REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 11372/19

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

26/8/2020 ……………………….

DATE SIGNATURE

In the matter between:

PERESOFT SOFTWARE AND SUPPORT (PTY) LTD	Applicant
and	
THE MINISTER OF SCIENCE AND INNOVATION (NO)	First Respondent
DIRECTOR-GENERAL: SCIENCE AND INNOVATION (NO)	Second Respondent

IN RE:

The main application of:

PERESOFT SOFTWARE AND SUPPORT (PTY) LTD	Applicant
and	
THE MINISTER OF SCIENCE AND INNOVATION (NO)	First Respondent
THE CHAIRPERSON OF THE R & D TAX INCENTIVE ADJUDICATION AND MONITORING COMMITTEE (NO)	Second Respondent
DIRECTOR-GENERAL: SCIENCE AND TECHNOLOGY	Third Respondent

J U D G M E N T

TLHAPI J

INTRODUCTION

[1] This is a review application by the applicant, which conducts business as a developer of specialised computer software and which seeks to review and set aside the refusal by the first respondent, to approve a tax incentive for a project which is being researched and developed by the applicant. The tax incentive was introduced during 2006 in terms of section 11D of the Income Tax Act 58 of 1962 ("the Act").

[2] The object of the tax incentive scheme is to encourage the private sector to participate in research and development in science and technology so as to improve advancement in that field in the Republic of South Africa. In order to benefit from the tax incentive, an application for approval for the research and development project has to be made to the first respondent to enable the applicant to claim the tax benefit from the South African Revenue Services. The application form is available on the website of the Department, first respondent, and it is submitted electronically to the first respondent. The application form is received by a Secretariat which is charged with communicating the process from the first stage till the final stage of adjudication.

[3] The application is then referred to an expert who has the technical know-how to consider and evaluate and prepare a report for an evaluation by the Research and Development Tax Adjudication and Monitoring Committee established in terms of section 11D (11) of the Act. The Committee comprises of officials from National Treasury, the Department of Science and Innovation and the SA Revenue Services. The Committee considers and debates the merits and demerits of the application and makes recommendations to the first respondent for determination whether to approve or not to approve the application.

[4] The applicant seeks the following order:

> "1. Reviewing and setting aside of the refusal by the first respondent, on or about 21 August 2018 under reference number 2017/003222/01 to approve in terms of section 11D(9) of the Income Tax Act 58 of 1962, the applicant's research and development program for the development of a Web enabled Cash Book to integrate with Sage 300 ERP accounting software;

2. Directing the first respondent to approve the said application by the applicant;
3. Directing the first respondent, to inform the Commissioner of Revenue in accordance with section 11D(16) of the Income Tax Act, of the approval of the applicant's research and development, setting out such particulars as are required by the Commissioner;
4. Directing the first respondent to pay the applicant's costs;
5. Further and/or alternative relief."

[5] The application was opposed. An order authorizing a name change of the respondents by substituting the names of the first and third respondents, to reflect what they are presently known by was granted.

[6] The applicant states that the issue relates to it and the first respondent, that even though mention is made of persons appointed by Department of Science and Innovation, National Treasury and South African Revenue Services, it does not seek to join them since none of them have an interest in the matter.

BACKGROUND

[7] Mr Robert Morris Perel (Mr Perel), a qualified computer programmer is the sole director of the applicant. Since 1982 he has been involved in various aspects of research, programming, development and creation of computer programs and software. In 1983 he established Peresoft Software which was followed by registration of a close corporation Peresoft Software and Support CC and, in 1996 it converted to Peresoft Software and Support (Pty) Ltd. According to Mr Perel the applicant is a well-known and internationally recognized developer and marketer of software, specializing in the maintenance of accounting and financial management programs. Its products are "sold and supported by more than 500 dedicated Solution Providers throughout Africa, Asia, Australia, Europe Canada and the USA".

[8] During 2016 the applicant began research and development work on developing a new program which it had not as yet officially named. The name to be attached to the new program was in all likelihood going to be called "Cashbook" like the present existing Cashbook. The applicant had already created its add-on to operate on the Windows platform and the add-on was called RecXpress, 'which meant that Cashbook and RecXpress required a Windows operating system to function. Cashbook and RecXpress are currently successfully marketed to institutions worldwide'. It was intended that the program which was being developed would be a completely new one, which would 'be a complete rewrite for a completely different operating platform. 'The combination of the two programs, Cashbook and RecXpress would enable users to operate them without necessarily using a Windows operating system and regardless of any operating system the users may have'. The research and development

involved the creation of a new program described as a *"We-enabled Cash Book to integrate with SAGE ERP accounting software"*. When completed it will be a program as envisaged in section 11D and section 1 of the Copyright Act 98 of 1978.

