the grounds for refusing to pay the grant raised by the DTI were unfounded. The DTI did not suggest that if that was the case the amount due to Murendi was less than the full amount of the grant. Its approach was an all or nothing one. Accordingly, the appeal is dismissed with costs, including the costs of two counsel.

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JUDGE OF APPEAL

APPEARANCES:

For appellants:	M Mphaga SC (with him H C Janse van Rensburg)
Instructed by:	State Attorney, Pretoria
	State Attorney, Bloemfontein.
For respondent:	T Ngcukaitobi SC (with him P Bothma)
Instructed by:	Falcon & Hume Incorporated, Sandton
	Webbers Attorneys, Bloemfontein.