IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

[*REPORTABLE*]

Case No: 9675/2017

In the matter between:

THE MINISTER OF ENVIRONMENTAL AFFAIRS Applicant

and

RECYCLING AND ECONOMIC DEVELOPMENT INITIATIVE OF SOUTH AFRICA NPC
(Registration number 2010/022733/08) Respondent

AND

Case No: 10123/17

In the matter between:

THE MINISTER OF ENVIRONMENTAL AFFAIRS Applicant

and

KUSAGA TAKA CONSULTING (PROPRIETARY) LIMITED Respondent

JUDGMENT: 15 SEPTEMBER 2017

Henney J:

Introduction

[1] This is a consolidated application, brought by the Minister of Environment Affairs (hereinafter referred to as "the Minister" or "the Applicant") for the final liquidation of two entities that has an association with each other.

[2] The Minister, on 1 June 2017, brought an application, under case number 9675/2017, for the provisional liquidation of the Respondent, the Recycling and Economic Development of South Africa ("Redisa"), a non-profit, solvent company before Cloete J, which was granted. Cloete J also issued a rule nisi that required the Respondent and any other party with a legitimate interest to show cause, if any, on Tuesday, 25 July 2017:

1) Why the Respondent (Redisa) should not be placed under a final winding-up order;
2) Why the liquidator of the Respondent (Redisa) should not be directed to distribute the entire net value of the Respondent to the Waste Management Bureau; and
3) Why the costs of this application should not be cost in the winding-up of the Respondent (Redisa).

[3] In the second application, on 8 June 2017 under case number 10123/2017, the Minister brought the application for the provisional liquidation of Kusaga Taka Consulting (Pty) Ltd ("KT"), a privately owned, solvent company before Le Grange J, who also granted the application. The court also issued a rule nisi that required the Respondent and any other party with a legitimate interest, to show cause, if any, on Tuesday, 25 July 2017:

1) Why the Respondent (KT) should not be placed under a final winding-up order;
2) Why the liquidator of the Respondent (KT) should not be directed to distribute the entire net value of the Respondent to the Waste Management Bureau; and
3) Why the costs of this application should not be cost in the winding-up of the Respondent (KT).

The basis upon which the Minister sought an application for the liquidation of KT was because KT acted as the management company of Redisa.

[4] In respect of both applications,[1] the Minister was granted an order for the provisional liquidation of both Respondents' in terms of section 81 (1)(c)(ii) and/or 81 (1)(d)(iii) read with section 157 (1)(d) of the Companies Act 71 of 2008 ("the Companies Act"). Both these applications were brought on an ex parte basis. The Applicant in both these applications was also granted leave in terms of the provisions of section 157 (1)(d) of the Companies Act to bring the application for the provisional

[1] Redisa and KT will individually be referred to as "the Respondent" or collectively as "the Respondents".

and final winding-up of the Respondents in terms of section 81 (1)(c)(ii) or 81 (1)(d)(iii).

[5] Both Respondents' in the respective applications anticipated the return day in terms of Rule 6(8) and caused the matter, in respective of both cases, to be set down on 22 June 2017. Whereby they sought an order that their respective applications be heard on an urgent basis and the rule nisi be discharged in respect of both provisional applications with costs, including the cost of two counsel to be borne by the Applicant on the scale as between attorney and client.

[6] On 22 June 2017, the matter came before Sher AJ who postponed the matter for hearing on the urgent roll on Wednesday, 5 July 2017. The Applicant was ordered to file a replying affidavit on or before 28 June 2017. On 29 June 2017 the Applicant provided the Respondents' with an electronic copy of her replying affidavit which contained new evidence. This resulted in the Applicant having to apply on 5 July 2017 for condonation for the late filing of her replying affidavit which contained new evidence as well as the late filing of her supplementary affidavits to the founding affidavit and the supporting affidavits to her replying affidavit.

[7] This condonation application was strenuously opposed by both Respondents. This court after hearing this application granted condonation for the late filing of the replying affidavit, supplementary affidavits and new evidence contained in the replying affidavit and further supplementary affidavits, in support of this new evidence. Leave was granted to the Respondents to file rebutting affidavits in answer

to this further evidence, which they did. Thus the matter was heard before me on an urgent basis during the recess on the 5th and 6th of July 2017.

[8] The Respondents also raised the following points in limine, which the court will deal with at a later stage during this judgment. These are:

1) That the Minister had no locus standi to bring these applications;
2) That the Minister could not have launched the application for a provisional liquidation order on ex parte basis;
3) That the ground for urgency relied upon by the Minister denies that scrutiny and that the ex parte application should be struck from the roll with reasons; also
4) That the Minister failed to disclose highly relevant facts to the court when the ex parte application was moved.

[9] The application in both matters are opposed on these further additional grounds:

1) That there is no prima facie case made out by the Minister for the relief sought; and
2) That it would not be just and equitable to wind-up the two companies.

[10] The appearances in the Redisa application were as follows: Adv Woodland SC with the assistance of Adv Rust appeared on behalf of the Applicant; Adv Burger SC and Adv Smalberger SC appeared for the Respondent. In the KT application the appearances were: Adv Muller SC and Adv Swart SC, with the assistance of Mr Myburgh, on behalf of the Applicant; with Adv Dickerson SC, assisted by Adv

Reynolds, for the Respondent. This court is indebted to counsel for the comprehensive heads of argument and supplementary submissions, which have been of great assistance in preparing this judgment.

Background

[11] Redisa submitted a proposed integrated industry waste tyre management plan to the Minister for approval in terms of the Waste Tyre Regulations, 2009 ("the Waste Tyre Regulations").[2] This proposed plan also referred to as the "*Redisa Plan*" was approved on 29 November 2012, subject to the conditions of approval as set out in paragraph 2 and 3 of the Minister's letter of approval.[3]

[12] These conditions relates to reporting, targets, collection of stockpiles, and the amendment and review of the plan. This plan together with the Ministerial approval was published in terms of Regulation 11(4) of the Waste Tyre Regulations and was published in the Government Gazette by way of Government Notice 988 of 30 November 2012.

[13] The Redisa Plan is an integrated industry waste tyre management plan, as contemplated in Regulation 9 and 10 of the Waste Tyre Regulations. This plan was approved for an initial period of five years from the date of publication, which will expire by operation of law on 30 November 2012. It is also the only waste management measure in place for the management of waste tyres.

[2] Under Government Notice R. 149 of 2009 published in Government Gazette No. 31901 of 13 February 2009, as amended by Government Notice R. 1493 of 2016, published in Government Gazette 40470 of 2 December 2016.
[3] Attachment BM 4 – page 276-277 [Redisa record].

[14] A broad overview of the plan is that it seeks to manage tyres and casings that enter the South African economy, either through local production and manufacturing, or through the importation thereof, after they had been consumed and become waste. The purpose is to generate zero waste from tyres.

[15] Under this plan, every producer and importer of tyres and casings had to pay a contribution fee to Redisa, the manager of the plan, which was used to facilitate the collection, transport, distribution and storage of these waste tyres. These waste tyres had to be subjected to the new waste management hierarchy, which was introduced by section 3 of the National Environmental Management: Waste Act, 59 of 2008 ("the Waste Act"). The components of this waste management hierarchy include waste avoidance and reduction, and to ensure that waste is re-used, recycled and recovered.

[16] As part of this waste tyre management hierarchy these tyres inter alia have to be collected by waste tyre collectors, stored in waste tyre depots and transported to firms in industries that can use the waste tyres to develop new products or uses for tyres, such as recyclers, tyre-derived fuel manufacturers, tyre crump producers, pyrolysis, processors or other downstream industries.

[17] Originally, the Redisa Plan provided for the compulsory subscription by all tyre producers as defined in Part 3 of the Waste Tyre Regulations and has been prescribed by Regulation 9 (1)(k) [before it was repealed with effect from 1 February 2017]. In terms of this provision, a waste management fee of R2,30 plus VAT per kilogram of manufactured and/or of imported tyres and casings was levied and

collected by Redisa from all the subscribers and/or the members who were compelled to subscribe. The fee provided Redisa with an income stream intended to be used for the sole purpose of implementing and administering the Redisa Plan.

[18] A tyre producer's failure to subscribe to an integrated industry waste tyre management plan ("IIWTMP") and who continues producing tyres would constitute an offence. The legal nature of the Redisa Plan as an "*integrated industry waste tyre management plan*" has been described by the Supreme Court of Appeal to be an instrument of subordinate legislation which came into legal existence or force after Ministerial approval of the Redisa Plan under the Waste Tyre Regulations.[4]

[19] Redisa is registered as a non-profit company, and according to the Minister, it is also an organ of state, which is engaged in the administration and implementation of subordinate legislation. KT on the other hand acted as a management company, appointed by Redisa, to manage the operations of the plan. According to the Redisa Plan, which was accepted by the Minister, Redisa will have a Memorandum of Incorporation ("MOI") governing its activities.

[20] An aim of the MOI was to ensure the independence of the Redisa board. The board members should consist of: two executive directors, one legal expert, one financial, five captains of industry and higher learning, and one from the informal business sector. The terms and conditions for the remuneration of an incorporator, a director or any person appointing a director of the company is set out in the MOI.[5]

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[4] *Retail Motor Industry Organisation and Another v Minister of Water and Environmental Affairs and Another* 2014 (3) SA 251 (SCA) paras 30-32.
[5] Attachment BM3 - paragraph 4.2 read with paragraph 8.2 and 8.10 of the MOI – page 240 [Redisa record].

[21] In terms of Regulation 9 (1)(jA) of the Waste Tyre Regulations (as amended), it provided, with effect from 2 December 2016, that an integrated industry waste tyre management plan (such as the Redisa Plan) must at least be aligned to the pricing strategy for waste management charges.

[22] The "*National Pricing Strategy for Waste Management*" or "*Pricing Strategy*" was published under Government Notice 904 of 11 August 2016,[6] in terms of the legislative requirement under the newly inserted section 13A (1) of the Waste Act.[7] This resulted in various legislative changes in terms of the Waste Act, such as an amendment to the Revenue Laws Act 13 of 2016, which commenced on 19 January 2017, which further resulted in an amendment of the Customs and Excise Act 91 of 1964, which was amended with effect from 1 February 2017.[8]

[23] The effect and consequence of all these amendments introduced a tyre tax or an environmental levy on tyres for collection by SARS.[9] As from 1 February 2017, SARS is now charged by law with the responsibility to collect this tyre tax and or environmental levy on tyres from the manufacturers, importers or producers of tyres and to pay these funds into the National Revenue Fund, as contemplated in section 213(1) of the Constitution.

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[6] Government Gazette No. 40200.
[7] See paragraph 2.2 of the Pricing Strategy.
[8] As set out by the Minister in paragraph 17 of the founding affidavit of the Redisa application – page 16 [Redisa record].
[9] Currently Redisa, the Minister and SARS are involved in litigation in the North Gauteng High Court regarding these provisions.

[24] Redisa is no longer charged with the responsibility to collect its contribution from tyre producers or importers in South Africa in terms of the Redisa Plan. Redisa is prohibited from continuing with the collection of the Redisa contribution unless such a contribution was due before 1 February 2017, which in practical terms means that Redisa would have continued collecting such contributions for a period of three months up to 31 May 2017.