[9] Mr Perel avers that during 2017 on the advice of one Mr Rogerio Manuel Bandeira Russo ("Russo"), who had knowledge of the applicant's business, decided to apply for the tax incentive. He gave directive to Russo to make the application on behalf of the applicant, which he did on 31 August 2017 by completing a form which he uplifted from the website of the Department, the first respondent. The application was duly completed by Russo and he had read it. Receipt was acknowledged by Mr William Mabogoane of the Department.

[10] On 1 September 2017 Mr Mabogaone sent an e-mail which required answers to 6 questions and, except for 2 questions which were added to the 6 questions, these were identical to those contained in the application form initially completed by Russo. Mr Perel referred the email to Russo and he agreed with the answers given by Russo which were now written in red font. The answers were sent to the first respondent and on 21 August 2018 the application was declined. Mr Perel stated that the covering letter marked "A" and signed by the first respondent advised of the right to review. The applicant contended that the refusal of the application amounted administrative action reviewable within the meaning of the "PAJA", the Promotion of Administrative Justice Act 3 of 2000, ("the PAJA").

A brief history to the technical background to the research and development project ("R & D project")

[11] The applicant gave a brief history of the research and development project it was engaged in and this narration was not disputed by the respondents.

11.1 The installation of software to conventional systems of programming and setting up of computer systems entailed (i) the operating system and computer program (ii) the application program. These programs are interdependent for purposes of achieving real functionality.

11.2 Different computers can therefore only connect with each other if the same or compatible software has been installed.

11.3 Operational costs are reduced in conventional systems only when the systems operate over server-based databases.

11.4 "This limitation has become a serious shortcoming in conventional systems, particularly in the global financial management and accounting and financial fields."

[12] The applicant specializes in the financial management and accounting and financial fields. As a result of the shortcomings in the conventional systems, a modern system of programming is being developed which will allow for a faster, reliable and cost effective and a higher volume of data processing being achieved. Web-based programs no longer require the installation of the application software to be installed in every computer and, the necessity to install updates to every computer. Instead a copy of the application programme is installed at a location somewhere in the world and access to the application is by way of a licenced subscription to the application software, which is regularly updated and is available to users at a much lower cost. Of importance is that the communicating computers are still required to use the same operating system, because the application software licence is still determined by the operating system. The applicant as a result identified the need for a program which is presently being researched and developed.

The applicant's research and development project.

[13] The applicant avers that it has over the years developed a successful Windows based program in the market called "Cashbook". It is a system where, with the consent of all interested parties there is a compilation of data that creates a cashbook which complies with the financial and legal requirements of the country where the product is being used.

[14] Over the years Cashbook and RecXpress have been marketed by SAGE which also markets its own product known as SAGE 300 ERP, 'which is a software application program consisting of 8 modules and, which is used as a comprehensive package for accounting and financial management in small and medium businesses'. However, Cashbook and RecXpress are only available as an optional extra to users of SAGE 300 ERP who have a windows operating system. This has been found to restrict functionality between users who have a Windows operating system.

[15] In 2016 the applicant realized a need to move away from the limitations and disadvantages encountered in a conventional system. It had to develop a new program to ensure its standing as one of the world's leading software developers in the field of financial management and, to also to avail Cashbook and RecXpress to all users of SAGE300 ERP, not limiting use to only those using Windows operating systems. A new program with the following characteristics was required:

15.1 The new program had to be web-based

15.2 It had to make functionality available to all SAGE 300 ERP users

15.3 The SAGE guidelines were used to research and develop the new project

15.4 To date no program exists anywhere in the world which can make Cashbook and RecXpress available to all users of the SAGE 300 ERP available to users

> regardless of their operating systems. The project was and still is new and the problems and uncertainties encountered require further extensive research.

