IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISON, PRETORIA

CASE NUMBER: 69164/2019

(1) REPORTABLE: YES

(2) OF INTEREST TO OTHER JUDGES: YES

(3) REVISED.

....19/4/22.....

SIGNATURE **DATE**

In the matter between:

RECYCLING AND ECONOMIC DEVELOPMENT

INITIATIVE OF SOUTH AFRICA NPC Applicant

And

PIRELLI TYRE (PTY) LTD Respondent

Delivered on: 19 April 2022

JUDGMENT

SARDIWALLA J:

Introduction:

[1] This is an application brought on notice of motion whereby the Applicant seeks the Respondent to comply with its legal obligations, in terms of a Deed of Adherence signed by the Respondent, of which it committed itself to compliance with the REDISA Plan including the payment of fees.

Background to the Application:

[2] On 30 November 2012 the Minister of Water and Environmental Affairs promulgated the Integrated Industry Waste Tyre Management Plan ('HWTMP') more commonly known as 'the REDISA Plan'. The REDISA Plan is an instrument of subordinate legislation was created to manage the national network for collecting waste tyres, storing them and delivering them to the recycling process.

[3] There REDISA plan is a self-funding initiative funded by a waste tyre management fee that all tyre manufactures and importers pay to REDISA in terms of the Waste Tyre Regulations, 2009, published under GN R149 in GG 31901 of 13 February 2009 ("The Regulations') promulgated under the Environment Conservation Act 73 of 1989 ('the ECA").

[4] The Applicant is a company incorporated in terms the Companies Act, 71 of 2008 of South Africa and is responsible for the scheme.

[5] The Respondent is a company carrying on business as a tyre importer and/or

manufacture of tyres as defined in terms of the REDISA Plan and is a subscriber to the REDISA Plan.

[6] The Respondent signed a Deed of Adherence "the DOA' on 29 January 2013 in which it committed itself to the compliance with the REDISA Plan which included the payment of the waste tyre management fee.

[7] The Respondent has failed to comply with its obligations to pay the waste tyre management fee for the period of August 2016 to November 2016 to the amount of R3,775,558.77 calculated as follows:

7.1 Invoice number 6000, dated 5 August 2016, for an amount of R878,394.93;

7.2 Invoice number 6155, dated 16 September 2016, for an amount of R833,949.71; and

7.3 Invoice number 6332, dated 15 November 2016, for an amount of R1, 194,920.17 and

7.4 Invoice number 6333, dated 15 November 2016, for an amount of R868,293.96.

[8] On 30 July the Applicant addressed a letter of demand to the Respondent for the outstanding fees, setting out the Respondent's legal obligations and consequences of non-compliance in respect of the REDISA Plan. The Applicant instituted this application on 13

September 2019., the purpose of which is that the Applicant seeks payment of the outstanding fees in terms of the following order: -

> *"1. Payment in the Sum of R3,775,558.77;*
>
> *2. Interest thereon a tempora morae;*
>
> *3. Costs of suit; and*
>
> *4. Further and/or alternative relief."*

[9] The application is opposed by the Respondent on the grounds that:

9.1 The Applicant in contravention of the REDISA Plan failed to review the Waste Tyre Fee annually and in consultation with the relevant consumer bodies;

9.2 Did not determine the Waste Tyre Fee on a cost recover basis; and

9.3 That the Applicant's calculation of the Waste Tyre Fee for the period of October to December 2016 was unlawful and unconstitutional.

Applicant's Argument

[10] It is the applicant's submission that the respondent has wilfully and intentionally failed to comply with its statutory obligations and contractual obligations of the Deed of Adherence set out below as follows:

a) The REDISA Plan

"Clause 4 "Subscribers to the Plan" provided that:

Any tyre producer, in terms of part 3 of the Waste Tyre Regulations must subscribe to an Integrated Industry Waste Tyre Management Plan (IIWTMP) approved by the Minister. A tyre producer's failure to subscribe to an approved IIWTMP whilst continuing to produce tyres would constitute an offence.

