THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 798/2018

In the matter between:

MINISTER OF TRADE AND INDUSTRY **APPELLANT**

and

SUNDAYS RIVER CITRUS COMPANY (PTY) LTD **RESPONDENT**

Neutral citation: *Minister of Trade and Industry v Sundays River Citrus Company (Pty) Ltd* (798/2018) [2019] ZASCA 184 (03 December 2019)

Coram: Petse DP, Swain, Mbha and Mbatha JJA and Eksteen AJA

Heard: 01 November 2019

Delivered: 03 December 2019

Summary: Trade and Industry – grant payable to enterprises to promote their competitiveness as incentive for job creation and retention – grant payable to enterprises undertaking investment in competitiveness enhancing activities of existing operations – calculation of grant based on the manufacturing value added by the enterprise concerned in its manufacturing process – no particular method of grant calculation prescribed – audited financial statements but one of the methods that may be used to determine actual manufacturing value added.

ORDER

On appeal from: Eastern Cape Division of the High Court, Port Elizabeth (Jaji J sitting as court of first instance):
The appeal is dismissed with costs.

JUDGMENT

Petse DP (Swain, Mbha and Mbatha JJA and Eksteen AJA concurring):

[1] At issue in this appeal is the question whether the Eastern Cape Division of the High Court, Port Elizabeth (the high court) was correct, following upon a successful review of administrative action, to direct the appellant, the Minister of Trade and Industry, in recalculating a grant payable to the respondent, Sundays River Citrus Company (Pty) Ltd, in terms of a government scheme to utilise the 'pool account method' of calculation instead of the annual financial statement method (the AFS method). The appellant says the answer is in the negative. But the respondent says that this question must be answered in the affirmative. This issue arises against the backdrop recounted below.

[2] The respondent is an incorporated limited liability company. Its principal place of business is in the Sundays River Valley, Eastern Cape. It conducts the business of packaging and marketing citrus fruit on behalf of citrus fruit farmers in four different centres in the Eastern Cape. Its sole shareholder is another limited liability incorporated company named SRCC Holdings (Pty) Ltd (SRCC Holdings). Some 106 citrus fruit farmers in the Sundays River Valley own shares in SRCC Holdings.

[3] The respondent's business model operates along the following lines. Citrus fruit farmers who are shareholders in SRCC Holdings deliver their harvest to the respondent's

warehouses. There the fruit is washed, dried, waxed, sorted and packaged for sale under various brands both to international and local markets. The respondent derives its income in the form of packing fees and marketing commission from its packaging and marketing activities on behalf of the citrus fruit farmers. The net returns from the sale of the citrus fruit are then paid over to the farmers on a proportionate basis after deduction of not only the respondent's operational expenses but also costs associated with the preparation of the citrus fruit for sale. Each farmer's proportionate share of the net profits takes account of those costs according to each farmer's level of participation in the pool.

[4] For accounting purposes, the revenue derived from the marketing and sale of citrus fruit and expenditure incurred in generating that revenue is all dealt with in what the respondent describes as a 'pool account' on behalf of all the participating citrus fruit farmers. The net profit earned from these activities is paid to the participating farmers based on the extent of their participation in the various pools. The net profit in the various pools is arrived at by deducting from the proceeds of sale, packing and marketing fees, cost of packing materials, distribution and related costs.

[5] It is necessary to emphasise that given the nature of the respondent's business model, the calculation of the net profit generated in the pool account is kept separate from the respondent's income statement. This entails that the packaging and marketing fees charged to the pool are reflected in the respondent's pool accounting records as expenses in the pool account and are deductible from the gross proceeds of the citrus fruit as are all other pool expenses in arriving at the net profit.

[6] In order to promote enterprise competitiveness and, as a consequence, job creation and retention, the Department of Trade and Industry (DTI) introduced the Manufacturing Competitiveness Enhancement Programme (the MCEP) some seven years ago in terms of which it paid grants to qualifying businesses. The MCEP's main objective was to design and administer incentive programmes seeking to support and enhance competitiveness of a variety of manufacturing entities across a range of sectors. To qualify for a grant, a business entity must first apply to the DTI and receive approval, which will invariably be granted if the criteria prescribed by the DTI are met. Businesses seeking to avail themselves of a grant were required to, amongst others, invest in any one or more of the following: capital

equipment for upgrading and expansions; enterprise-level competitiveness improvement activities for new or increased market access; and product and process improvements.[1] Once a business has been approved to receive a grant under the scheme it becomes eligible to submit a claim to the DTI for payment of the grant in accordance with a prescribed formula set out in the MCEP's Guidelines. These Guidelines were revised from time to time and those that were in operation at the commencement of the proceedings in the high court were contained in Version 4 of April 2014.