[16] The first respondent denies that what is envisaged by the applicant relates to something new. It is contended that the software program the applicants seeks to develop is aimed at resolving a technical problem which enhances the functionality of SAGE 300 ERP accounting software program, in order to make it accessible on different platforms and interfaces. There is already an existing Cashbook program. What is envisaged is to improve the efficacy of an already existing program and it does not qualify as a research and development program for purposes of benefitting from the incentive in section 11D of the Act.

Difficulties and uncertainties encountered

[17] In order to gain access to the use of the application of software of his choice, a user has to make use of a browser and the existing different operating systems have a browser, which browser with its software is a computer program on its own. Since the browsers use specific operating systems they cannot integrate with other software designed for different operating systems. This causes uncertainties and problems which call for investigation and experiments for possible solutions. Presently there is no browser program in existence to avail Cashbook and RecXpress to users of SAGE 300 ERP and there is need to research and develop a new program and a website having the envisaged capacity.

[18] Another uncertainty presents itself in each programming language since each has its own syntax to create commands. The new program must be enabled to cross the various barriers created by the different browsers to integrate with the SAGE 300 ERP software to capacitate functionality in Cashbook and RecXpress regardless of the different operating systems. 'The main difficulty lies in programming languages, commands and operating systems acting as an integrated system to form a new program. The applicant contends that the programming algorithms which originate from these uncertainties take weeks or months to research and to develop into a successful algorithm. The applicant contends that the first respondent failed to have regard and consider any of the uncertainties and failed to apply its own definition of uncertainties to the facts.

[19] The first respondent denied that the applicant's envisaged program would resolve any uncertainties. There was existing functionality in the market identified by the applicant as the SAGE 300 ERP software, which has a functionality of Cashbook and RecXpress which is accessible in certain platforms. What the applicant wants to do is to increase accessibility on the Web. It was contended that there was no evidence tendered that there were uncertainties encountered by the program. The applicant had failed to demonstrate 'any systematic

investigative or systematic experimental activities or testing of any software' to resolve any uncertainty suggested.

The application form and the replies to the questions posed by Mr Mabogoane

[20] The applicant dealt with the questions in the application form and those forwarded by Mr Mabogoane and commented that the first respondent did not in its reasons criticise the answers given in the reasons for the refusal of the application.

20.1 *What is the scientific or technological objective (end goal) of the project?*

The applicant contended that the responses given on both occasions related to the same thing which was that it was intended to develop a web-based platform using a browser which could process accounting process across the internet as opposed to the limitations of the use of operating systems in conventional systems.

20.2 *Explain the scientific or technological uncertainty that the project aims to resolve?*

The applicant contended that the two answers went hand in hand because it was obvious that there would be uncertainty, because this type of project had never been successfully attempted before, no software existed from which solutions could be learnt. It was contended that it should have been a matter of logic to the Committee appointed to adjudicate the matter and, to give recommendations to the first respondent in that where no example existed the whole project would be clouded in uncertainty

20.3 *Explain the scientific or technological advance the project aims to achieve?*

The applicant contended that the two answers go hand in hand, the second expanding on the first which was to make SAGE 300 ERP available to users and to shorten the time in which reconciliations were performed.

20.4 *Describe the computer program or software you intend to create or develop?*

The applicant contended that the answers given go hand in hand and they related to developing a compatible SAGE 300 ERP to operate across the internet regardless of operating system; that it took years to develop various developmental language, it was unique and protected by copy right.

20.5 *Explain the innovative nature of the computer program or software Product. How is the software product newly introduced on the basis of its scientific or technological characteristics?*

The applicant contended that the answers given go hand in hand in that the innovative nature in the new program was clearly stated.

20.6 *Describe how the computer program or software you intend to create could not be developed using the existing technology?*

The applicant contended that the answers go hand in hand. The new program required a web-based program with special characteristics that are not available to SAGE 300 ERP users anywhere and it will take a long time develop.

[21] The first respondent contended that in the responses to the questions the "applicant failed to show that it was involved in the research and development of a computer program that was geared to resolve technological uncertainty."