[25] This resulted in numerous interactions with Redisa, as well as representatives of the entire tyre industry in South Africa, with regard to the amendment of the Waste Tyre Regulations and the required alignment of the Redisa Plan. Since 2014, the Department had various interactions with Mr Hermann Erdmann ("Erdmann"), the Chief Executive Officer ("CEO") of Redisa, and various representatives of Redisa to discuss the alignment of the Redisa Plan to the amended Waste Act, the Pricing Strategy and amended Waste Tyre Regulations.

The Minister's case against the Respondents' in the two applications:

Against Redisa

[26] What is clear from the papers is that there is some dissatisfaction on the part of Redisa and in particular Erdmann about the new funding model for Redisa. He made various representations either to the Department of Environmental Affairs ("the Department") and/or Treasury to which reports from PricewaterhouseCoopers ("PwC") were attached, to persuade the Minister, the Department as well as National Treasury not to implement the new Pricing Strategy. The Minister's case against Redisa, as well as KT, is largely set out in the founding affidavit as well as the further

evidence presented in the replying affidavit and the further supplementary affidavits, which upon application she was admitted to file.

[27] In the Redisa application, the Minister submits that:

1) The Respondent (Redisa) is resisting the changes in the funding model and it has launched two separate applications in the Gauteng Division of the High Court to review and set aside the Pricing Strategy and the amendment of the Waste Tyre Regulations, respectively. These applications are still pending.

2) That Redisa has set up a management company, KT, to handle all operational aspects of the plan, and instead of implementing the Redisa Plan with an independent board, it handed the complete executive control of the Redisa Plan over to KT.

[28] The Minister further submits that despite several requests for copies of the contract or contracts with full details of the terms of the contractual relationship between Redisa and KT, Redisa has failed to provide this information to her or the Department. This information was only provided at a later stage to iSolveit Consulting ("iSolveit"), a company instructed by the Department to undertake a performance assessment audit of Redisa. The Minister submitted in her founding affidavit that this management agreement, which was requested and deliberately withheld from the Department and from iSolveit, clearly indicates that Redisa has something to hide.

[29] According to the Minister, three of the executive directors of Redisa, including Erdmann, are shareholders and/or have a direct financial interest in KT. The

Department only discovered this during May 2016, when the Department received a report from iSolveit. The board of directors, therefore, cannot be regarded as independent.

[30] The Minister further submits that over the period of approval of the Redisa Plan, the staggering amount of R662 281 million collected by Redisa was channelled to KT. In fact, Redisa is conducting business in the same building, on the same floor, in another wing of that building from where KT conducts its business.

[31] It emerged that a company by the name of Nine Years Investments ("NYI"), which is a private profit company, owns 75% of KT. The directors of NYI are Erdmann, his son Alexander Erdmann, Charline Kirk ("Kirk") and Christopher Crozier ("Crozier"). The other 25% shareholding of KT is held by Avranet (Pty) Ltd ("Avranet"), of which another director of Redisa, Stacey Davidson ("Davidson"), is the sole shareholder. Erdmann, himself, owns 80% of the shareholding in NYI, while Crozier and Kirk each holds a 10% shareholding. Crozier, who is a director of KT, the company that manages Redisa, is also a shareholder in NYI. Erdmann, who is the CEO of Redisa, owns 80% of the shares in NYI, which holds 75% of the shares in KT, being the company that manages Redisa and over which Erdmann exercises control.

[32] The Minister contends, therefore, that Erdmann directly controls KT through being the majority shareholder in the company that owns KT, and is therefore directly remunerated through his majority shareholding in the company NYI. This, according to the Minister, is in direct contravention of the Companies Act as well as the MOI of

Redisa. Erdmann therefore directly benefited from his involvement in Redisa a non-profit company.

[33] Erdmann failed to disclose his interest in NYI and KT to the Minister or the Department. He further failed to disclose any conflict of interest as required in paragraph 5.3 of the MOI. The Minister in her replying affidavit further states that the Department was placed in possession of the employment contract of Erdmann, the actual management agreement between Redisa and KT, as well as the different amendments thereto, and the sublease agreement between the Respondent and KT, which further fortifies her view that Erdmann as well as KT and Redisa has failed to make proper disclosure as to the real situation that existed between these two entities and Erdmann and the other directors interests therein.

[34] It further came to light that the full PwC report was not disclosed to the Minister or the Department, and especially the negative aspects of that report. Erdmann also did not share the contents of that report which he received on 30 March 2017, or in his answering affidavit deposed to on 19 June 2017.

[35] The Minister in her replying affidavit also refers to a report by Accountants @Law (Pty) Ltd (“A@L”), who was appointed by the liquidators after the provisional order was granted against both entities. A@L had to conduct a forensic accounting investigation into the trade, dealings and affairs of Redisa and KT. The investigation confirmed that the affairs and operations of the two entities are inextricably intertwined in that they shared premises, and accounting and information systems.

[36] Many staff functions straddle both businesses and there are numerous agreements between them and the related entities of Erdmann, and certain other executives of both entities. Furthermore, that the entire day-to-day management of Redisa has been subcontracted to KT in terms of the management agreement. According to the Minister, this contradicts Erdmann's averments that there is a separation of operations, powers and roles of the two entities.

[37] The Minister submits that it is the cursory opinion of the forensic investigators that the executives of Redisa, who was entrusted with the obligation to manage waste tyres on a national scale which involves large sums of money, have abused their fiduciary duties. It was also never disclosed in the Redisa Plan that there would be a relationship between the executives of Redisa and the management entity KT, which would result in any conflict of interest.

[38] Notwithstanding Erdmann's contract of employment, which was not produced to the Department despite numerous requests, wherein he warrants that he is free of any conflict of interest between the duty owed to Redisa and his private interests, numerous conflicts of interest were found. The forensic investigators also made preliminary conclusions that breaches may have been committed in terms of the Companies Act, the Income Tax Act 58 of 1962 and the Prevention and Combating of Corrupt Activities Act 12 of 2004.

[39] In terms of the employment contract it required Erdmann to have disclosed any conflict of interest in any trade, business or occupation, whether that business is for his personal benefit, or that of his family including his wife. The investigators

found such conflict of interest,[10] but no such disclosures were made to the Minister or the Department.

[40] The investigation also revealed that Erdmann's salary would be R140 000,00 per month, to be reviewed annually by the board of directors in February of each consecutive year. In January 2013, the cost to company of Erdmann's salary was R171 805,00 per month which increased in May 2017 to R347 070,00 per month. According to A@L, this is an increase of 102% and some 246% more than CPI over the same period.

[41] Erdmann is permitted to be reimbursed for out-of-pocket expenses necessary to fulfil his duties, provided that those expenses are supported by proper vouchers. None of the expenses he incurred is supported by the necessary vouchers. The A@L forensic investigation into these two entities revealed the following:

1) Payments were made to Westfalen Management Services (Pty) Ltd, of which the wife and son of Erdmann are the directors, in the amount of R495 900,00 purportedly for reimbursement of expenses without any supporting documents. This according to A@L constitutes a breach of Erdmann's employment contract.
2) On 2 February 2013, a director of Redisa signed a resolution in terms of which Redisa entered into a lease agreement of 24 months in respect of residential accommodation for Erdmann. Redisa paid a deposit of R160 000,00 to the owner of the property. Redisa further paid the monthly rental of R65 000,00

[10] Paragraph 33 of the A@L report – page 2007 [Redisa record].

over the 24 months for the residential accommodation of Erdmann. It also made other payments in respect of residential accommodation.

3) Redisa paid some R270 880,00 for a security upgrade at a private residence, which seems to be the property of the HE & ME family trust of which the sole beneficiary appears to be Alex Erdmann. The trustees are Erdmann, his wife, his son and a certain Mr Botha.

4) Redisa has been paying for private full-time day and night security at the residences of two of its directors, namely Erdmann and Davidson. The payments in respect of Davidson continued even when she no longer resided at the specific address. No employee fringe benefit tax had been deducted in respect of these payments. The total costs expended by the same, amounts to R2 182 579,42.

5) The intellectual property of KT, which according to the Minister can only be sourced from fulfilling its management functions for Redisa, was transferred at no value to another private profit company, NYI, which is controlled by Erdmann. The shareholding of Erdmann in this entity is set out above in paragraph 30.

6) NYI receives 2.5% of the 18% administration costs from the revenue that Redisa previously collected from tyre producers as royalty.

7) Redisa paid R76 748 million for the cost of the NCCS[11] to supplement the Redisa Plan and reimbursed KT for the setup cost and expenses, including the IT costs, which inclusive of the R76 million amounted to about R97 million. According to A@L, KT is now claiming ownership of the IT and finance systems and the right to the IP which should properly vest in Redisa. Thus this

[11] Defined in the Redisa Plan as “National Centralised Computer System” under paragraph 6.

means that KT not only gave away the IP belonging to Redisa but also agreed to pay NYI (in which Erdmann has the controlling share) royalties for the use of the same IP.

8) KT received R662 281 million of the total R2, 256 billion of the public funds Redisa collected in terms of the Redisa Plan.

9) According to A@L, KT entered into another agreement with NYI in terms of which KT recorded that it required additional management services for which NYI would be paid a monthly management fee of R650 000,00 escalating at 7.5%. In 2017, the fee of the additional management services amounted to R868 055 per month excluding VAT. According to the Minister, this further extravagant expense on the public funds that was previously collected by Redisa was paid to NYI in addition to the royalties that KT agreed to pay Erdmann and his other associates.

10) KT paid dividends to the shareholders, inclusive of Erdmann and the other executive directors of Redisa, in the amount of R84 million over the past four years; while NYI received an amount of R121.6 million in dividends, management fees and royalties.

11) Erdmann owns 80% of the shares in NYI and would have benefitted from dividends in the amount of R97 million.

12) Redisa has spent some R23 million on residential property in Bryanston, purportedly for free accommodation for the staff of Redisa, which according to the Minister, is not authorised in the Redisa Plan.

13) Redisa also spent a total of R121 million in an unauthorised investment in an non-profit company, the Product Testing Institute.

14) The seven executive directors employed by Redisa received remuneration, since 2013 to date, to the amount of R7 883 million. Certain executives are paid as independent contractors and PAYE is not deducted. This, according to A@L, maybe a contravention of the Income Tax Act. Furthermore, the residential accommodation provided for Erdmann and the private security arrangement for certain directors at their homes, is potentially a component of remuneration to these executives, which if not declared for income tax purposes would attract penalties.

15) The salaries of executives and personnel appear to be significantly above market for Cape Town or South Africa. This, according to A@L, requires further investigation.

16) NYI has a lease agreement for the head office of Redisa which it subleases to KT, who then further subleases it to Redisa. In terms of this sublease, Redisa until 28 February 2015 paid 30% of the cost and thereafter 50% thereof. Redisa only employs 10 people while KT has more than 100 people in its employment. Redisa is overcharged to the tune of about 40%, which amounts to in excess of R2.4 million per annum.