[7] The MCEP also provides for a formula to be used in determining the amount of the grant which represents the value that a manufacturer adds to a product in the course of its manufacturing process. This value is calculated as a defined percentage of the 'Manufacturing Value Added'[2] over a two year period. The maximum amount of the grant is capped in accordance with the size of the participating enterprise. The respondent is one of the approved beneficiaries of the scheme.

[8] On 28 March 2013, and in line with the prescripts of the MCEP, the respondent submitted a claim to the DTI for payment of the grant due to it. After an inordinate delay and persistent prompting from the respondent, the DTI ultimately advised the respondent that it had calculated the grant amount in the sum of R 1 820 748.The respondent disputed the correctness of this amount, contending that it was nowhere near the amount that it considered was due to it, having regard to its Manufacturing Value Added. Protracted negotiations aimed at resolving the impasse then ensued. But the DTI was not prepared to budge, asserting that its calculations were consonant with the Guidelines' prescribed formula.

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[1] Part 3.1.3 of the MCEP Guidelines provides as follows:
'Applicants will be able to apply for one or a combination of the above-mentioned components at company and/or cluster level, based on their needs. Applicants can achieve this by investing in capital equipment for upgrading and expansions; green technology upgrades for cleaner production and resource efficiency activities; enterprise-level competitiveness improvement activities for new or increased market access, product and process improvement and related skills development; as well as conducting feasibility studies.'

[2] The Manufacturing Value Added (MVA) is calculated by deducting the sales value of imported goods, sales value of other bought in finished goods and material input costs (used in manufacturing process) from an enterprise's total sales or turnover over a two-year period. The total qualifying grant represents a percentage of the MVA depending on the historical size of the enterprise concerned.

[9] During November 2016, and after some three years had elapsed and abortive attempts at negotiations with the DTI, the respondent instituted motion proceedings against the appellant. In addition to costs and further or alternative relief, it sought an order in the following terms:

'(a) That the decision taken by the Department of Trade and Industry to pay to the Applicant a grant in the sum of R1 820 748,00 in terms of the calculation provided by it to the Applicant on 12 May 2016, as its grant in terms of the Manufacturing Competitive Enhancement Programme, launched in 2012, be and is hereby reviewed and set aside.

(b) That the Department of Trade and Industry is ordered to recalculate the Applicant's grant by utilising the pool account method of calculation, alternatively, the annual financial statement method of calculation;

(c) That the Department of Trade and Industry is ordered to pay to the Applicant the sum arrived at by utilising such calculation'.

[10] In support of its application, the respondent averred, amongst other things, that:

'18.1. The Applicant converted from a co-operative to a private company in 2000, but its business is still operated on exactly the same co-operative principles that were applied when it was a co-operative. Only *bona fide* citrus farmers, who deliver fruit to the Applicant for grading, packing and marketing, qualify to become shareholders of the Applicant's holding company.

18.2. The pooling system is widely used by co-operatives in the agricultural processing industry. When members deliver their produce to a co-operative, such as the Applicant, the produce loses its identity and is pooled or grouped based on certain criteria, e.g. variety, quality grade and size. The delivered produce is graded and sized in order to determine the number of standard units of fruit delivered in terms of each differentiated grouping of quality grade and fruit size.

18.3. The farmer member qualifies for pool participation based on the total quantity of standard units of fruit that he delivered over the duration of the pool into each differentiated grouping in the pool. The co-operative will then process the produce, for example, making wine or processing and packing fresh fruit as in the case of the Applicant, and will then market the final product under the label of that co-operative. An example of this is Simonsvlei Wines, a product of Simonsvlei (Co-operative) Ltd.