Reasons given by the First Respondent

[22] The applicant addressed the covering letter and the annexure "A" which communicated the response to its failed application. It takes issue with the covering letter which does not clearly indicate which requirements in section 11D they failed to comply with. The applicant contended that under the heading *"Application of the Law"* the first respondent while ascribing certain meanings, there is no indication as to which part of the response falls short of any other meaning ascribed to the words. Under the heading *"Reasons for Non-approval"* the applicant contended that the response met every requirement in the reasons for disapproval and as far as they viewed the entire document only one reason had been given in contemplation of section 11D(2) of the Act which appear in the words *"failed to demonstrate that the results of the proposed activities are a resolution of scientific or technological uncertainty to meet the requirements of 11D(1)".*

[23] The applicant proceeded to deal with section 11D(1)(*b*)(iii) of the Act. The applicant contended that it had been stated that the element, innovativeness was expressed, in that the project was to create a program which will be the first ever program of its kind. This complied with the research envisaged in 11D(1) of the Act. The uncertainty in the results was the key feature of the research, that the applicant was working towards the development or creation of a program, where every keystroke tried out and eventually used in the research process, was systematically investigative or systematically experimental in nature or activity. He contended that the applicant had therefore met the requirements of section 11D(1)(*b*)(iii).

[24] The first respondent contended that the applicant had misconstrued the requirements of 11D(1)(*b*)(iii) in that it was not the uncertainty in the desired outcome of the project that the applicant had to address, but it was for the applicant to demonstrate that the research and development embarked upon was geared towards resolving a scientific or technological uncertainty.

Grounds of Review

[25] The applicant contended that the nature of the form that was downloaded was such that in parts it required a yes or no answer and, in certain parts certain answers were not taken into account when evaluating his application. Incorrect interpretation of and misconstruing of sections 11D(1) and 11D(1)(*b*)(iii) of the Act amounted to an unfair administrative action as contemplated in section 3 of the Promotion of Administrative Justice Act 3 of 2000 ("the PAJA"), that such refusal adversely affected his rights and should not have been refused without giving the applicant opportunity to present or dispute information or arguments which they were not invited to explain.

[26] The first respondent contended that it was not necessary for the applicant to be afforded a third opportunity to make formal or oral representations and that it was in the discretion of the first respondent to call for oral representation before the final decision.

The Supplementary Affidavit in terms of Rule 53 (4) On the Uniform Rules of Court

[27] Having received the record the applicant did not file an amended notice of Motion to incorporate additional relief, however it was indicated when responding to the answering affidavit in reply, that reliance would also be had to section 6 of PAJA. The latter ground was expanded in counsel's heads of argument. The record of proceedings filed consisted among them documents they had not seen before, being the evaluation report of Mr Mensah and the minutes. What was not included were the initial application form completed by Russo and his response to the email questions of Mr Mabogaone These were annexed and dealt with in the founding affidavit. Mr Mensah's report makes no mention of his response to the emailed questions neither did the first respondent mention that regard was had to them. It is therefore inferred that first respondent, Mr Mensah and the R&O Tax Incentive Adjudication and Monitoring Committee failed to consider the content of applicant's responses properly.

[28] The applicant questions the authority, competency and qualification of Mr Mensah to express expert opinion on programming and existing software in the market, since no mention is made of his expertise in the report. It is contended that he erred in crucial aspects which destroy the legitimacy of his report:

(i) First, was his reasoning that 'a body of knowledge exists to the taxpayer to successfully execute the proposed activity' when the applicant stated as at paragraph 22 - 27 of the founding affidavit that there was no existing software anywhere in the world to make the product researched and developed 'as a web-based product to users of SAGE 300 ERP software' and that the product will be a completely new product. Mr Mensah had not mentioned the name of any software or creators of other software applications which he said were available to the applicant, to prove his claim.

(ii) Second, was the conclusion that the applicant's activity was a 'deemed product enhancement and would not render the resolution of a scientific or technological' uncertainty. This stems from the erroneous statement that there was a body of knowledge available to the applicant. The applicant contends that the uncertainties have been dealt with in paragraphs 28 to 34 of the founding affidavit.

(iii) Third, the applicant contended that Mr Mensah had misconstrued the interpretation of 11D(1) of the Act, where he introduced certainty or success in the research and development of the product, in order to qualify it for the tax incentive.

[29] The applicant indicated what he accidentally failed to mention was that SAGE was developing a new web-based version of the ERP 300 software and that while the application was aimed at the present users of SAGE 300 ERP, it was also aimed for the future users of the software who will be using the web-based version of SAGE 300 ERP. The applicant also stated that it was constantly in touch with SAGE to ensure that applicant's development will integrate with the SAGE 300 ERP software.