17) Redisa made investments in excess of R20 million in Imvelo Rubber and Waste Beneficiation (two different private profit companies in which Erdmann has direct interest), which is allegedly subsidiaries of Redisa. A@L is of the view that this requires further investigation.

18) Redisa has spent in excess of R16 million on costs, purportedly for other waste streams, not authorised in terms of the Redisa Plan. This amount was initially misrepresented as far lower to the forensic investigators. The invoices

disclosed to the investigators did not contain any company number, or director/executive, or contact telephone number, or contact person.

19) Some R9.8 million was paid by Redisa to McKinsey for research into other waste streams other than those permitted in the Redisa Plan.

20) The minutes of the board meeting of Redisa dated 4 October 2011 record that Helen Kente Makgae, a director, was authorised to sign the management agreement between Redisa and KT. There is no evidence according to the investigators that the executive directors being Erdmann, Kirk and Davidson recused themselves from this decision.

21) Redisa, according to the Minister, also deviated from the Redisa Plan by exporting the waste tyres.

[42] Thus for these stated reasons, the Minister argues, it would be just and equitable for Redisa to be wound up. She further contends that subsequent to the representations made by Redisa on 23 May 2017, Erdmann sent a notice to all interested parties tentatively on 31 May 2017, to inform them that as from 1 June 2017: (a) Redisa will no longer collect waste tyres from the waste collection points, including micro-collectors; (b) that Redisa's depots will remain open but will not accept any deliveries; (c) that deliveries to the processors will continue as scheduled until further notice; and (d) that all enquiries should be directed to the Waste Management Bureau of the Department.

To the contracted transporters in the downstream industry that Redisa was supposed to establish, Erdmann expressed a similar intention that it will scale down its operations.

[43] The Minister, with reference to the case of **Kia Intertrade Johannesburg (Pty) Ltd v Infinite Motors (Pty) Ltd**[12], submits that Redisa's effective repudiation of the implementation of its plan, constituted the loss of its substratum as the realisation of its main object as well as the ancillary objects, as determined by reference to its MOI, became objectively impossible.

Against KT

[44] One of the main reasons cited by the Minister why the relief against KT is being sought, is because the Minister was of the view that KT and Redisa was involved in a scheme to divert public funds that was earmarked for the furtherance of a specific environmental objective. In addition, Redisa's executive directors have abused KT's corporate identity to achieve this goal.

[45] According to the Minister, contrary to the suggestion by Crozier (the CEO of KT), she never stated in her founding affidavit that she was not aware that Redisa would conclude a management agreement. This is clearly stipulated in the Redisa Plan. The undisputed fact is that she has attempted since 2014 to obtain a copy of the management agreement concluded by Redisa in terms of the Redisa Plan. She has only received copies of the agreement and addendums thereto, that was attached to the Respondents' answering affidavit, which became available during the course of these proceedings. The Minister once again, in the case of KT, relied on the A@L report that was furnished to the liquidators regarding the relationship and operations of Redisa and KT, which was referred to earlier on.

[12] [1999] 2 All SA 268 (W).

[46] In reference to the shareholders of KT, the Minister once again submits that it is common cause that the only shareholders of KT are two companies, i.e. NYI and Avranet. Moreover, three of Redisa's executive directors are also (i) directors of NYI or Avranet, and (ii) shareholders of either NYI or Avranet, and thus indirect shareholders of KT. None of Redisa's directors are directors of KT, thus there is no overlap between the board of Redisa and the board of KT. However, according to the Minister, Crozier chose not to disclose the details of the shareholding. It was also never disclosed in the Redisa Plan that there would be a relationship between the executives of Redisa and the management entity KT, which could create a conflict of interest.

[47] The Minister's case against KT is based on the manner in which KT had been used as the management company of Redisa, a non-profit company, to benefit the directors and shareholders of NYI and Avranet, and in particular Erdmann. The Minister also relies on the contents of the A@L report to establish the relationship between all the role-players as set out above in paragraph 30 of the judgment, where the same grounds and facts are used by the Minister as in the Redisa application.

[48] In particular, the Minister submits it would be just and equitable for KT to be wound up on one or more of the following grounds. Firstly, the executive directors of Redisa (all indirectly own 100% of the shareholding in KT) have unconscionably abused the corporate personality of KT by utilising it to unlawfully divert and misappropriate public funds generated by the non-profit company, Redisa:

1) This was done by means of:

    (a) Redisa paying KT a management fee of some R432 million.

(b) Redisa renting office space from KT, which in turn rents the exact space from NYI. As stated previously, pursuant to the lease agreement between Redisa and KT, Redisa is obliged to pay 50% of the cost of renting the office space. Despite the fact that it only occupies approximately 10% of the official rented office space.

(c) By allocating 50% of the rental expense to Redisa, the executive directors of Redisa (who own 90% of the company from which the property is leased i.e. NYI) do not have to utilise the funds they have already received from Redisa (in terms of the management agreement) to pay for all the office rental. They simply recover an amount (50% of the office rental) from Redisa. This time, according to the Minister, under the guise of rent. In this way, the Minister submits Redisa's executive directors, with the assistance of KT, are able to divert more funds away from Redisa to NYI.

2) The Minister submits that NYI forms part of a web of companies that is used to siphon money away from Redisa and which is beneficially owned by Erdmann (80%) and Kirk (10%), both of whom are executive directors of Redisa, and Crozier (10%) who is a director of KT and deponent to the answering affidavit.

3) Redisa made payment to KT of at least R97 million to enable KT to acquire assets, which included the NCCS to the value of R76 million. These payments were made by Redisa:

(a) With the object of benefiting Redisa's executive directors;

(b) In direct contravention of section 10 read with Item 1(3) of Schedule 1 of the Companies Act, 2008;

(c) In direct contravention of subordinate legislation (the Redisa Plan), which contemplated that the computer system is owned by Redisa, and merely implemented and managed by the managing company; and

(d) In direct contravention of Redisa's MOI.

[49] Secondly, the Minister submits that Redisa and KT are, for all intents and purposes, merged. In this regard, she submits that there is objective evidence from the forensic auditors appointed by the provisional liquidator, which states: "*The operations of Redisa and KT are intertwined. They share premises on the fourth floor of the Sunclare building in Claremont Cape Town (each having a separate physical portion of the offices with their own swipe card security), accounting and information systems and many staff functions struggle both business units. There are numerous agreements between them and related parties of Hermann Erdmann (Erdmann) and certain other executives of both entities. The entire day-to-day management of the business of Redisa has been subcontracted to KT in terms of a management agreement."*[13]

The Minister submits that the one can thus no longer exist without the other. This was done in direct contravention of the subordinate legislation (the Redisa Plan) and in direct contravention of Redisa's MOI.

[50] The last ground, which according to the Minister would be just and equitable to grant an application for the liquidation of KT, is that KT's only client, Redisa, gave notice on 1 June 2017 that it would seize all operations with effect from 1 June 2017.

[13] Paragraph 6 of the A@L report – page 2004 [Redisa record].

She therefore submits that the substratum of KT, who only exists to conduct the day-to-day activities of Redisa, has thus disappeared. KT's stance is simply that it is a private company that earns an income from rendering services to Redisa, which fails to take into account the stark reality that the persons in actual control of Redisa are for all intents and purposes the same people that effectively control KT.

[51] Given these facts and realities, the Minister stated that it is not surprising that Crozier as deponent to the answering affidavit simply denied all allegations against it. Crozier further failed to mention that he himself is a 10% shareholder of one of KT's shareholders, i.e. NYI. Erdmann, the deponent to Redisa's application and whose entire affidavit was incorporated and attached to KT's answering affidavit, is the ultimate financial beneficiary of not only KT but also of the other related companies that arise income from Redisa.

[52] The Minister further submits that the clearest indication of KT's lack of independence is evident from the fact that KT elected not to respond to specific paragraphs of the founding affidavit, but instead chose to incorporate the affidavit that was deposed by the ultimate beneficiary of the scheme, i.e. Erdmann. The Minister submits that KT's mostly bald denials are far-fetched and clearly untenable and the court will be justified in rejecting them merely on the papers.

Redisa and KT's Case: Points in Limine

[53] Both Redisa and KT's main attack against the application brought by the Minister in respect of both applications is raised by means of the following points in limine.

(1) Locus Standi

[54] Firstly, the Minister has no locus standi to bring these applications, which were brought in terms of section 81 (1)(d)(iii) read with section 157 (1)(d) of the Companies Act. They contend, that section 79 (2) of the Companies Act expressly stipulates that the winding-up of a solvent company is governed by Part G of Chapter 2, read with Item 9 of Schedule 5 to the Companies Act. These provisions, more especially section 79 (1), provides that a solvent company may only be wound up voluntarily by the company or its creditors (under section 80), or by an order of court (under section 81).

[55] Section 81 prescribes the categories of persons who may apply to court for the winding-up order. Section 81 (1)(c)(ii) provides that one or more creditors of a solvent company may apply to court to wind up the company if it is just and equitable to do so. Section 81 (1)(d)(iii) affords standing to the company, one or more of its directors and one or more of its shareholders to apply to court for a winding-up order, were such an order would be just and equitable.

[56] They submit that the Minister being alive to the fact that she does not fall within the categories of persons afforded standing under these provisions, sought to rely on section 157 (1)(d) of the Companies Act which provides for extended standing to persons "*acting in the public interest, with leave of the court".*

[57] Both parties contend that the Minister's reliance on section 157 is misconstrued as the section applies to the alternative procedures for addressing complaints or securing the rights contained in section 156. They state that both

sections are contained in Part A of Chapter 7, which is headed *"**Remedies and Enforcement**".* The contention is thus that section 157 does not provide the basis to extend the categories of persons authorised to apply for the winding-up of a solvent company under Part G of Chapter 2. On the contrary, it is limited to those procedures as set out in section 156 contained in Chapter 7.

[58] The alternative procedures for addressing complaints or securing rights as envisaged therein may be applied for by a person:

a) Directly contemplated in the particular provision of the Act;

b) Acting on behalf of persons contemplated in paragraph (a), who cannot act in their own name;

c) Acting as a member of, or in the interest of, a group or class of affected persons, or an association acting in the interest of its members; or

d) Acting in the public interest, with leave of the court.[14]

[59] Redisa and KT further submit that there is a textual reason why section 157 does not apply. And that is because section 79 (2) of the Companies Act expressly confines the procedures for the winding-up of solvent companies "*whether voluntary or by court order"* to Part G of Chapter 2 (i.e. sections 79 to 83). Redisa submitted that even if section 157 (1)(d) were to have applied to applications for winding-up as envisaged in section 79 and 81 of the Companies Act, there would be a reason why section 157 should not have been relied upon by the Minister. The simple reason is that it would not be in the public interest to wind up a solvent company at the instance of a third party and against the wishes of the company itself.

[14] Section 157 of the Companies Act.