18.4. In the case of the Applicant, all its pooled citrus is marketed both nationally and internationally under various brand names like Sundays, Outspan etc. without any reference to the individual farmer members. The farmer members share in the net proceeds of the sales according to their relative pool participation in the various pools.

19.

19.1. The aforegoing manufacturing process of adding value to the product requires appropriate accounting, that is, pool accounting. The pool account is in essence similar in nature to a trust account in the sense that income and expenditure items are accounted for therein, on behalf of the pool participants, and the net profit remaining after conclusion of all transactions is paid over to the pool participants.

19.2. In this regard, the Applicant invoices the pool account in respect of packing and marketing fees which are sufficient to cover the Applicant's operating costs incurred in providing the services, as well as to provide the Applicant with a net profit to ensure its reserves are maintained. Once the citrus fruit from a specific year's produce has all been sold and all income and costs have been accounted for, the Applicant (like all other co-operatives) calculates the net profit for each pool by deducting from the sales proceeds all the manufacturing costs such as the packing and marketing fees, packing materials, distribution costs and the like.

19.3. Importantly, the packing and marketing fees charged by the Applicant to the pool account are reflected in the Applicant's income statement in the annual financial statements as its main income. Also important, in this regard, is that the calculation of the pool's net profit is kept separate from the Applicant's income statement, similar to the principles that would be applied to a trust account, and is called a pool account. The packing and marketing fees invoiced to the pool by the Applicant are therefore accounted for as expenses in the pool account and are deducted from the fruit proceeds, together with other pool expenses, in order to arrive at the net profit of the pool account that can be paid out to the various farmer members participating in the pool.

20. The pool account method thus utilises the pooled citrus turnover and material input costs relative to the packaging by the Applicant of citrus fruit on behalf of the farmer members, as well as the net payment to them in lieu of citrus fruit delivered by them, as input values in the calculation of the MVA – as opposed to having regard only to the Applicant's own turnover and material input costs as reflected in its audited annual financial statements ("AFS method").

21. The pool account method of calculation is, moreover, a more accurate assessment of the MVA for a company which provides a co-operative service to its farmer members, than is the AFS method of calculation. This is so because it provides a more realistic representation of the cost of material used in the manufacturing process and the value of the sales of manufactured goods. It is therefore a more realistic representation of the cost of material used in the manufacturing process and the value of the sales of manufactured goods. It is therefore a more realistic determination of the Applicant's actual MVA. The pool account

method was regarded by Dectra, after taking advice from auditors PricewaterhouseCoopers ("PWC"), as fundamentally correct and more relevant than the AFS method, for the aforegoing reasons, and it has been applied by Dectra and accepted by the DTI in eleven applications (five applications were approved prior to the Applicant's application and six applications were approved after the Applicant's application) by other clients of Dectra providing co-operative services, of the kind provided by the Applicant, in the wine industry. Details of those eleven applicants are as follows:

21.1. Langverwacht Koöperatiewe Wynmakery Beperk, approved by the DTI on 22 February 2013 and the first claim payment made on 26 July 2013;

21.2. De Doorns Wynkelder Primary Co-operative Ltd, approved by the DTI on 30 August 2013 and the first claim payment made on 12 June 2014;

21.3. Vredendal Wynkelder (Edms) Beperk, approved by the DTI on 1 August 2014 and the first claim payment made on 2 October 2015 with a second claim payment made on 30 September 2016;

21.4. Bonnievale Wynkelder Koöperatief Beperk, approved by the DTI on 29 April 2013 and the first claim payment made on 24 October 2013;

21.5. Montagu Wine and Spirits Co (Pty) Ltd, approved by the DTI on 29 April 2013 and the first claim payment made on 4 November 2013;

21.6. Slanghoek Wynkelder (Pty) Ltd, approved by the DTI on 5 March 2015 and the first claim payment made on 30 November 2015;

21.7. Brandvlei Wynkelder (Edms) Beperk, approved by the DTI on 22 August 2014 and the first claim payment made on 4 February 2015;

21.8. Ashton Wynkelder (Edms) Beperk, approved by the DTI on 23 January 2015 and the first claim payment made on 6 Novemer 2015;

21.9. Appelsdrift Wynmakery (Edms) Beperk, approved by the DTI on 22 August 2014 and the first claim payment made on 17 June 2015;

21.10. Die Roodezandt Koöperatiewe Wynmakery Beperk, approved by the DTI on 18 March 2013 and the first claim payment made on 13 August 2013; and

21.11. Lutzville Wingerde Beperk, approved by the DTI on 31 May 2013 and the first claim payment made on 30 October 2015 with a second claim payment made on the same date.'