In order for the proper operations of the Plan, all subscribers will have to sign a deed of adherence acknowledging the existence of the IIWTMP and the requirements of the Waste Tyre Regulations…

Clause 16 'Estimated Costs" provided that:

.. in the initial years of operations, there will be over-recovery of operating costs from the Waste Tyre Management Fee as a number of depots, transporters and Processors will be less than the targets final numbers. The over-recovery will be accumulated as provisions will be used to find establishment and set up costs..

…REDISA will obtain its funds primarily from the levying of Waste Tyre Management Fees from subscribers of R2.30 + VAT per kg of manufactured and/or imported tyres and casings…

Clause 17.1 "Payments' provided that:

The Waste Tyre Management Fee levied on the subscribers will be calculated to

recover the cost of the waste tyre management process ..

Subscribers will have to produce monthly and actual statistics on tyres produced and/or imported…payment terms for subscribers who are regular importers or manufacturers and who are subscribed to the Plan will be 90 days…

…The Waste Tyre Management Fee will be reviewed annually and accordingly notified to all subscribers, and is subject to change depending on actual costs and number of tyres manufactured and imported. REDISA will strive at all times to minimize the Fee, while still meeting its mandate. REDISA's objective will be to contain the levy amount in real terms to be equal to or less than the initial amount.

Clause 28.2 'Compliance Monitoring' provides that:

Failure to abide by the terms of the obligations of a subscriber towards REDISA will result in non-compliance, and this will include but not be limited to, inter alia, in the circumstances set out below:

- *Failure to provide monthly declarations within 2 workings days of due date;*
- *Failure to declare fully all tyres manufactured, imported or exported;*
- *Failure to pay Waste Tyre Management Fee by due date.*

b) <u>The Deed of Adherence</u>

On 29 January 2013, the Respondent represented by its financial manager Riaan van Niekerk signed the 'DOA' to comply with the REDISA Plan and all its provisions

including any reasonable administrative requirements and act in compliance and abide by the REDISA plan at all times.

[11] It argues that the Respondent has not denied the Applicant's claim or the quantum but has instead raised a defence of 'collateral' challenge to the fee payable due to the Applicant's alleged failure to review the fee being an unlawful administrative act. Relying on a plethora of legal precedent the Applicant's argued that a court could only exercise its discretion to allow a party to invoke 'collateral' challenge where there is a reasonable explanation and basis to do so. Therefore, there is an onus on the Respondent to demonstrate that there were appropriate circumstances, including an adequate explanation for the delay in challenging the unlawful administrative act, which the Applicant submits the Respondents has failed to do. It states that despite the fact that the Respondent had the opportunity to institute review proceedings regarding the determination of the fees, which is designed to investigate alleged unlawful administrative acts, it failed to do so for several years without any explanation why it did not take such steps if it claims there were irregularities. Nor does the Respondent provide any explanation of any other action it took to address the irregularities it claims exist. It now for the first time raises the issue of unlawfulness in these proceedings with an objective to utilize the defence to defy its statutory obligations which should not be permissible.

[12] The Applicant indicated that it had complied with it obligation to 'review' the fee which it contended also included to 'revise' and to 'amend' when it held several operational meetings with the Department between 2013 and 2014 and that it was the Department's position that 'the REDISA Plan does not need to be amended and taken through the review process as contemplated in Regulation …12'. It therefore in terms of those consultations published its first annual public report in October 2015 on its website which it specifically

addressed the maintenance of the fee at R2.30kg.

[13] It averred that the Respondent's alternative defence that the REDISA Board has misappropriated the REDISA funds to enrich its shareholders, in which its reliance was on the winding up proceedings instituted by the Minister against REDISA was untenable as the SCA in those proceedings rejected the theory that there was any misappropriation. Lastly that there was no basis for the order of discovery sought by the Respondent as it is a general principle that there is no discovery in applications unless there is an application in terms of Rule 35(13) which the Respondent's again have failed to institute. As a result, there is no actual defences against the Applicant's relief.