THE ISSUES

[30] The main issue raised in the founding affidavit was that it was contended that the first respondent incorrectly interpreted section 11D(1)(*b*)(iii) of the Act in the reasons for refusing the applicant's application. It was contended that the first respondent had disregarded the element of uncertainty in the analysis of the answers in the application form and those given to Mr Mabogoane. It was also contended in the supplementary affidavit that Mr Mensah had misconstrued the interpretation of section 11D(1) and in finding that the section introduced

and element of certainty. Another issue related to how to deal with new reasons which did not form part of the first respondent's reasons as communicated to the applicant.

THE LAW

[31] Section 11D(1) provides:

> "(1) For the purposes of this section **'research and development'** means systematic investigative or systematic experimental activities of which the result is uncertain for the purpose of—
>
> (*a*) …
>
> (*b*) creating or developing—
>
> (i) …
>
> (ii) …
>
> (iii) a computer program as defined in section 1 of the Copyright Act which is of an innovative nature;
>
> (iv) … ."

Section 1 of the Copyright Act 98 of 1978 defines the term computer program as:

> "a set of instructions fixed or stored in any manner and which when used directly or indirectly in a computer directs its operation to bring about a result".

[32] It is my view that the issues to be determined herein are to be considered in the light of the information that was before the adjudicating committee, having regard to the application form, the answers by one Mr Russo on behalf of the applicant and, also those subsequently given in response to Mr Mabogoane, also given by Mr Russo. The decisions sought to be reviewed are contained in the letter and annexure communicated to the applicant by the first respondent.

[33] It is also important to have regard to the purpose for which 11D was enacted being, the grant of a 150% tax incentive for research and development, in section 11D(1) where it is provided, **"research and development"** means, "systematic investigative or systematic experimental activities of which the result is uncertain …" and creating and developing in 11D(1)(*b*)(iii) "a computer program which of an innovative nature" … … (my emphasis)

[34] Counsel for the applicant contends that the reasons given by the first respondent should be understood to carry the same meaning as that emphasized in the underlined wording in the Act. Since no definition of the words is available in the Act, the applicable principles of interpretation should be followed, which require that the ordinary meaning be given to words. Counsel for the first respondent contended that in the first respondents reasoning, Annexure A which was attached to the covering letter communicating the outcome, under title *"Application of the Law",* the meaning and interpretation of the words in section 11D are explained. He states that section 11D should be interpreted to mean that there must be

an indication that the program is resolving a scientific or a technological uncertainty. This calls for an examination of the first respondent's reasons which were recorded in two paragraphs, in the following manner:

> "Further for the proposed activities to be classified as R&D in the Act, its completion must be dependent on the resolution of a scientific and or technological uncertainty"
>
> " … the applicant failed to demonstrate that the results of the proposed activities are a resolution of scientific or technological uncertainty to meet the requirements of section 11D(1) of the Act".

It is argued for the applicant that the qualifying reason is contained in the second paragraph. In my view and having regard to the definition in section 11D, the applicant when presenting the application for the incentive should still be engaged in a 'systematic investigative activity' or a 'systematic experimental activity', the result of which is still uncertain, where no resolution has as yet been achieved and where the activity is ongoing. There should be no room for certainty as yet when the application is launched and when the application is adjudicated on behalf of the first applicant because the program was still being researched and developed. It is only the applicant who can give indication when it has found an solution to its research and development, in which event the purpose for the incentive would not be available.

[35] In this regard I would avoid using words not used in the legislation enacted like the word 'resolution' as used in the first respondent's reasons, for the mere reason that it brings a different meaning to what is intended in the enactment and this is evident in the response in paragraph [11] of the answering affidavit for example, where the first respondent gives another meaning, an additional meaning to 'systematic investigative or systematic experimental activity as described in 11D, to mean what the applicant must satisfy as described in the guidelines as the *"Hypothesis to experimentation and Observation and evaluation to logical conclusions."* At paragraph [58] of the answering affidavit the deponent states: *"The applicant has failed to show that it is involved in the research and development of computer programs that is geared to resolve technological uncertainty … unless the applicant can demonstrate that the project will resolve* a *technological uncertainty which is already existing, the applicant's project does not meet the requirements."* Another example is the meaning and interpretation to be ascribed to the words *"of an innovative nature"* as used in section 11D(1)(*b*)(iii) as opposed to the use of the single word *"innovative"* in sections 11D(1)(*b*)(ii)(*bb*) and (*c*).