[11] The appellant opposed the application. In pursuit of that opposition, it responded to the respondent's categorical averments set out in the preceding paragraph thus:

'30. Ad Paragraph 18 thereof

Save to state that the business model of the applying entity is irrelevant to the calculation of the grant, the contents hereof are noted. It may also be noted that the Applicant is, by its own admission, a private company and can accordingly not claim "co-operative" status and/or the calculation of the grant in accordance with any method other than that based on its own Audited Financial Statements (AFS) in accordance with the Guidelines.

31. Ad Paragraph 19 thereof

The Applicant's method of earning income is, with respect, not relevant to the calculation of the grant amount. The Applicant has to satisfy the qualifying criteria as provided for in the Guidelines and has to submit audited financial statements to substantiate the figures which it submits as the basis for the calculation of the grant applied for. The Applicant cannot, with respect, compile two sets of financial statements and then submit the statements which are of greater advantage to it, as it appears to do in this instance. The dti cannot be held liable for any mistakes or misrepresentation made by the Applicant or its consultant. Save for the aforegoing, the contents hereof are noted.

32. Ad Paragraph 20 thereof

Save to reiterate that the acceptable method of calculating an applicant's grant amount, is the AFS method … the contents hereof are noted. I also repeat the submissions made at paragraph 30 above.

33. Ad Paragraph 21 thereof

33.1 It is denied that the "pool account method" or any particular method which is preferable to any particular applying entity, is the "fundamentally correct" method of calculating a grant amount. It is submitted that the applying entity cannot be prescriptive as to its preferred method of calculation and the dti is not obliged to apply the method as prescribed by the entity.

33.2 With regard to the entities listed at sub-paragraphs 21.1 to 21.11, it is submitted that the information supplied by entities when lodging applications for grants, is subject to a confidentiality agreement and may not, without the said entity's written authorisation, be disclosed to any third parties.

33.3 Furthermore, the deponent to the Founding Affidavit is well aware of the confidentiality of the information which is relied upon in these paragraphs. This is evident from the correspondence which was addressed to the Applicant's attorneys in reply to a request for the documentation relied upon in making these allegations. A hard copy of the relevant correspondence is attached hereto as annexure "A".

33.4 In the absence of the eleven wineries referred to, waiving the benefit of the confidentiality agreements entered into with them, the dti is unable to properly deal with the allegations herein. In any event, what is at issue in this litigation is whether

> the calculation effectively sought to be reviewed is correct and in accordance with the Guidelines. It is of no assistance to the Applicant to argue, in effect, that if other grants had been incorrectly calculated, the Applicant is entitled to benefit therefrom. If it should be found that any applicant has unduly benefited from the MCEP, the dti is obliged, in terms of the Public Finance Management Act, act 1 of 1999 (the"PFMA"), to recover such undue payment/benefit from such applicant.'

[12] In its heads of argument in the high court, the appellant conceded that the decision made by the DTI with respect to the amount determined by it as a grant payable to the respondent fell to be reviewed and set aside. Following upon this concession, therefore, all that remained to be determined by the high court on the merits was the remedy as contemplated in s 8(1) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

[13] In due course, the application came before Jaji J who, on 10 April 2018, granted an order[3] substantially in the terms sought in the notice of motion. On 19 June 2018 the learned Judge granted leave to the appellant to appeal to this court against paragraph (b) of his order.