[60] The Minister's contention, namely that they are dealing with public funds which were collected by Redisa before 1 February 2017, is wrong. Redisa contends that the funds are administered at the behest of the producers (as defined in the Redisa Plan) and are not paid into the National Revenue Fund. If a producer does not subscribe to the Redisa Plan, it has to subscribe to an integrated waste management plan prepared in terms of the Waste Act. This fee is not spent, in accordance with the new legislation, by Redisa in a predetermined ratio. It is as little public funds as are the fees collected by a private school from parents of students attending the school. This contention cannot be relied upon as a just and equitable ground, on the basis that Redisa deals with public funds. According to Redisa, this is still the position even after the intervention of Act 13 of 2016. Once monies collected by the National Revenue Fund from the producers are paid to Redisa, this position may change but as yet no such payments have been made.

[61] The Respondents' further submitted that even if section 157 (1)(d) were to apply, the Minister was required to have applied for this court's leave to do so before launching her application. KT, in particular argued, that even if the Minister properly obtained leave under section 157 (1)(d), she failed to demonstrate why KT a solvent private company should be wound up in the "*public interest"*. KT further argued that courts are circumspect in granting standing on the ground of public interest. In this regard, the Constitutional Court [15] has held that an applicant is required to demonstrate that he or she is genuinely acting in the public interest, and that in determining whether to grant standing on this basis regards must be had to: (i) whether the applicant has another reasonable and effective remedy; (ii) the nature of

[15] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) para 234.

the relief sought; and (iii) the range of persons who may be affected by the order and the opportunity they had to present evidence or argument.

[62] Furthermore, it is argued that the Minister's application is defective for at least the following reasons. Firstly, the Minister has a variety of other reasonable and effective remedies at her disposal. After she approved the Redisa Plan, in terms of which Redisa was authorised to conclude the management contract with KT, she could have exercise her right to initiate a review of the amendment of the plan. She did not exercise that right. It was also open to her to challenge the conclusion of the management contract on public law grounds, if as she contends that Redisa is a public body. Either in terms of the Promotion of Administrative Justice Act 2 of 2000 or on the basis of the principle of legality. Secondly, the Minister seeks the liquidation of a privately owned, solvent company, contrary to the wishes of its shareholders and directors. She does this by way of a final order, whereby she wants the liquidators of KT to transfer the entire net value to the Waste Management Bureau or the liquidators of Redisa. She does not seek to achieve the ordinary consequence of the liquidation of a solvent company (namely the payment of creditors and the distribution of the surplus to shareholders). She seeks to effectively expropriated (for no consideration), the company's assets by transferring them to an entity under her control.

[63] Lastly, neither persons with a direct interest in KT (its shareholders and directors), nor affected persons in the waste industry (including those who pay a levy under the Redisa Plan) were given notice of the Minister's application, let alone afforded the opportunity to make submissions.

Minister's Response to Locus Standi

[64] The Minister, in turn, argues that in bringing this application she acts in the public interest in seeking the winding-up of the two entities, as contemplated in section 157(1)(d) of the Companies Act. She further submits that the legal standing for claims based on statute is determined with reference to the relevant statute and its purpose. Under the 1973 Companies Act, the Minister of Trade and Industry has circumscribed powers to make an application for the winding-up of a company on just and equitable grounds. In this regard, it cannot be gainsaid, that Parliament was aware of this narrow approach to standing when it drafted the 2008 Act, and that it enacted section 157 in order to expand the class of persons who may institute legal proceedings under the Act.

[65] The Minister in argument, in respect of both applications, submits that a generous and purposive interpretation should be given to section 157 (1). This section has a striking resemblance to section 38 of the Constitution. The interpretation relied upon by KT, as well as Redisa, is entirely inconsistent with the interplay between section 157 (1)(a) and 157 (1)(d). Section 157 (1)(a) provides that when an application can be made to a court, the right to make the application or bring the matter may be exercised by "*a person … directly contemplated in the particular provision of this Act*". Those *persons* inter alia refers to a company's directors, shareholders, the commission or panel, or the company itself, in the contents of a winding-up order under section 81.

[66] Section 157 (1)(d), however, extends such standing to "*a person … acting in the public interest, with leave of the court*." By necessary implication these will be

other than those contemplated in section 157 (1)(a), thus persons other than those directly contemplated in a particular provision in the Act. The Minister further argues that in any event, had it been the intention of the lawgiver in section 157 (1) to restrict the remedies available to the applicants contemplated in section 157 (1)(a) – (d) only those remedies in Chapter 7, the introductory phase in this section would have read "*when in terms of this **chapter,** an application can be made to**…** a Court."* Instead, the Minister argues, the phrase reads "*when in terms of this **Act,** an application can be made…".* In this regard, the section is very clear.

[67] Moreover, the Minister argues, in its material part section 156 reads: "*[a] person referred to in section 157 (1) may … enforce any provision of … this Act, … by… (c) applying for appropriate relief to the division of the High Court that has jurisdiction over the matter".* Section 81, so, Mr Muller argues, is clearly a provision of the Act which the Minister, acting in the public interest with leave of the court, seeks to enforce in terms of section 157 (1)(d).

[68] Mr Muller further argues that neither **Henochsberg**[16] nor **Contemporary Company Law**[17] suggest otherwise. The Minister further argues that one of the objects of the Companies Act is to promote compliance with the Bill of Rights in the application of company law. Both applications centers around the application and implementation of the approved integrated industry waste tyre management plan ("the Redisa Plan"), which the Supreme Court of Appeal has found constitutes subordinate legislation.

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[16] P Delport & Q Vorster *Henochsberg on the Companies Act 71 of 2008* [May 2017 – SI 14] at 548.
[17] F Cassim *Contemporary Company Law* 2011 Juta&Co at 827.

[69] The Minister is responsible for the oversight and implementation of South Africa's environmental management systems (inclusive of the Redisa Plan). This responsibility the Minister has in terms of section 7 (2) of the Constitution, which obliges her "*to respect, protect, promote and fulfil*" that rights in the Bill of Rights, amongst others, the fundamental right enjoyed by everyone "*to an environment that is not harmful to their health or wellbeing*" as entrenched in section 24 (a) of the Constitution. This responsibility is also enshrined to her in terms of the Waste Act.

[70] The Minister submits that the applications makes it clear that she has good grounds for believing that KT and Redisa are involved in a scheme to divert public funds, earmarked for the furtherance of specific environmental objectives, to Redisa's executive directors who have abused KT's corporate identity to achieve their goal. She further submits that the public has a clear and obvious interest not only in the proper application and spending of public funds, but also in the protection of the environment.

[71] The Minister being the Member of Parliament tasked with protecting the environment and overseeing the implementation of legislation that was enacted for that goal, is best suited to protect the public's interest in these matters. According to the Minister, Redisa who was responsible for drafting the Redisa Plan acknowledges this fact.

[72] The Minister further makes the submission that as she is privy to the manner in which KT and Redisa have implemented the Redisa Plan and applied the public funds, she is also in the best position to place the information before the court that is

relevant for the protection of the public interests. Section 157 (1)(d) does not define or explain what would constitute action in the public interest by the applicant contemplated in that section. According to the Minister, this is clearly deliberate, as each case would have to be assessed on its own merits.

[73] The Minister submits that she is clearly acting in the public interest, as contemplated in section 157 (1)(d) in bringing these respective applications. She submits this for the following reasons:

1) The considerable monies collected by Redisa under the plan is clearly public monies, in the form of tax, collected from a large number of entities in the tyre manufacture and distribution industry.
2) The purpose of the plan is to dispose of and recycled tyres in an environmentally responsible fashion for the benefit of the general public, however, at the same time to create sustainable employment, underpinned by transformation objectives, also in the public interest.
3) She further submits that for reasons which are evident in the papers, KT is in essence an alter ego of Erdmann and the directors of Redisa, which is in direct contravention of the plan.
4) Furthermore, substantial sums of public money, in the form of income generated by Redisa through the implementation of the plan, had been funnelled to KT.
5) That a further investigation into the flow of monies and the recovery of these substantial sums is clearly in the public's interest.

It is for these reasons that the Minister submits that she is acting in the public interest, and that she has the requisite locus standi.

[74] In reply to the contention that section 79 (2) confines winding-up procedures to Part G of Chapter 2, based on a so-called textual reason or interpretation of that section cannot, according to the Minister, be correct. That is because the provisions in the 2008 Companies Act, must be interpreted purposively and as a whole, and not separately or in isolation. The purpose of the Act was intended to broaden not narrow questions of standing in general.

[75] Reliance on this so-called textual approach, according to the Minister, also does not assist the Respondent because all that section 79 (2) provides is that the procedures for winding-up a solvent company are governed by Part G of Chapter 2. Such procedures would include, for example, those prescribed in section 80, for a voluntary winding-up, and the Masters certification prior to dissolution of the company as prescribed by section 82. According to the Minister section 79 (2) does not, in its terms or by necessary implication deal with non-procedural issues such as the legal standing of those that may be entitled to employ its provisions.

[76] The Minister further argues that KT and Redisa's submission that she first had to require the court's leave in terms of section 157 (1)(d) before the winding-up application, is wrong. She says so for the following reasons:

a) Section 157 (1)(d) does not, in its terms, require "*prior leave*". It simply requires "*the leave of the Court".*

b) Furthermore, there is no logical reason why the leave of the court cannot be sought, and granted, in the same application and at the same time as a substantive relief for which the leave of the court is sought.

[77] The Minister states that none of the authorities which KT relies on in the heads of argument supports a different proposition. In the authorities cited, the Constitutional Court[18] was dealing with the proposed class action in terms of section 38 (c) of the Constitution. It goes without saying that if the leave of the court is required, action proceedings, by definition, cannot be instituted before the leave of the court has been granted. The matter is entirely different in application proceedings.

[78] The Constitutional Court in the **Mukaddam** case was not dealing with a similarly worded provision to section 157 (1)(d), but laid down a matter of practice. Those wishing to issue summons setting to bring class actions under section 38 (c) of the Constitution must require the prior leave of the court. The earlier case of **Mukaddam and Others v Pioneer Foods (Pty) Ltd and Others**[19] in the Supreme Court of Appeal, simply followed the approach/requirements in the **Children's Resource Centre**[20] case which was also concerned with certification of a class action under the common law.

[79] This point is also not squarely addressed by Justice Chris Jafta ("Jafta")[21] in his discussion of the provisions of section 157 (1)(d), where the learner judge simply made an observation that, before a party launched proceedings in the public interest, it must apply for leave to do so. He did not discuss the question in issue here, which

[18] Mukaddam v Pioneer Foods (Pty) Ltd and Others 2013 (5) SA 89 (CC) ("Mukaddam").
[19] 2013 (2) SA 254 (SCA) para 4.
[20] Children's Resource Centre Trust and Others v Pioneer Foods (Pty) Ltd and Others 2013 (2) SA 213 (SCA) para 26 ("Children's Resource Centre").
[21] Jafta C "Critical analysis of the extended legal standing provisions under section 157(1) of the Companies Act 71 of 2008 to apply for legal remedies" 2015 (1) *Journal of Corporate and Commercial Law & Practice (JCCL&P)* 35.

is whether there is any reason why leave cannot be sought in the same application in which substantive relief is sought.

[80] The Minister further argues that the further objection that was raised against the locus standi on the grounds that the Applicant fails to demonstrate why KT, a solvent company, should be wound up in the public interests, is not an legitimate objection to the Minister's locus standi and should be more accurately described as a reason proffered why the court should decline to confirm the provisional winding-up order on the ground that the public interest is not served by the winding-up of KT.