Respondent's Argument

[14] The respondent opposed the application on two grounds. Firstly, that REDISA failed to review the fee annually or at all and therefore the fee was unlawful. It alleges that if REDISA did in fact review the fee that it did not consider or consul with the Respondent which is unlawful and procedurally unfair. Therefore, it is not obligated to pay a fee that was imposed unlawfully by REDISA. It's second argument was that the conduct of REDISA's Board was *mala fide* in that the funds of the REDISA Plan were being misappropriated to the benefit of the managing company appointed for the collection of the fees. Further that The Board failed in its obligations terms of clause 17.1 to minimize or reduce fees where the actual costs each year was lower and the surplus increased.

[15] The Respondent relied on the previous litigation proceedings instituted by the Minister to further its arguments regarding the review of fees and the Applicant's conduct. It further

averred that in respect of the meeting held between the Board and the Department of Environmental Affairs, the fact that the Department did not permit the increase as suggested by the Applicant was not an instruction to not review the fee, rather to the contrary the Respondent argued that the Department was clearly of the view that the Applicant could not only justify and increase but the continued rate of R2.30kg as appropriate. Therefore, the conduct of the Applicant in not reviewing the fee and not consulting the subscribers was not lawful. Lastly that the Department had no power to instruct the Applicant not to comply with the REDISA Plan and its failure to conduct the review and consult with subscribers was arbitrary and contrary to the 'doctrine of public accountability' which is a punishable offence in terms of Regulation 17(1)(B) of the Waste Tyre Regulations.

The Collateral Challenge

[16] A collateral challenge raises the invalidity and unlawfulness of an administrative action as a defence prior to it being set aside. It is collateral because it is raised in proceedings which are not intended to decide the validity or otherwise of such administrative action.

[17] In the case of *Gobela Consulting CC v Makhado Municipality* (910/19) [2020] ZASCA 180, the Supreme Court of Appeal (SCA) was called upon to consider whether the high court was entitled to find that a contract was invalid and unlawful despite the municipality not having made a counter-application seeking to review and set it aside after being sued by the consulting firm for alleged breach of contract. The municipality had instead raised a collateral challenge, where it relied on the invalidity of the disputed contract due to prescribed procurement processes not being followed.

[18] The appeal concerned a dispute arising from a contract concluded by the municipal manager on behalf of Makhado Municipality with Gobela Consulting. The contract emanated from an unsolicited proposal submitted by Gobela to the municipality to render certain services. No performance was rendered in terms of that contract. Gobela alleged that the municipality had refused and/or neglected to allow it to perform its obligations in terms of the contract and subsequently issued summons against the municipality, claiming the entire contract value as damages for alleged breach of contract.

[19] The municipality raised a special plea disputing the municipal manager's authority to enter into the contract. In its plea, the municipality denied liability on the basis that the contract was in contravention of the Local Government: Municipal Finance Management Act 56 of 2003 and the municipality's own Supply Chain Management Policy, and that as a result, the contract was invalid and unlawful. Importantly, the municipality did not file a counter-application seeking the review and setting aside of the contract.

[20] The high court found that the contract was concluded in breach of the applicable procurement prescripts which are designed to ensure a transparent, cost-effective and competitive tendering process as prescribed by section 217 of the Constitution and the provisions of the Municipal Finance Management Act. Accordingly, it dismissed Gobela's claim on the basis that the contract was invalid and unlawful. Gobela appealed the judgement and argued in the SCA that the high court had erred in dismissing its claim, on the basis that since the municipality did not bring a counter-application to set aside the contract, it was not open to the court to sanction the municipality's collateral challenge to the validity of the contract by declaring the contract invalid and unlawful. In support of its argument, Gobela

relied on *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* 2014 (5) BCLR 547 (CC) (*Kirland*).