[14] As is apparent from the terms of the relief claimed by the respondent in the high court, two main issues arose for decision. First, the respondent impugned the correctness of the appellant's calculation of the grant in the sum of R1 820 748. Second, the respondent sought an order directing the appellant to recalculate the grant amount by utilising the 'pool account method' of calculation or alternatively the annual financial statements method of calculation. With respect to the recalculation, the respondent explained the basis upon which it relied in support of its case. Having regard to the nature of the dispute between the parties and their respective contentions, the high court was called upon to decide which one

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[3] '(a) That the decision taken by the Department of Trade and Industry to pay to the applicant a grant in the sum of R 1 820 748, 00 in terms of the calculation provided by it to the applicant on 12 May 2016, as its grant in terms of the Manufacturing Competitive Enhancement Programme, launched in 2012, be and is hereby reviewed and set aside;

(b) That the Department of Trade and Industry is ordered to recalculate the applicant's grant by utilising the pool account method of calculation;

(c) That the Department of Trade and Industry is ordered to pay to the applicant the sum arrived at by utilising such calculation;

(d) That the respondent pay the costs of this application, inclusive of the costs of postponement of 19 October 2017.'

of the two methods of calculation (or any other method) would be appropriate upon remittal of the matter to the DTI for reconsideration, having regard to the MCEP's Guidelines.

[15] As already mentioned, the high court directed the appellant, in recalculating the grant payable to the respondent, to utilise the 'pool account method of calculation'. The appellant contests the propriety of this order on various grounds. The thrust of its contention in its heads of argument is that, in doing so, the high court in essence found that the 'respondent had satisfied the requirements of s 8(1)*(c)*(ii)*(aa)* of PAJA. It did so, argues the appellant, in circumstances where the respondent had not made out a case therefor.

[16] Building on this contention the appellant's primary submission is that the main issue in this appeal is whether the high court was correct, in effect, concluding that the requirements of s 8(1)*(c)*(ii)*(aa)* of PAJA had been satisfied.

[17] Before considering this issue it is convenient at this stage to deal with three of the self-standing subsidiary points raised by the appellant. The first submission was that the high court erred in categorising the grant payable under the MCEP as a reward when in truth it is an incentive. This submission only needs to be stated to be rejected. It does not advance the appellant's case in any way and is nothing short of a red herring.

[18] The second submission was that the facts alleged on behalf of the appellant in its answering affidavit created a dispute of fact on the papers as to whether it was appropriate to utilise the pool account method in recalculating the respondent's manufacturing value added. Relying on the rule in *Plascon-Evans*,[4] counsel for the appellant argued that the high court was thus precluded from deciding the case on the papers. Counsel is mistaken in advancing this contention. As Heher JA said in *Wightman t/a JW Construction v Headfour (Pty) Ltd & another* [2008] ZASCA 6; [2008] 2 All SA 512 (SCA); 2008 (3) SA 371 (SCA) para 13:

'A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets

[4] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 at 634-635.

the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.'

[19] Indeed, when members of the Bench pointed out to counsel that the appellant had not pertinently answered to the allegations made in paragraphs 18 to 21 of the founding affidavit, wherein the respondent comprehensively laid the basis upon which it relied in motivating for the utilisation of the pool account method (for recalculating the manufacturing value added), he seemed not to have a direct answer. Instead, counsel referred us not to the appellant's answer to paragraphs 18 to 21 (quoted liberally above) but to other paragraphs of the answering affidavit. We were invited to infer from the paragraphs to which we were referred and the tenor of the answering affidavit that, in substance, the respondent's allegations were disputed. That cannot be.

[20] It is trite that in motion proceedings the respondent is required to set out clearly which of the applicant's allegations are admitted and which are denied and to set out his version of the relevant facts. It is generally not sufficient to rely on bare or unsubstantiated denials.[5] Nor was it sufficient for the appellant in answering to the respondent's averments to envelope them 'in a fog which hides or distorts the reality'[6] relating to the use of the pool

[5] *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163-1165.
[6] See *Wightman*, fn 6 above, para 16.

account method for beneficiaries of the scheme in the wine industry. As this court rightly noted in *Transnet Ltd v Rubenstein*, 2006 (1) SA 591 (SCA) para 28, affidavits in motion proceedings constitute both the pleadings and the evidence in support of the cases advanced by the parties. A party that chooses to be coy in answering its opponent's averments does so at its own peril. Indeed, in the totality of the evidence presented in the high court it cannot be said that the affidavits filed on behalf of the appellant gave rise to a dispute of fact on the bases on which its counsel relied in argument. Thus, the argument relating to the perceived dispute of fact is unavailing.