[36] Counsel for the applicant correctly points out that meaning to be ascribed to the words are the ordinary meaning as dealt with in his heads of argument for example at paragraph 7.4 and 7.5, when dealing with the ordinary meaning that should be ascribed to the word "Uncertain" (taken from the Shorter Oxford Dictionary (1968) and the South African Pocket Dictionary). Furthermore, it was contended that in as far as it concerned the interpretation of the words "*innovative"* and *"of an innovative nature,"* the first respondent had as at

paragraph 97 of the answering affidavit introduced a qualitative comparison between the applicant's intended product and that of other similar products, thereby rendering an incompatible interpretation of the two. The Act does not define these two expressions and there had been no judicial interpretation existing. It was contended that the rigid interpretation of the words was indicative of the first respondent's reliance on some guideline and did not allow an interpretation according to the principles laid down by law.

[37] It is my view that if the first respondent wished to elicit information as described, being a reference to the "Guideline" and requiring the applicant to expand on its presentation, it could have drawn the applicant's attention to the guideline. Mr Mabogaone posed almost similar questions as asked in the application form, without indicating that a more comprehensive exposition was being asked for and to give guidance as to what was required to be explained. As I see it, it was assumed by the first respondent that Mr Mabogoane's additional questions would have elicited additional comprehensive information, thereby taking the view that the applicant was given a second chance to explain itself. Counsel for the first respondent conceded in argument that some of the questions were similar to those in the application form. It is my view that it is possible that the questions as formulated in the application form could be viewed as being too simple and restrictive, in as far it they were designed to give answers to what I believe are complex issues, especially where a tax incentive of a 150% is being applied for.

[38] Those persons involved in the interpretation of a statutory provision should not engage in a complex process or introduce into the provision that which is not intended by the legislature. The principle applied in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at 603- 604 should be followed, where it was stated:

> "[18] The present state of the law can be expressed as follows: Interpretation is a process of attributing meaning to words used in a document, be it legislation, some other statutory instrument or contract having regard to the context provided by reading the particular provision or provision in light of the document as a whole and the circumstances attended upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose for which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of these factors. The process is objective not subjective. A Sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory enactment is to cross the divide between interpretation and legislation in a contractual context, it is to make a contract for the parties other than the one they in fact made. The inevitable point of departure is the language

> of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the documents."

[39] Counsel for the first respondent contended that in the preceding paragraphs to the reasons in "Annexure A" the minister dealt with the meaning of section 11D(1). It is my view that the meanings ascribed to 'systematic; investigative; experimental; hypothesis' are not definitions in the Act, however, it could be that they were obtained from a guideline not forming part of the certified record of proceedings and not availed to the applicant before adjudication. Interpretation of the words should follow the trite principles already mentioned.

[40] It was contended by the applicant that the first respondent could not furnish new reasons not initially communicated to the applicant as it sought to introduce the guideline and in my view certain portions of the report by Mr Mensah. In the replying affidavit certain issues are raised about Mr Mensah's qualifications and the fact that he failed to file an affidavit relating to his expertise. Counsel for the first respondent dealt with Mr Mensah's evaluation by drawing comparisons to what was alluded to in the founding affidavit. As I see it, most of the allegations in the founding affidavit were an explanation of what the application was about, which comprehensive narrative was not similar to that given in the application form and the follow up answers to the query of Mr Mabogoane. My concern is that nowhere in the reasons of the first respondent especially those as dealt with in "Annexure A", does the first respondent refer to Mr Mensah's reasons as being one of the reasons and recommendations relied upon when deciding not to grant the application. Well, except for paragraph 2 of the reasons of the first respondent, where the first respondent echoes the conclusion in Mr Mensah's report. I have already indicated that in those reasons it is assumed that it was the guidelines which were being referred to as seen from the answering affidavit and which guidelines do not form part of the record.