[81] The further submission by KT that the Minister may have had other remedies at her disposal cannot be a bar to a winding-up order. So, the Minister submits, provided that the public interest is served by a winding-up. Initiating a review and amendment of the plan, the Minister argues, is of no assistance in dealing with the defalcations and misappropriation which have already taken place. According to the Minister, the investigation and recovery machinery available to liquidate in winding-up is quintessentially what is required for this.

[82] For the same reasons, she says, challenging the execution of the management agreement is of no assistance in relation to that which has already taken place. It would not be of assistance in relation to the many millions which have flowed from Redisa to KT for reasons which is entirely unexplained by and apparently unrelated to the management contract, and subsequently flow out of KT by way of dividends and other payments.

[83] The Minister further submits that it is no surprise that the shareholders and directors of KT oppose the winding-up application because the directors and shareholders frequently adopt this position when they perceive that the winding-up of the company is inimical to their personal interests. Their mere opposition in the present case doesn't make the Minister's application defective but merely makes it oppose.

[84] The Minister further states that the reasons why the creditors and the shareholders were not notified are because they do not have a legal interest to be cited as parties in the winding-up proceedings. Notice, however, was given as directed by the court, to interested parties, subsequent to the provisional order that was granted against KT by the court on 8 June 2017. This included service on KT's employees and publication thereof in the Government Gazette and in two local newspapers.

(2) The Ex Parte Application

[85] Redisa further submits that the ex parte application in terms of rule 6 (4)(a) is not suitable to wound up a solvent company, especially where neither the company nor any of its creditors are the applicant. In terms of the practice directives of the Western Cape Division of the High Court, notice of intention to apply for the provisional order of liquidation shall be given to the company concerned prior to the filing of the application except when a court is satisfied that it would be in the interests of the company or the creditors to do so or that the company has knowledge that such application is to be made. No such allegation could have been made in the founding papers.

[86] According to Redisa the purported reason for the ex parte application explained by the Applicant as being an alleged fear that knowledge of the application by Redisa would expedite endeavours to dissipate public funds under its control, that Redisa would sabotage the computer system used by it or that the evidence may be destroyed, no evidence to substantiate these allegations has been produced.

[87] According to Redisa, a further example of an unfounded allegation made by the Minister in regard to the alleged dissipation of funds is where she states in her founding affidavit that Redisa may have "*succeeded to transfer R30 million of public funds, independent of the implementation of the Redisa plan out of the country".* As stated in the answering affidavit, this money was used to acquire machinery required for the implementation of the plan.

[88] The Minister was fully informed about this machinery. The reasons suggested by the Minister cannot be relied upon for an ex parte winding-up order. What the Minister's seeks under the guise of a winding-up application is a form of a Mareva injunction coupled with an Anton Piller. The Minister has not shown the requirements of an anticipatory order in her founding papers. Redisa argues that on this ground alone, the rule should be discharged and a special order of costs should be granted against the Minister.

[89] Redisa further submits that the scope of the order is overbroad, which states in paragraph 7, that the powers of the provisional liquidator be extended to include the power and authority to continue to conduct the business of the Respondent as a going concern. The effect of this order, is that it is not capable of being in force as it

does not address where the funding for the business of Redisa should come from, how the provisional liquidators will conduct the business without the co-operation of their employees and how the provisional liquidators are to proceed without the amendment of the plan, which amendment has not been agreed to or promulgated.

(3) Non-disclosure

[90] Redisa argued that the Minister in the founding papers discusses the final iSolveit report dated 3 February 2017, but had failed to furnish this document to Redisa. This omission was not brought to the attention of the court or explained. Redisa only saw it as an annexure to the founding affidavit. The Minister made innuendos about Redisa's probity in the founding papers that was clearly unwarranted. On this basis, Redisa submits that the rule should be discharged and that the Minister should be ordered to pay the costs of the application on an attorney and client scale.

[91] KT in their submission on this point states that the Minister was under a strict duty to disclose all relevant facts to this court. The information she furnished to the court was incorrect or misleading, and omitted relevant information. On this basis alone, the court should discharge the rule nisi. In this regard, KT submits that the Minister's affidavit is replete with broad allegations that it and Redisa are involved in a covert scheme for the diversion and misappropriation of public funds, which scheme is characterised by a lack of transparency and secrecy and by the withholding of important information from the Minister. It was on this basis it seems that the court granted the Minister ex parte relief. These allegations were false.

[92] First, her claim that she only discovered that the four executive directors of Redisa are also shareholders in KT via a report commissioned by the Department from iSolveit, is manifestly false. According to them, the Minister would have been aware since the implementation of the Redisa Plan that the executive directors of Redisa are shareholders of KT.[22]

[93] In fact, KT submits that the Minister raised this matter in a letter dated 1 November 2016.[23] This fact was more over disclosed in financial statements, submitted since its inception, and representatives of Redisa advised the Minister's Department of this in meetings during the formulation of the Redisa Plan.[24]

[94] Second, the Minister claimed that there is some mystery surrounding Redisa's appointment of KT to attend to the administration of the Redisa Plan, and that the management contract between Redisa and KT has not been provided to her or to her Department. These allegations, KT submits, are scandalous and entirely without foundation, there is nothing undisclosed or unauthorised about Redisa's appointment of KT to manage the business operations. The management of Redisa's operations to a management company is expressly provided for in the Redisa Plan, which was gazetted by the Minister.

[95] It further contends that the portion of the levy to be allocated towards the cost of the functions (20% of the total) is also expressly provided for in the gazetted plan. Redisa provided iSolveit with a copy of the plan on 17 March 2016 and again on 21

[22] Page 51 [KT record].
[23] Page 1366 [KT record].
[24] Page 1021 para 215 [KT record].

July 2016. This management agreement is also expressly disclosed in Redisa's annual financial statements.[25]

[96] The Minister complained that the management agreement itself was held from her and the terms "*kept secret'*, but failed to disclose that KT was never asked for a copy which would have been provided. It is furthermore untrue that Redisa withheld the management contract because, the Minister was informed by Redisa in a letter dated 30 November 2016 that it had provided the management contract to iSolveit on 17 March 2016 as well as 21 July 2016.

[97] It is therefore KT's submission that the misrepresentations made by the Minister are sufficiently material in the context of this case and justify the setting aside of the ex parte order.

Minister's Reply to Non-Disclosure

[98] The Minister submits, in the Redisa application, that she has made full disclosure of all the facts that have a bearing on the relief sought in the application at hand. The litigation which the Minister and Redisa are currently involved in, is completely irrelevant to the application at hand. In this regard, Redisa confuses the administrative process of giving notice to the Minister's intention to consider the withdrawal of approval of the Redisa Plan with this application which is for the liquidation of the Respondent which has complete and separate processes to be addressed in two separate forums.

[25] Page 1021 [KT record].

[99] The Minister in the KT application submitted that the allegations by KT that she has failed in her duty to make full proper disclosure of facts in the ex parte application are vague and unfounded, especially when tested against the principles that govern such a duty to disclose.

1) Firstly, KT is wrong in stating that the Minister had not disclosed the existence of the pending application between Redisa and the Minister. This fact was disclosed.

2) Secondly, the Respondent fails to explain why the Minister allegedly omitted to deal with the two pending applications in any detail in the application for the winding-up of the Respondent. The Minister submitted that there is clearly no merit in this complaint for the following reasons:

   2.1 The Respondent (KT) is not a party to the pending litigation;

   2.2 The pending application concerns the review and setting aside of the National Pricing Strategy or Regulation 9 (1)(jA) of the Waste Tyre Regulations, 2009;

   2.3 This application is concerned with the misappropriation of public funds and the abuse of the Respondent's corporate personality - something that clearly has nothing to do with either the National Pricing Strategy or Regulation 9 (1)(jA) of the Waste Tyre Regulations, 2009.

3) Thirdly, the Minister did not allege that she was not aware of the fact that the management agreement was entered into between Redisa and KT. What the Minister said was that Redisa failed and/or refused to provide a copy of the actual agreement to the Minister.

4) Fourthly, that KT is incorrect in saying that the Minister did not disclose that she was aware of the fact that a portion of the levy was to be allocated to the

cost of administering the Redisa Plan. She expressly acknowledges in the founding affidavit that the Redisa Plan makes provision for 20% of the levy to be expended on administration costs.

5) Lastly, the KT is incorrect in alleging that the Minister withheld from the court that she was aware that the executive directors of Redisa were the indirect shareholders of the Respondent. She clearly stated in the founding affidavit that she was aware of this.

These facts therefore demonstrate that KT has failed to show that any material facts were withheld from the court when the ex parte application was heard.

(4) Not Just and Equitable

[100] Redisa argues that the just and equitable ground in section 81 (1)(d) of the Companies Act should not be interpreted so as to include any matter similar to the other class of action in section 81 (1), and that the examples of deadlock given in section 81 (1)(d) are exhaustive and do not limit section 81 (1)(d)(iii) but submits that it extends to all cases of deadlock. And it is usually in the context of the deadlock that this provision is relied upon.[26] Furthermore, it submits that the "*just and equitable"* ground for winding-up' should not only be based on facts, but the broad conclusion of law, justice and equity.

[101] Redisa in addition submitted that a court in coming to a conclusion as to what is just and equitable, have to balance the interests of the individuals affected with the

[26] With reference to *Thunder Cats Investments 92 (Pty) Ltd and Another v Nkonjane Economic Prospecting & Investment (Pty) Ltd and Others* 2014 (5) SA 1 (SCA) para 14.

interests of good governance and the administration of justice. It further entails a judgment on the facts and the exercise of judicial discretion.

[102] It submitted that subject to the comments made by the court in **Rand Air**,[27] section 81 (1)(d) of the Companies Act is not confined to cases analogous to the grounds mentioned in other parts of the section. The submission further is that there is no general rule as to the nature of the circumstances that have to be present, or a fixed category of circumstances which provide the basis for just and equitable winding-up. The ordinary categories identified would include the following: (1) the disappearance of the companies' substratum; (2) illegality of the objects of the company and fraud in connection therewith; (3) a deadlock in the management of the company's affairs; (4) grounds analogous to those for the dissolution of a partnership; and (5) oppression.

[103] Of the five categories identified by the court in **Rand Air**, only one would find application in this case. This is where there is an illegality of the objects of the company and fraud was committed in connection therewith. Which on the Minister's version that there was a disappearance of public funds, is clearly wrong.

[104] This version is not sustainable and cannot constitute as a ground upon which the Minister can argue that it is just and equitable to wound up Redisa, for the following reasons. Prior to Act 13 of 2016, the levy on tyres was not paid into the National Revenue Fund; the levy was to be collected and spent, as agreed to in the plan; the only obligation that Redisa had to discharge vis-a-vis the Minister via the

[27] *Rand Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd* 1985 (2) SA 345 (W) ("Rand Air").

NCCS was to have the plan audited in terms of IFRS requirements and provide that statistical data.