[21] Last, I deal with the argument that the high court erred in finding that the respondent had a legitimate expectation that its application for a grant would be assessed utilising the pool account method. On a reading of the respondent's affidavits I did not understand it to be the respondent's case that it had a legitimate expectation that it would be treated similarly with the entities named therein. As I see it what it sought to do was to point out that the utilisation of the pool account method was not something unusual or extraordinary but a common occurrence within the DTI. And that it was not seeking something outside of the parameters of the MCEP. After all, what the respondent claimed to be a realistic amount of the grant payable to it represented a percentage of the manufacturing value added in its manufacturing process.

[22] Section 8 of PAJA, headed 'Remedies in proceedings for judicial review', empowers a court in proceedings for judicial review to grant any order that is just and equitable, having regard to the exigencies of each case. Such orders include:

> *'(a)* directing the administrator—
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> (i) to give reasons; or
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> (ii) to act in the manner the court or tribunal requires;
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> . . .
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> *(c)* setting aside the administrative action and—
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> (i) remitting the matter for reconsideration by the administrator, with or without directions; or
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> (ii) in exceptional cases—
>
> *(aa)* substituting or varying the administrative action or correcting a defect resulting from the administrative action'.

[23] The exceptional remedy of substitution is an equitable one that has its origin in our common law, long before the advent of our constitutional order and the enactment of PAJA. The circumstances under which a court would be justified in exercising this power were over the years explained in various decisions by our courts. In *Johannesburg City Council v Administrator, Transvaal, & another* 1969 (2) SA 72 (T) at 75A-76C, Hiemstra J explained the position thus:

'Ordinarily, when an administrative decision is set aside, the matter is sent back for reconsideration, but not necessarily so. An early guideline is the case of *Norman Anstey & Co v Johannesburg Municipality*, 1928 W.L.D. 235, where GREENBERG, J., said at p. 242:

"I think the Court is only entitled to order the issue of a certificate or licence when it is clear on the facts that the local authority would be bound to grant the certificate or licence."

The Court then merely saves time by giving a decision which is a foregone conclusion. In *Maske and Gilbert v Aberdeen Licensing Court*, 1930 AD 30 at p. 45, and in *Gildenhuys v Parys Liquor Licensing Board and Another*, 1957 (4) SA 142 (O) at p. 151, considerations of time impelled the Court to make the decision itself, but there too the Court would not have done so if the end result had been open to doubt. In *Essack v Durban City Council*, 1953 (4) SA 17 (N) at p. 23, the consideration was that the respondent had revealed an unjustifiable determination to adhere to a wrong decision – an attitude calculated to impair the prospects of applying its mind afresh. A similar consideration applied in *Adam's Stores (Pty.) Ltd v Charlestown Town Board and Others*, 1951 (2) SA 508 (N).

In Livestock and Meat Industries Control Board v Garda, 1961 (1) SA 342 (AD), HOLMES, A.J.A., stated the "basic principle" as follows at p. 349G:

"From a survey of the foregoing decisions it seems to me possible to state the basic principle as follows, namely that the Court has a discretion, to be exercised judicially upon a consideration of the facts of each case, and that, although the matter will be sent back if there is no reason for not doing so, in essence it is a question of fairness to both sides."'

[24] In *Gauteng Gambling Board v Silverstar Development Ltd & others* 2005 (4) SA 67 (SCA) paras 28-29, Heher JA said:

'The power of a court on review to substitute or vary administrative action or correct a defect arising from such action depends upon a determination that a case is 'exceptional': s 8(1)(*c*)(ii)(*aa*) of the Promotion of Administrative Justice Act 3 of 2000. Since the normal rule of common law is that an administrative organ on which a power is conferred is the appropriate entity to exercise that power, a case is exceptional when, upon a proper consideration of all the relevant facts, a court is persuaded that a decision to exercise a power should not be left to the designated functionary. How

that conclusion is to be reached is not statutorily ordained and will depend on established principles informed by the constitutional imperative that administrative action must be lawful, reasonable and procedurally fair. Hefer AP said in *Commissioner, Competition Commission v General Council of the Bar of South Africa and Others* 2002 (6) SA 606 (SCA):