[21] In answering the question whether the high court was entitled to declare the contract invalid and unlawful in the absence of a counter-application specifically seeking that it be reviewed and set aside, the SCA referred to the Constitutional Court's (CC) judgement in *Merafong City Local Municipality v AngloGold Ashanti Limited* 2017 (2) SA 211 (CC) (*Merafong*). In the Merafong judgement, the majority found that South African law allows for a degree of flexibility in collateral challenges to administrative action.

[22] In *Merafong*, the CC reaffirmed the Oudekraal principle *(Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA)) that a decision by an organ of state remains binding until set aside. Moreover, it provided some guidelines for assessing the competence of a collateral challenge. With specific reference to *Kirland*, it provided that,

> *"Both decisions [Oudekraal and Kirland] recognised that there may be occasions where an administrative decision or ruling should be treated as invalid even though no action has been taken to strike it down. Neither decision expressly circumscribed the circumstances in which an administrative decision could be attacked reactively as invalid. As important, they did not imply or entail that, unless they bring court proceedings to challenge an administrative decision, public authorities are obliged to accept it as valid. And neither imposed an absolute duty of proactivity on public authorities. It all depends on the circumstances.*
>
> …

A reactive challenge should be available where justice requires it to be. That will depend, in each case, on the facts."

The SCA held that the permissibility of a collateral challenge to the lawfulness of an administrative action depends on a variety of factors. In this case, the SCA considered firstly, that the high court took into account in its judgement that, despite the absence of a counter-application, the validity and lawfulness of the contract was raised squarely in the pleadings. Secondly, by not declaring the contract invalid and unlawful, the untenable outcome would be that the high court would be authorising the very result which section 217 of the Constitution and all other procurement-related prescripts seek to prevent. Thirdly, finding in favour of Gobela would have the equally untenable result that the municipality would be required to pay for a benefit it did not receive.

[23] The SCA held that justice required that the municipality be allowed to raise a collateral challenge and consequently that the high court was entitled to declare the disputed contract invalid and unlawful, despite the municipality not having counter-applied for it to be reviewed and set aside.

[24] This judgement made it clear that a court is entitled to declare a contract invalid and unlawful where justice requires it to do so, even in the absence of a counter-application seeking the review and setting aside of the contract. However, each case will and should be decided on its own merits.

Breach of contract in terms of the Deed of Adherence

[25] The Applicant contends that failure to pay the waste management fee is a material breach of the contract as set out in terms of *clause 16 and 17.1* of the REDISA Plan. On 30 July 2019 Applicant's attorneys addressed a letter to Respondent informing it that it was in breach of the agreement of REDISA Plan, by failing to make payment of the fees due to Applicant as set out in *clause 16 and 17.1* respectively.

[26] Significantly the respondent does not deny that it is indebted to the Applicant but has instead raised the 'collateral' challenge to vitiate its responsibility to pay in terms of the Deed of Adherence. The Respondent addresses the issue of the breach of the agreement by stating that the Applicant was in fact in breach of the REDISA Plan for its failure to review the Fee annually. It in fact does not even dispute the amounts claimed by the Applicant it simply alleges that the fee for the specific period is unlawful and therefore it cannot be required to pay it. To the contrary the Respondent in its papers confirms that the REDISA Plan was binding on the parties but seeks only to hold the Applicant accountable for its alleged failures in attempt to absolve itself from its responsibility in terms of the Plan. Alternatively suggests that the failure of the Applicant to comply with the Plan by consulting with the Respondent permits it not to comply either. However, the Respondent has not provided any proof in this respect but rather requires this Court to sanction its unlawful conduct merely on the basis that the alleged conduct of the Applicant too is also unlawful. Such contentions are bad in law and cannot be deemed to be a just and equitable approach to addressing contraventions.