[105] Furthermore, the management of the plan was Redisa's responsibility; it was proposed by Redisa a non-profit company representing persons who produce waste in the tyre industry; it was conceptualised by Redisa after consulting all those concerned; and it envisage a further contract between Redisa and third parties to implement the plan. The idea that on the so-called "polluter pay principle", the producer levy will be used by Redisa to dispose of the producers' waste products at no cost to them while creating business and private opportunities in the process, was that of Redisa.

[106] Redisa was to have independent auditors and was to appoint an external management company. The waste tyre management fee provided for in the plan is not collected by SARS, but by Redisa. It is not spent in accordance with revenue legislation, but by Redisa in a predetermined ratio. Therefore the just and equitable ground relied upon, on the basis that Redisa deals with public funds, is without foundation. KT also argues that the Minister has failed to show that it would be just and equitable to wound up the company.

[107] Her contention that the substratum of KT's business has fallen away because Redisa would be finally wound up, has no legal or factual basis. KT's main source of income is the management agreement, which remains extant; the mere fact that Redisa has been placed under provisional liquidation does not affect the contract.

And it is for the provisional liquidators to determine the steps that they consider appropriate in relation to the Redisa contracts.

[108] The fact that they may, subject to their powers and also Redisa's MOI and the Redisa Plan, terminate the management agreement with KT does not make it just and equitable for KT to be wound up. The Minister's further allegation that KT is part of the scheme involving the abuse of its corporate personality and the further allegation that Redisa outsourced its functions to KT, and that KT was at all times the alter ego of Redisa, are also without foundation. KT argues that in a case where the corporate or separate legal entity is being abused, the remedy which the court will on occasion admit to is to look beyond the legal fiction of separate personality to the real controllers of the company.

[109] Liquidation of the company is not a remedy for the abuse of the legal fiction. They further argue that there is in any event no merit to the allegation that there has been an abuse of the separate legal personality, in this case. Common ownership and control of two entities is one of the factors which must be demonstrated for finding that the separate legal personality of the two entities is being abused. In this case Redisa has no shareholders or members. While, KT is privately owned. Redisa and KT have no common directors. There is no common ownership and control.

[110] It is common cause that the Redisa Plan expressly provides for the outsourcing of certain functions by Redisa to a third party which in this case is KT. Such agreements are commonplace and the fact that the service provider, by

agreement with its client, performs such functions on behalf of the client does not render the service provider the client's alter ego.

[111] The fact that there is a management agreement in existence between Redisa and KT is consistent with the fact that they are two separate entities and properly treated as such by the other. KT has not received any payments from Redisa other than the agreed management fee, in return for attending to the administrative functions.

Evaluation

[112] This court will firstly make a determination on the facts and circumstances upon which the respective applications are based. Thereafter it will consider and make a determination on the points in limine raised by the two Respondents' in this consolidated application. Lastly, the court will determine whether based on the facts it would be just and equitable to grant an order for the winding-up of both Respondents.

Determination of the facts which underpins this application

[113] Apart from the points raised in limine by the Respondents' which are disputes of a legal nature, most of the facts raised in the Minister's founding papers upon which the applications was based are vehemently disputed by the Respondents in their answering papers. In coming to a conclusion as to the real and true facts of this case, the court should also have regard to the Minister's replying affidavit and further evidence which the court admitted on behalf of the Minister, together with the

rebutting affidavits that was presented into evidence by Erdmann on behalf of Redisa and Crozier on behalf of KT.

[114] It is clear that the Minister's case as set out in its founding affidavit regarding the broad allegations of impropriety by the Respondents' were further expanded upon and substantiated by the further evidence as presented in her replying affidavit and further supplementary affidavits and evidence that was admitted. The Minister's case in reply evolved around mainly the shareholdership of the directors of Redisa; the Minister's knowledge about the agreement between Redisa and KT; whether the directors of Redisa received any benefit or income directly or indirectly from Redisa, to which they were not entitled to; and whether such income or benefit were in contravention of the MOI as well as Schedule 1, Item 1(3) of the Companies Act.

[115] This court in its attempt to determine the actual facts upon which this application is based will not seek to deal with each and every fact that was raised by the Minister in her founding affidavit, which is placed in dispute by the Respondents, either in the answering affidavit and/or replying affidavit. In my view, given the fact that we are dealing with motion proceedings in which the Minister seeks final relief, it would be rather appropriate to deal with this application on the basis of those facts, as stated by the Respondents, together with the admitted facts or facts which are not in dispute, in the Minister's affidavits (founding as well as replying affidavits) that warrant the granting of the relief being sought by the Minister.

[116] In my view, in this case, there are sufficient facts not in dispute or disputed facts which are not material, and which are also not real and genuine disputes of

fact, on which relief can nevertheless be granted. Those facts which are in dispute would therefore be accepted as facts in favour of the Respondent. The court is of the view that this approach is consistent with the law expressed in various cases on this issue.

[117] In **Wightman t/a JW Construction v Headfour (Pty) Ltd and Another**,[28] it states:

"[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 the requirement because there is no other way open to the disputed 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

[28] 2008 (3) SA 371 (SCA).

that does not happen it should come as no surprise that the court takes a robust view of the matter."

[118] **Erasmus: Superior Court Practice**[29] with reference to certain cases it states: "*A bare denial of the applicant's allegations in his affidavits will not in general be sufficient to generate a genuine or real dispute of fact. It has been said that the court must take 'a robust, common-sense approach' to a dispute on motion and not hesitate to decide an issue on affidavit merely because it may be difficult to do so. This approach must, however, be adopted with caution and the court should not be tempted to settle disputes of fact solely on the probabilities emerging from the affidavits without giving due consideration to the advantages of* viva voce *evidence."*

[119] I will now proceed to determine the facts on the basis as set out above.

[120] It is common cause, that KT was established as a management company for the administration and implementation of the Redisa Plan. There is no evidence that KT conducted any other business. KT's existence and functioning is totally dependent on Redisa. KT has also not shown any evidence to this effect, that it has any other source of income or business other than that generated in terms of the management agreement between it and Redisa. KT is therefore dependent on Redisa for its existence. In fact it has been shown that the management agreement in terms of which KT would manage the Redisa Plan had been concluded between the two entities almost a year before the Minister had approved the Redisa Plan.

[29] Van Loggerenberg *Erasmus: Superior Court Practice* (Vol 2) 2nd edition Service 4, 2017 D1-74.

[121] Redisa can or could have always appointed another management company, because its existence does not depend on KT. As things stand at present and without KT having any other business or function and source of income, it cannot exist without Redisa. On the papers filed of record there is an ineluctable conclusion that Redisa is the lifeblood of KT. Should Redisa therefore be wound up, the lifeblood of KT will be cut off.

[122] Erdmann, as well as Crozier, were very vague and ambiguous and were also reluctant to reveal the extent of their involvement in NYI (in which Erdmann is an 80% shareholder and Crozier 10 %), which holds 75 % in KT. Both of them made the bald, unsubstantiated and sparsely proven allegation that the Minister and the Department knew all along that the directors of Redisa have an interest in KT. This they claimed by stating the following:

1) Erdmann in his answering affidavit says that "*Stacey Davidson is not a director of Nine Years"* and that "Nine *Years is the company which holds my interest in KT".* [30] He does not disclose the true nature and extent of his interests which NYI holds in KT. He fails to reveal that Davidson, a director of Redisa, is the 100% shareholder in Avranet, which holds 25% in KT. He further failed to disclose that Kirk, holds the other 10% in NYI.
2) That the relationship between Redisa and KT is nothing more than a pure business relationship wherein the two entities acts independently of each other whereby which KT in terms of the management agreement renders management services.

[30] Page 1074 - paras 311.3.5 and 311.3.6 [Redisa record].

3) That the only evidence both Crozier and Erdmann relies on to show that they have informed the Minister and the Department is either by stating that they have revealed it in the meetings that were held with either the Minister or officials of the Department, or that it was disclosed in the financial statements of Redisa from the outset.

4) The proof they rely on, as evinced in the financial statements of Redisa, were the following:[31]

"*Directors' interests in contracts*

The executive directors are shareholders of Kusaga Taga Consulting Propriety Limited, which has been contracted as a service provider by Redisa to support it in the implementation of the Plan that has been promulgated by Government Gazette. The executive directors recuse themselves from the discussion of the appointment of non-executive directors (sic) concluded the contract. This interest had furthermore been declared to the relevant government institutions and industry bodies beforehand"

And that … "*The management company, Kusaga Taka Consulting Propriety Limited, is related to Recycling and Economic Development Initiative of South Africa NPC as the executive directors are shareholders of this company."*

5) He however failed to disclose the true state and exact nature of the relationship as well as the true nature of his and the other directors' shareholding in the entities or related entities as earlier referred to.

6) Crozier in his answering affidavit says that the only shareholders of KT are the companies, NYI and Avranet. However, three of Redisa directors are also

[31] Page 1410 and 1430 [Redisa record].

directors of either NYI or Avranet and shareholders of either NYI or Avranet, and thus indirect shareholders of KT. [32]

7) He further stated that none of the directors of Redisa are directors of KT. However later, in paragraph 9 of his rebuttal affidavit, stated that there is no mystery to the shareholding in KT. This was after it was revealed in the A@L report that 25% is held by Avranet and 75% is held by NYI.
8) He says the Minister has always known that 100% of the shares in KT are held by these two companies. He however failed to produce any evidence of this fact. He conveniently and full well knowing the true facts failed to reveal what the exact interests and shareholding of these three, which either holds shares in NYI or Avranet, is.
9) Namely that Erdmann holds 80% while Kirk holds a 10% in NYI, both of whom are directors of Redisa, which in turn holds 75% shareholding in KT. That Davidson is the 100% shareholder in Avranet, which holds the other 25% in KT. This means that Erdmann, Davidson and Kirk, who are all directors in Redisa, hold either a direct share or indirect share in KT either through NYI or Avranet. He also failed to reveal that he as a director of KT holds a 10% share in KT through NYI.

[123] Nowhere in the answering affidavits of both Erdmann and Crozier, as stated earlier, was the exact nature of their respective shareholding revealed. Only sparse and unspecified references were made to it. It was only revealed after the liquidators appointed A@L to conduct a forensic accounting investigation into the trade, dealings and affairs of Redisa and KT. And as stated earlier, Erdmann in his

[32] Page 1020 - para 45 [KT record].

answering affidavit never disclosed that he is a 80% shareholder in the company, NYI, which holds 75% shareholding in KT.

[124] Further, as the CEO of Redisa never revealed that another director of Redisa, Kirk holds 10% in NYI and that, Davidson, also a director of Redisa holds 100% shareholding in Avranet, which in turn holds 25% shareholding in KT. In his rebutting affidavit, following on to the Minister's replying affidavit where she refers to the new facts that were discovered as a result of the report by A@L, he states that he has disclosed the fact that he is a shareholder of the company, which is a shareholder KT.[33]

[125] Crozier creates the impression in the rebutting affidavit that this fact was revealed to the Minister and the Department all along, without providing substantial proof of this fact, except that he says so and the vague and unspecified references to it in the financial statements.