" . . . (T)he remark in *Johannesburg City Council v Administrator, Transvaal, and Another* 1969 (2) SA 72 (T) at 76D-E that "the Court is slow to assume a discretion which has by statute been entrusted to another tribunal or functionary" does not tell the whole story. For, in order to give full effect to the right which everyone has to lawful, reasonable and procedurally fair administrative action, considerations of fairness also enter the picture. There will accordingly be no remittal to the administrative authority in cases where such a step will operate procedurally unfairly to both parties. As Holmes AJA observed in *Livestock and Meat Industries Control Board v Garda* 1961 (1) SA 342 (A) at 349G:

". . . the Court has a discretion, to be exercised judicially upon a consideration of the facts of each case, and . . . although the matter will be sent back if there is no reason for not doing so, in essence it is a question of fairness to both sides." [See also *Erf One Six Seven Orchards CC v Greater Johannesburg Metropolitan Council (Johannesburg Administration) and Another* [1998] ZASCA 91; 1999 (1) SA 104 (SCA) at 109F-G.]

I do not accept a submission for the respondents to the effect that the Court *a quo* was in as good a position as the Commission to grant or refuse exemption and that, for this reason alone, the matter was rightly not remitted. Admittedly Baxter *Administrative Law* at 682 - 4 lists a case where the Court is in as good a position to make the decision as the administrator among those in which it will be justified in correcting the decision by substituting its own. However, the author also says at 684:

"The mere fact that a court considers itself as qualified to take the decision as the administrator does not of itself justify usurping that administrator's powers . . .; sometimes, however, fairness to the applicant may demand that the Court should take such a view."

This, in my view, states the position accurately. All that can be said is that considerations of fairness may in a given case require the court to make the decision itself provided it is able to do so."

An administrative functionary that is vested by statute with the power to consider and approve or reject an application is generally best equipped by the variety of its composition, by experience, and its access to sources of relevant information and expertise to make the right decision. The court typically has none of these advantages and is required to recognise its own limitations. See *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd*; *Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407 (SCA) at paras [47] to [50], and *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others*

[2004] ZACC 15; 2004 (4) SA 490 (CC) at paras [46] to [49]. That is why remittal is almost always the prudent and proper course.'

[25] The dicta to which reference is made in paragraphs 23 and 24 above were endorsed by the Constitutional Court in *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd & another* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC). The Constitutional Court emphasised that 'substitution remains an extraordinary remedy' and that 'remittal is still almost always the prudent and proper course' to adopt.

[26] The Constitutional Court continued:[7]

'In our constitutional framework a court considering what constitutes exceptional circumstances must be guided by an approach that is consonant with the Constitution. This approach should entail affording appropriate deference to the administrator. Indeed, the idea that courts ought to recognise their own limitations still rings true. It is informed not only by the deference courts have to afford an administrator but also by the appreciation that courts are ordinarily not vested with the skills and expertise required of an administrator.'

[27] However, for the reasons that follow, the appellant's contention that the high court invoked s 8(1)*(c)*(ii)*(aa)* of PAJA at all is plainly unsustainable.

[28] It is now time to revert to the crux of the appeal. This is: whether in granting the order at issue in this appeal, the high court strayed beyond the parameters of the power conferred on it by s 8(1)*(a)*(ii) of PAJA. On this score the remarks of the Constitutional Court in *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) para 29 are instructive. There, Moseneke DCJ stated:

'It goes without saying that every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief. In each case the remedy must fit the injury. The remedy must be fair to those affected by it and yet vindicate effectively the right violated. It must be just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law. It is nonetheless appropriate to note that ordinarily a breach of administrative justice attracts public-law remedies and not private-law remedies. The purpose of a public-law remedy is to pre-empt or correct or reverse an improper administrative function. In some

[7] See para 43.

instances the remedy takes the form of an order to make or not to make a particular decision or an order declaring rights or an injunction to furnish reasons for an adverse decision. Ultimately the purpose of a public remedy is to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law.
(Footnotes omitted.)