[27] I am of the opinion that the Respondent cannot place the burden of existence of its defence, which in this matter has been done by way of a 'collateral' challenge, of the alleged unlawfulness of the determination of the fee on the Applicant. In the absence of evidence by the Respondent and on analysis of clause 17.1 of the REDISA Plan it is clear from the ordinary reading of the clause that the annual review would be an internal discussion on whether to amend or maintain and that the subscribers would be notified of the outcome of such discussion thereafter. Whilst perhaps I empathise with the Respondent that such decisions may adversely affect it and other consumers and therefore perhaps is imperative that such discussions be a collective endeavour, the Applicant electing not to exercise such discretion however does not make its conduct unlawful. There were corrective steps by way of review proceedings in which exclusion of the various consumer bodies could be addressed and remedied but the Respondent did not elect to pursue such route, without an adequate explanation thereof when it was in its best interests to do so. I am satisfied that as the REDISA Plan as it stands it does not confer an absolute obligation on REDISA to include the Respondent in the review process, albeit that it should have been discretionary, it does not place that obligation, therefore REDISA's election not to cannot be said to be unlawful on that basis alone.

[28] In the matter of Arbour Town (Pty) Ltd v Sunny Skies Investments CC t/a Chimney & Sabah Collection (aka Pearl of India) Shishi J Held that;

> "*The defendant must consequently put up a defence honestly, disclose fully the nature and grounds of it and in so far as he relies upon facts lay before the Court, facts which if proved will be a good defence."*

[29] Applying the principles of the *Merafong supra* to this application that this Court has the power to declare a contract or provisions of a contract or administrative action unlawful and invalid, where such discretion is to be exercised requires this Court to carefully consider the circumstances that permit it to do so. This requires an analysis of the whether the conduct of the Respondent in raising the defence is *bona fide* does not only require the Court to consider the delay in instituting the review proceedings but the conduct of the Respondent as a whole with regards to the dispute raised. It is not only a requirement that a defence be raised but rather more importantly the requirement is that the defence raised is also good.

[30] This application was launched in September 2019. The Respondent has since 2013 to July 2016 complied with its obligations in terms of the alleged unlawful REDISA Plan without any complaints. The Respondent, I have noted, has not at any stage indicated that it took any reactive steps to question, challenge or overt the review of the Fee with either the Department of Environmental Affairs, the Applicant or any other relevant consumer body that it alleges that the Applicant was under a statutory obligation to consult with to determine the annual review of the Fee. As found above, there was no absolute statutory obligation on the Applicant but more of a discretion on part of the Applicant. Moreover, there has been a period of time between when these proceedings were instituted and the matter was heard before me in which the Respondent would have further attracted liability to pay the alleged Fee. The Respondent is still continuing its business of manufacturing, importing and exporting tyres as a subscriber to the REDISA Plan. There are no allegations that the Respondent has not paid in terms of the Fee levied for the period after November 2016 to date. It therefore begs the question why then the Respondent has taken issue with the invoices that form part of this claim only. It clearly cannot and has not provided any evidence of any prejudice it has suffered during that time or after to suggest that its conduct for that specific period is warranted.

[31] Further that the Respondent also does not deny the contention by the Applicant that after its consultative meeting with the Department of Environmental Affairs that in October 2015 it published on its website its first annual public report which specifically addressed the retention of the Fee at the nominal rate of R2.30kg and therefore complied with clause 17.1 to accordingly notify its subscribers of the Fee to be applied. More relevant I find is that the Respondent continued to pay the Fee after the publication at the nominal rate for a further ten months before it unilaterally decided that it would no longer comply. Even then it failed to inform the Applicant, the Department of Environmental Affairs or any other consumer body of its dissatisfaction of the determination of the Fee or with the review process or the Applicant's failure to hold a proper review process as alleged. Instead the Respondent chose to stay silent and take no reactive steps until such time as it faced with coercive action to obtain compliance by the Applicant in bringing this Application.