[126] The question that needs to be asked is why Erdmann and Crozier were reluctant from the onset to disclose and reveal the exact nature of their direct or indirect shareholding in KT, the management company of Redisa, from which they directly benefited? They all along tried to create the impression that they were honest, played open cards and forthcoming about their involvement in KT, which is not true.

[33] Page 2301 - para 62 [Redisa record].

[127] It is inconceivable that if these facts were known to the Minister or the Department, that she would not have been concerned about the benefits that the directors of Redisa had acquired through KT. And she would have referred to it in her founding affidavit or would not have stated that she and the Department had not known that he was an 80% shareholder and Kirk was a 10% shareholder in NYI, which holds 75% shares in KT. The Minister would also have stated that she had known Davidson is the 100% shareholder in Avranet, which holds 25% in KT.

[128] Similarly, if these facts were known to the Minister, Crozier as a director of KT would have stated that the Minister knew that he held a 10%, Erdmann an 80%, and Kirk a further 10% shareholder in NYI, which has 75% shareholding in KT. Neither Erdmann, nor Crozier as far as the papers reveal, has emphatically disclosed the exact nature and manner of the shareholdership that the directors of Redisa has either directly or indirectly in KT. Except the vague and unspecified references thereto in the financial statements as referred to above. It can be safely accepted that this was never revealed to the Minister.

[129] If this is an attempt to create a dispute of fact as to what really was in the knowledge of the Minister and as to what was disclosed to the Minister, when such dispute is not a real, genuine, bona fide dispute of fact as borne out by the objective evidence.[34]

[130] KT and Redisa are correct in saying that the Minister knew all along that there was an agreement to render management services to Redisa. The Minister

[34] See *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634; *Wightman* n 28 para 13.

throughout the papers in respect of both applications also did not deny that she was aware that there was a management agreement. The evidence clearly shows that the plan was approved by the Minister on 29 November 2012. It is common cause as per the plan that provision is made for the appointment of a management company to be appointed by Redisa to handle all operational aspects of the plan. It seems, however, that nowhere in the approved plan was it mentioned that KT would be that management company. Furthermore, it seems that KT as the management company was appointed on 10 November 2011, almost a year before the plan was approved by the Minister.[35] Which Erdmann, Crozier and the other directors knew all along and knew that they would benefit if the plan would be approved. They failed to disclose this from the onset when the Minister approved the plan. Erdmann would have known that this would be contrary to the MOI and the Schedules of the Companies Act as will be shown later.

[131] This clearly shows that the agreement between KT and Redisa was concluded long before the Minister approved the plan or could have known about the agreement between the two entities, because the agreement already existed. This maybe one of the reasons why they were reluctant, since 2014, to disclose the actual agreement to the Minister or the Department.

[132] I agree with the argument of the Minister that in doing so, Redisa acted as KT's front in presenting the plan to the Minister because on KT's and Redisa's own version, KT was the creator of the plan. Crozier[36] states that the Minister and the Department were well aware of the respective roles of KT and Redisa in the

[35] Annexure CC3 - page 1059 [KT record].
[36] Page 1166 - para 215 [KT record].

implementation of the plan should it be approved, and that the Department and the Minister were also well aware of the identity of KT's shareholders.

[133] Nowhere in the plan mention is made that prior to the approval of the plan by the Minister, that KT and Redisa has agreed that KT will be the company that would be responsible for the management of the plan as the management company. This fact could easily have been disclosed or have been mentioned in the plan because at that time the agreement was already in existence between KT and Redisa. It is strange why this was not done if there was a genuine attempt by the two entities to fully disclose KT's involvement in Redisa right from the onset. They could easily have at that time, if they really wanted to, present the Minister or the Department with a copy of the management agreement

[134] Once again just as in the case of the true nature of Erdmann and Crozier's as well as the other directors shareholdership in the different entities and associated entities, Crozier states that KT is not able to provide proof of this. He states this was discussed informally with the Minister and the Department, and no minutes of such meetings were kept. Once again, this is a vague and sparsely proven fact, which is intended to create a dispute of fact, on the papers.

[135] What makes this allegation further unconvincing is that the evidence shows that in a meeting between officials of the Department and Redisa dated 12 August 2016, it was recorded that one of the outstanding issues on which action is to be taken was the fact that the Department needed to be placed in possession of the contract between KT and Redisa, and the procurement process for the appointment

of KT. When the Minister, however, on 31 October 2016 raised her concerns in respect of the plan and various other issues, she once again stated the following to Erdmann about the appointment of KT:

"*Redisa has appointed Kusaga Taga Consulting (KT) as the external management company. Redisa has, however, confirmed via the annual financial statements that the executive directors of Redisa are also shareholders of KT. This creates an untenable conflict of interest when dealing with public funds, despite the fact that these are directors allege that they recuse themselves when a conflict arises. Despite several requests to Redisa, it has not been forthcoming with information related to KT i.e*

- *The process followed in appointing KT;"*[37]

Despite the evidence, revealing that on 12 August 2016 in a meeting between Redisa and the Department, this information was requested, Redisa in reply, states that *"… this information was not requested."*

[136] It is also not in dispute that since 2014 the Minister had requested a copy of the management contract that was entered into between Redisa and KT. It is common cause that the Minister only received a copy of the contract, not directly, but through iSolveit for the first time in March 2016. Once again, one needs to ask the question why, just as in the case as to the exact nature of the shareholdership by the directors of Redisa in KT and the associated entities, were they so secretive about the management agreement that was concluded between KT and Redisa.

[137] Both Erdmann and Crozier has cleverly managed to understate the true facts by clothing it with an alternative version to place the version of the Minister in respect

[37] Page 621 [Redisa record].

of these aspects in dispute, which they wanted this court to believe. This was nothing but an attempt to obfuscate the true facts of this case relating to these aspects.

[138] As regards the allegations by the Minister as set out in paragraph 15 of the replying affidavit about the financial gain Erdmann, Crozier and Kirk and the other office-bearers and shareholders of either KT and/or Redisa had acquired either directly or indirectly from Redisa through Avranet and NYI, such allegations is not denied by Crozier or Erdmann and the other directors of Redisa.

[139] Erdmann, rather states in his rebutting affidavit [38] that: "*[t]he financial arrangements concluded between KT and its shareholders Nine Years Investments (Pty) Limited is private business."* He also does not even comment as CEO of Redisa, of which Davidson is also a director, on the financial benefit which Davidson had gained through her shareholdership of Avranet in KT.

[140] It may well be so, but it becomes relevant to the question whether Redisa transferred directly or indirectly any portion of its income or of its assets, regardless how it was derived to Erdmann, Kirk and Davidson, who in terms of Schedule 1, Item 1(3) of the Companies Act, was either an incorporator, or member or director of Redisa a non-profit company. Which was payment of R97 million for Erdmann, R12 161 million for Kirk and an amount of R21 million for Davidson, through their respective shareholdership in these entities. And an amount of R11 million was paid to these companies for royalties and R63 million members paid in dividends. Then there were suspicious payments made to Erdmann in respect of accommodation in

[38] Page 2307 - para 89 [Redisa record].

the amount of respectively R160 000 and R65 000; and the amounts for security upgrades at the private residence of Erdmann and Davidson. The further suspicious payments in respect of the cost of the NCCS in the amount of R76 million and the manner in which the liquidators claimed the IP belonging to Redisa was transferred to NYI. Even if these further amounts could be properly accounted for the suspicion surrounding these payments needs to be addressed.

[141] It will at this stage be convenient to refer to the provisions of **Schedule 1- Provisions Concerning Non-Profit Companies**, **Item 1(3)**, that states:

"(3) A non-profit company must not, directly or indirectly, pay any portion of its income or transfer any of its assets, regardless whether the income or asset was derived, to any person who is or was an incorporator of the company, or who is a member or director, or person appointing a director, of the company, except –

(a) as reasonable –

(i) remuneration for goods delivered or services rendered to, or at the direction of, the company; or

(ii) payment of, or reimbursement for, expenses incurred to advance a stated object of the company; …"

[142] It is common cause that the management fee was directly paid by Redisa to KT, of which NYI and Avranet are the shareholders. Erdmann, Crozier and Kirk owned 75% shares in KT through NYI. Davidson owned 25% shares in KT through Avranet. There may well have been a bona fide agreement between KT and Redisa, for management services rendered. There was however no bona fide agreement between Redisa, Erdmann, Davidson and Kirk, in the case of Erdmann as

incorporator, Davidson as a director and Kirk also as a director, to have directly or indirectly been given any portion of its income or transfer of the assets of Redisa to them.

[143] Erdmann, as incorporator held 80% shares in NYI of the 75% share in KT. He indirectly through KT and NYI received a large portion of the income of Redisa as incorporator or director. Davidson, by means of the 25% share Avranet has in KT, has also substantially been paid in an indirect manner a portion of the income of Redisa. Kirk, another director of Redisa through the 10% share of NYI, has received 10% indirectly of the income of Redisa.

[144] Under clause 4.1 and 4.2 of the MOI[39] of Redisa, the provisions of Item 1(3) of Schedule 1 is repeated and forms part of the MOI. In terms of clause 8 of the MOI[40] under the heading – **Special Provisions Relating To Tax Exemption** the following provisions are relevant to this case:

"8.1 It is envisaged that the Company shall apply to the Commissioner for approval as a public benefit organisation, as contemplated in s 30 (3) of the Income Tax Act, and that and accruals of the company will be exempt normal tax. In order for to qualify for such tax exemption the company shall at all times comply with the provisions of clause 8.2 to 8.15.

8.2 As recorded in clauses 4.1 and 4.2 of this Memorandum of Incorporation, the income and property of the company howsoever derived shall be applied solely towards the promotion of the Company's objects or be invested and no portion thereof shall be paid or transferred, directly or indirectly, to any person other than in the cause of the promotion of the Company's objects; provided, that nothing herein contained shall prevent the payment in

[39] Page 257 [Redisa record].
[40] Page 258-259 [Redisa record].

good faith of a reasonable human remuneration to any officer or servant of the Company in return for any services actually rendered to the Company.

8.3 The company shall take reasonable steps to ensure that each activity carried on by the company is for the benefit of, or is widely accessible to, the general public at large, including any sector thereof (other than small, exclusive groups).

8.4 The Company shall comply with such conditions, if any, as the Minister of Finance, may prescribe the way of regulation to ensure that the activities and resources of the company are directed in the furtherance of his objects…"

A further relevant provision under clause 8 is the following:

"8.10 The Company will not pay any remuneration, as defined in the Fourth schedule of the Income Tax Act to any employee, office bearer, Director or any other person, which is excessive, having regard to what is generally considered reasonable in the sector and in relation to the services rendered and will not economically benefit any person in a manner which is not consistent objects of the company…."

[145] Although the Minister questions the reasonableness of the remuneration paid to Erdmann and the other directors, Erdmann's assertion is that this remuneration is fair and competitive in respect of what would ordinarily be paid to a person holding such a position and cannot be gainsaid or disputed on the papers.