[29] This theme was elaborated upon in *Bengwenyama Minerals (Pty) Ltd & others v Genorah Resources (Pty) Ltd & others* 2011 (4) SA 113 (CC) where Froneman J held as follows:

'This "generous jurisdiction" in terms of s 8 of PAJA provides for a wide range of just and equitable remedies, including declaratory orders . . . orders directing the administrator to act in an appropriate manner, and orders prohibiting him or her from acting in a particular manner.'[8]

[30] The learned Justice went on to say:

'I do not think that it is wise to attempt to lay down inflexible rules in determining a just and equitable remedy following upon a declaration of unlawful administrative action.'[9]

[31] Typically, an order of substitution under s 8(1)*(c)*(ii)*(aa)* entails that the reviewing court itself makes the decision that, in its view, the administrator should have made. As a result, the need for remittal is obviated and the dispute between the parties is put to an end once and for all. Here the high court did not purport to invoke s 8(1)*(c)*(ii)*(aa)*. Thus, the best that can be said in favour of the appellant is that the order of the high court had the effect of curtailing the ambit of the parties' dispute and circumscribing the exercise of the administrator's powers, upon reconsideration of the matter, in relation to the method of calculation.

[32] It is by now manifest that the cause of the appellant's discontent is in truth the fact that the high court directed the DTI to utilise the pool account method in its recalculation. Its contention is that this aspect of the case ought to have been left to the DTI for it to recalculate the amount according to the prescripts of the MCEP untrammelled by directions. This is so,

[8] Para 83.
[9] Para 85.

argues the appellant, because it is not open to the respondent to prescribe to the DTI to utilise another entity's financial records (this being a reference to SRCC Holdings). But this submission stems from a misconception on the appellant's part. As counsel for the respondent pointed out, it is to the respondent's pool accounts that one must look in order to determine the true extent of the manufacturing value added in the respondent's manufacturing process as comprehensibly explained in the respondent's founding affidavit.

[33] In its heads of argument in this court the appellant accepted that 'the MCEP's Guidelines do not provide for the grant to be calculated in accordance with either the pool account method or the financial statement method'. Nevertheless, it sought to argue that the audited financial statement method best achieved the apparent purpose of the MCEP. The implication of this concession is telling. Indeed it puts paid to the very essence of the appellant's case as it goes to show that each case will necessarily turn on its own facts.

[34] The case of the appellant was presented on the footing that the way paragraph (b) of the high court's order was crafted indicates that it invoked s 8(1)*(c)*(ii)*(aa)* of PAJA. This then gave rise to the question whether exceptional circumstances existed to warrant this. The fallacy underpinning counsel's argument is not hard to find. The argument entirely overlooks the true ambit of the case that remained to be decided by the high court once the merits of the review were conceded. The whole dispute between the parties centred around the method of calculation. Other than contending that the audited financial statements must be used, the appellant failed to pertinently answer the respondent's case which contended for the utilisation of the pool account method. On the contrary, the respondent comprehensively explained why this was eminently the most appropriate method to adopt 'because it provides a more realistic representation of the cost of material used in the manufacturing process and the value of the sales of manufactured goods'.

[35] The reality is that in the light of this it would have been a futile exercise to remit the question of the recalculation of the grant without the high court simultaneously issuing appropriate directions, as it was statutorily empowered to do under s 8(1)*(a)*(ii) of PAJA. This, particularly in the light of the factual matrix before it and the entrenched diametrically opposed positions adopted by the parties. Ultimately, as the high court found on a conspectus of the evidence placed before it, it turned out that the position taken by the

appellant was indefensible. Had the high court not issued directions, the dispute between the parties would have remained unresolved. This was all the more so in a case like the present where the DTI had – to borrow the phraseology used in *Essack* above – 'revealed an unjustifiable determination to adhere to a wrong decision' thereby evincing an attitude that it would utilise the audited financial statement method come what may. This would have had the distinct potential for further litigation resulting in the wastage of both human and financial resources.

[36] Seen in this light there can be no doubt that the invocation of s 8(1)*(a)*(ii) of PAJA by the high court was appropriate. Accordingly, this appeal falls to be dismissed.

[37] There is in any event another insurmountable hurdle in the appellant's path. This is so because s 8(1)*(a)*(ii) of PAJA empowered the high court to weigh the relevant factors mentioned in this section and itself determine what an appropriate remedy would be. In doing so, it exercised a discretion in the narrow sense. This means that this court's power to interfere on appeal is circumscribed.[10] However, as this point was not addressed by the parties either in their heads of argument or oral argument nothing more need be said about it.

[38] In the result the following order is made:
The appeal is dismissed with costs.

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X M Petse
Deputy President

[10] See *Trencon*, fn 12 above, paras 84-90.

APPEARANCES

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