[32] Firstly, even if this Court where to consider the review of the Fee unlawful, it would then have the effect of sanctioning the Respondent's unlawful conduct which is clearly *mala fide* and permit it to escape its contractual and statutory liability. The Court would therefore be condoning The Respondent's blatant disregard for its responsibility in terms of the REDISA Plan and Deed of Adherence. Secondly it would be condoning its failure to institute the processes afforded to it to remedy any administrative action which may be unlawful against it. The Respondent's version that there is legal precedent that states that a factor of delay plays no part in whether or not it has the right to a 'collateral' challenge and therefore cannot prevent it from bringing such a challenge is misconceived or misinterpreted. The Respondent loses sight of the fact that delay is only one of the factors to consider and not the only factor and that the Court in *Merafong* clearly emphasised that delay would play no part in 'classical' collateral challenges. That, I am of the view is the distinctive difference between *Merafong* and the Respondent case. The Respondent has proffered no evidence that its defence falls under the

guise of a ‘classical’ collateral challenge and as such it is not for this Court to merely make the assumption that it does.

[33] This Court is tasked with weighing up the interests of justice which also include the Respondent’s failures to any other reactive steps regarding the validity of the Fee. To the contrary again the Respondent places the burden of remedial and corrective action at the feet of the Applicant simply because it claims that there is no appeal process or other internal remedy to challenge the Applicant’s alleged unlawfulness in determining its Fee’s and as a result it had no other choice but to raise a ‘collateral’ challenge. I cannot find truth in this statement. There were other remedies available to the Respondent such as the review proceedings which was created to addresses and investigate administrative action especially with relation to The Public Administrative Justice Act 3 of 2000 in respect of reasonableness and fair procedure in circumstances such as the Respondent’s. It’s failures to do so is not simply a question of its delay, it is also a question of why the Respondent chose not to take any action at all. In this case the Respondent has taken no action at all with no explanation. The Respondent has not provided any evidence that it was deprived from doing so and as such I find that the interests of justice require that the Respondent be held accountable.

Conclusion

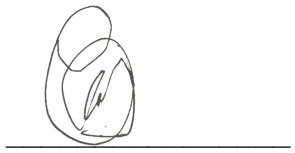
[34] In applying the dictum of *Merafong supra* that *‘unless they bring court proceedings to challenge an administrative decision, public authorities are obliged to accept it as valid. And neither imposed an absolute duty of proactivity on public authorities. It all depends on the circumstances’* that they may have been no absolute duty on the Respondent but I find that the duty was rather a reactive duty to absolve itself of any liability to pay the Fee, if indeed it

strongly believed that there was an unlawful action taken against it to be proactive in addressing such alleged unlawfulness. I accordingly find that the conduct of the Respondent did not satisfy this Court that there are circumstances before it that require this Court to intervene in the interests of justice and to the contrary it would require this Court to act as its mediator rather than an objective and impartial instrument of law. In my view it could not have been the legislature's and/or the Rules Board of South Africa's intention that the Respondent invoke or attempt to invoke Rule 13(3) Uniform Rules of Court to suspend its obligations to comply in a lawful claim or allow the Respondent to circumvent proving it has a good defence by requiring the Applicant by way of discovery to disprove its 'collateral' claim.

[35] I accordingly find that this Court cannot sustain such a contention and as a result I find that the Respondent's defence is without cause and fact and as a result must be dismissed. I am therefore satisfied that the Applicant has made out a case for the relief sought *in casu* and cannot be deprived of its power to exercise its rights to compel compliance.

[36] *I accordingly hereby make the following order that:*

1. ***The Respondent is ordered to pay the Applicant in the sum of R3, 775,558.77 together with interest thereon a tempora morae; and***
2. ***The Respondent is ordered to pay the costs of this application on an attorney and own client scale.***



SARDIWALLA J

JUDGE OF THE HIGH COURT

APPEARANCES

Date of hearing	:	3 February 2021
Date of judgment	:	19 April 2022
Counsel for the Plaintiff	:	ADV L KELLY
Applicant's Attorneys	:	Cliffe Dekker Hofmeyer
Counsel for the Respondent	:	ADV BC STOOP SC
Respondent's Attorneys	:	Barnard Incorporated