[41] In *Jicama 17 (Pty) Ltd v West Coast District Municipality* 2006 (1) SA 116 (C) at paragraphs [11] and [12] emphasised the importance of conveying reasons to a party adversely affected thereby, so as not to allow reasons which come out for the first time in an answering affidavit to supplement reasons already given. In *National Lotteries Board and Others v South African Education and Environment Project* 2012 (4) SA 504 (SCA) at paragraphs [22] -[27] the following is stated:

> "[24] … the high court relied on the decision of *Cleaver J in Jicama (Pty) Ltd v West Coast District Municipality*, which has an impressive English Pedigree.
>
> [26) … The question here is not whether there were other reasons in the record that justified the board's decision, but whether it could give reasons other than those it gave initially for refusing the application.

> [27] The duty to give reasons for an administrative decision is a central element of the constitutional duty to act fairly. And the failure to give reasons which include proper or adequate reasons should ordinarily render the disputed decision reviewable."

[42] On what grounds is this decision reviewable? Although in the founding affidavit the applicant based its grounds on a fair procedure that was not followed, in that it was not called upon to explain its case, before the matter was adjudicated or before reasons were given, it is indicative in the answering affidavit that the first respondent relied on additional grounds which were not discovered. In that regard I find that the procedure was unfair in that the first respondent also relied on a standard not set out in the act or any regulation enacted but on guidelines to adjudicate the application. The applicant was not made aware of the importance of structuring it's responses according to the standard in the guidelines. In the replying affidavit at paragraph [15] the applicant addresses the qualifying criteria introduced by the first respondent as an *ultra vires* action reviewable under several of the grounds in section 6 of the PAJA and in conclusion the applicant states that it is incorrect, arbitrary and not rationally related to the facts.

[43] I have already indicated that the applicant did not amend its notice of motion to insert the additional grounds it relies on in terms of section 6 of PAJA

(i) 6(2)(*d*) where the decision was influenced by an error of law;

(ii) 6(2)(*e*)(iii) irrelevant considerations were taken into account or relevant considerations were not considered';

(iii) 6(2)(*f*)(ii) where the action is not rationally connected to the purpose for which it was taken; and

(iv) 6(2)(*c*) the action was procedurally unfair.

These were stated in counsel's heads of argument. My view is that if such grounds can be determined from the facts then in the interests of justice the decision is reviewable on those grounds so established.

[44] I also find that the decision is reviewable in terms of section 6(2)(*d*) in that the decision was influenced by the incorrect interpretation of the provisions of sections 11D(1) and 11D(1)(*b*)(iii). I am of the view that this is not a matter where a court of law is competent to substitute the decision of the first respondent. It is a complex matter which should be left to the first respondent to adjudicate, as it has available to it a process of evaluation by experts in the field the applicant is engaged in, of the research and development of a scientific and or technological computer program. The Act also makes provision for oversight processes to be engaged by the first respondent in conjunction with Treasury and the Receiver of Revenue, since this incentive has the potential to also impact on the fiscus. I find that the applicant

should be referred back to the first respondent for the adjudication of its application as set out in the order below.

[45] In the result the following order is granted:

[1] The refusal of the applicant's application by the first respondent on 21 August 2018 under reference 2017/003222/01 is hereby reviewed and set aside in terms of sections 6(2)(*c*) and 6(2)(*d*) of the PAJA.

[2] The matter is referred back to the first respondent for adjudication in terms of the Act.

[3] The first respondent is directed, within 45 days of the service of this order, through Mr Mabogoane (Deputy Director) and or any competent official in his place, to review the questions in the query in the email dated 1 September 2017, in such a manner setting out additional requirements and answers required for purposes of adjudicating the application for an incentive by the applicant in terms of the Act. The official is directed to make available to the applicant any material it has relied upon in the past and which it shall rely upon in setting out what is required from the applicant and the standards applicable in the adjudication of the application.

[4] The applicant is directed to supplement its answers in the application as directed in [3] as required in the Act and in any manner it deems fit. The applicant is directed to serve the first respondent with its answers within 30 days of its receipt of the question in (3) above;

[5] The first respondent is ordered to pay the costs of the applicant including those of two counsel where engaged.

TLHAPI V V
(JUDGE OF THE HIGH COURT)

MATTER HEARD ON	**:**	**12 FEBRUARY 2020**
JUDGMENT RESERVED ON	**:**	**12 FEBRUARY 2020**
ATTORNEYS FOR THE APPLICANTS	**:**	**PIERRE RETIEF INC.**
ATTORNEYS FOR THE RESPONDENTS	**:**	**THE STATE ATTORNEYS**