[146] The income that he and the other directors through an indirect manner have received through KT and the other entities, cannot be justified in terms of Item 1(3), Schedule 1 of the Companies Act, as well as clause 4.1 and 4.2, read with clause 8.2 and 8.10 of the MOI. Erdmann, Davidson and Kirk in any event, do not state that the income they indirectly received through KT and the other companies are in

accordance with the exceptions as set out in Item 1(3) of Schedule 1 or clauses 4.1, 4.2, as well as 8.2 and 8.4 (except for the remuneration) of the MOI. The income they therefore received indirectly from KT and the companies which hold shares in KT, were indirectly received from Redisa, which is unlawful and not in accordance with Schedule 1, Item 1(3) or the provisions of the MOI. The Minister therefore is correct at the very least in her assertion that these funds are misappropriated through KT to its directors. And that the other suspicious payments made in respect of accommodation and other benefits, which according to the Redisa Plan and MOI, is allegedly part of this misappropriation of public funds.

[147] Erdmann, Kirk, Davidson, as well as Crozier have clearly abused the corporate personality of KT, NYI and Avranet to unduly benefit themselves. In such a case it would not be improper to disregard the separate legal personality of these entities. **Henochsberg**[41] under the discussion of section 19 of the Companies Act states the following: *"**Lifting the veil**. – In some cases the Court has disregarded the company's separate legal personality, ie it has focused on the natural person or persons 'behind' the company as if there were no dichotomy between such person or persons and the company."*

They also after referring to some cases state: "*It does not appear that the law is settled as to the circumstances in which the Court can or should, as it has been put, 'lift' or 'pierce the veil' of corporate personality."* [42]

[41] Delport *et al* n 16 p 85.
[42] Delport *et al* n 16 p 85.

[148] The authors states further with reference to a case of this division in **Ex Parte Gore and Others NNO**[43] quoting from para 4 that: *"[W]hat is entailed on any approach, whether it be called a 'piercing' or a 'lifting', is a facts-based determination by the courts in certain cases to disregard some or all the characteristics of separate legal personality that statute law ordinarily attributes to a duly incorporated company."*

[149] According to the authors "*only when fraud, dishonesty or improper conduct are present should the separate legal personality of the company be balanced against policy considerations favouring the piercing of the corporate veil*." [44] *(Emphasis added)*

[150] In **Die Dros (Pty) Ltd and Another v Telefon Beverages CC and Others**[45] Van Reenen J held:

"[23] Courts do not have a general discretion to disregard a company's separate legal personality whenever they consider it just or convenient to do so. The then Appellate Division (per Smalberger JA , who wrote the majority judgment) in Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others *1995 (4) SA 790 at 803G - H and I - J expressed the view that it is a salutary principle that courts should not lightly disregard a company's separate legal personality, but should strive to give effect to it, as to do otherwise would negate and undermine the policy and principles that underpin the concept of separate corporate personality and the legal consequences that attach thereto, but held that where fraud, dishonesty or other improper conduct is present, other considerations come into play, in which event, the need to preserve the separate corporate personality of a company has to*

[43] 2013 (3) SA 382 (WCC).
[44] Delport *et al* n 16 p 86.
[45] 2003 (4) SA 207 (C).

be balanced against policy considerations favouring the piercing of the corporate veil." (Emphasis added)

[151] In **Hülse–Reutter and Others v Gödde**[46] the test as to whether it would be appropriate to pierce the corporate veil has been formulated as follows as referred to by **Henochsberg**: "*there must at least be some misuse or abuse of the distinction between the corporate entity and those who control it which results in an unfair advantage afforded to the latter." (Emphasis added)*

[152] In my view based on this test as formulated by the Supreme Court of Appeal, there was clearly a misuse or abuse of the distinction between the corporate identity of KT, NYI and Avranet and those who control it like, Erdmann, Crozier, Davidson and Kirk which resulted in an unfair advantage to them. This unfair advantage was that as directors of Redisa (except Crozier) they indirectly received income which they were not entitled to in terms of the provisions of the MOI and Schedule 1, Item 1(3) of the Companies Act. This was unlawful.

[153] It is for that reason that they failed to disclose the exact and true nature of their shareholdersship in these companies. By doing so they abused and misused the distinction between the corporate identity of these entities and themselves. They were not entitled to any benefits or income of the non-profit organisation in the manner in which they did, and tried to conceal the exact nature of such income or benefits. Except of course where they were entitled to reasonable compensation and remuneration for their services, as directors of Redisa.

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[46] 2001 (4) SA 1336 (SCA) para 20.

[154] Before dealing with the question whether the Minister had the necessary locus standi to bring this application, I am of the view that it has been shown that Redisa is without any doubt an organ of state for the following and the further reasons that follow later in the judgment.

[155] In terms of s 239 of the Constitution an "*Organ of State"* is defined as:

"*(a) any department of state or administration in the national, provincial or local sphere of government; or*

(b) any other functionary or institution –

(i) exercising a power or performing a function terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation,…"

[156] In terms of this constitutional provision and in the light of the functions Redisa performs, it is without a doubt an organ of state. It also seems that Redisa in its own MOI regard themselves as an organ of state. Where in terms of clause 8.3 it states that the company shall take reasonable steps that each activity carried on by the company is for the benefit, or is widely accessible to the general public, including any section thereof (other than small, exclusive groups). In terms of clause 8.4 of the MOI the company shall comply with such conditions, if any, the Minister of Finance may prescribe by way of regulation, to ensure that the activities and resources of the company are directed to the furtherance of its objectives.

[157] What is clear from these two provisions of the MOI, as opposed to an entity that is not an organ of state, is that the company must carry out its functions for the benefit or should be widely accessible to the general public or any section thereof. If it was not an organ of state, why would such a provision be included in the MOI. Furthermore, what business would the Minister of Finance have in subscribing conditions by way of regulation to ensure that the activities and resources of the company are directed for the furtherance of its objectives? This provision, in my view, which was adopted by the company in its MOI, is nothing other than to make the company accountable in the manner it operates to ensure that its activities and resources are directed solely in the furtherance of its objectives. The power was given to the Minister of Finance and not to the board of directors of Redisa.

[158] It is common cause that the collection of waste tyres and the prevention of pollution by means of these waste tyres are primarily a government function, mandated in terms of the Constitution to the relevant state department which is the Department of Environmental Affairs. It is common cause that the Minister delegated this function to Redisa in terms of the Redisa Plan. It is common cause that the Minister in accepting and endorsing the Redisa Plan, by publication thereof in the Government Gazette, elevated it to the status of subordinate legislation. In dealing with the question of whether the Minister has the necessary locus standi, it will also become apparent why Redisa can be regarded as an organ of state.

[159] The next question to consider is whether the fees that were collected by Redisa before 1 February 2017 can be considered public funds. Mr Burger's submission that the fees payable to Redisa under the Redisa Plan does not

constitute public funds, is based on the fact that these fees are paid by producers who subscribe to the Redisa Plan, and those who do not subscribe to the Redisa Plan has subscribe to an integrated waste management plan prepared in terms of the Waste Act. Further, this waste management tyre fee is collected by Redisa and not collected by SARS.

[160] It is therefore not spent in accordance with the revenue legislation, but by Redisa in the prescribed ratio. He therefore argues that it is as little public funds as are fees collected from parents of students attending a private school. I do not agree with this submission. It is clear that a tyre producer's failure to subscribe either to the Redisa Plan or to an IIWTMP and still continues to produce tyres constitute an offence.

[161] There is therefore no voluntary contribution that is made by any tyre producer. If a producer does not contribute they would contravene the provisions of the Waste Act. The failure to contribute would constitute an offence and is enforced by an act of Parliament. When Parliament exercises its function in enacting legislation it exercises a public function in terms of the Constitution. When it enacted this legislation, it did not do so for the benefit of a few privileged individuals as would be the case in the example cited by Mr Burger in his heads of argument where he compared the fees collected in terms of the Redisa Plan and fees collected by a private school.

[162] The basis and the purpose of the Redisa Plan is for the overall public benefit which tyre producers has to pay as a result of the tyres that they produce, which

would end up as waste and which would be harmful to the general public. Furthermore Redisa fulfils a constitutional function, as stated earlier, for the benefit of the public. The Minister in accepting the Redisa Plan, on 26 November 2012, clearly explains for what government and public purpose the funds collected by Redisa should be utilised for.

[163] Some of the aims of the Redisa Plan would be to create jobs and small businesses. While in the analogy and comparison given by Mr Burger in relation to the private school, the benefits that derive from the fees collected by the school would only accrue to those children attending that school. Whereas the benefits and purpose of the Redisa Plan would be to mainly benefit the public at large. No real and tangible benefits accrue to the tyre producers who must contribute towards the Redisa Plan. It is in the same manner which the public at large benefits from the Road Accident Fund to which only motorists make a contribution but which is regarded as public funds.[47]

[164] The Minister's contention therefore that the money collected by Redisa, that ended up in the pockets of the directors of Redisa through KT, is public funds is therefore correct.

[165] The question to consider now was whether the Minister had the necessary locus standi to bring the application for the liquidation of these two entities. Ordinarily the winding-up a solvent company by an order of court is provided for in section 81 of the Companies Act. This can only be done, in the following circumstances, where:

[47] See in this regard *Road Accident Fund v Timis* (29/09) [2010] ZASCA 30 (26 March 2010) para 13 and *Madzunye and Another v Road Accident Fund* 2007 (1) SA 165 (SCA) paras 17-18.

"a) the company has –

(i) resolved, by special solution, that it be wound up by the court; or

(ii) applied to the court to have its voluntary winding-up continued by the court;

b) a practitioner of a company appointed during business rescue proceedings has applied for liquidation in terms of section 141 (2)(a), on the grounds that there is no reasonable prospect of the company being rescued; or

c) one or more of the company's creditors have applied to the court for an order to wind up the company on the grounds that –

(i) the company's business rescue proceedings have ended in the manner contemplated in section 132 (2)(b) or (c)(i) and it appears to the court that it is just and equitable in the circumstances for the company to be wound up; or

(ii) it is otherwise just and equitable for the company to be wound up;

d) the company, one or more of its directors or one or more shareholders have applied to the court for an order to wind up the company on the grounds that –

(i) the directors are deadlocked in the management of the company, and the shareholders are unable to break the deadlock, and –

(aa) irreparable injury to the company is resulting, or may result, from the deadlock; or

(bb) the company's business cannot be conducted to the advantage of shareholders generally, as a result of the deadlock;

(ii) the shareholders are deadlocked in voting power, and have failed for a period that includes at least two consecutive annual general meeting dates, to elect successors to directors whose terms have expired; or

(iii) it is otherwise just and equitable for the company to be wound up;

e) a shareholder has applied, with leave of the court, for an order to wind up the company on the grounds that –

(i) the directors, prescribed officers or other persons in control of the company are acting in a manner that is fraudulent or otherwise illegal; or

(ii) the company's assets are being misapplied or wasted; or

f) the Commission or Panel has applied to the court for an order to wind up the company on the grounds that –

(i) the company, its directors or prescribed officers or other persons in control of the company are acting or have acted in a manner that is fraudulent or otherwise illegal, the Commission or Panel, as the case may be, has issued a compliance notice in respect of that conduct, and the company has failed to comply with that compliance notice; and

(ii) within the previous five years, enforcement procedures in terms of this Act or the Close Corporations Act, 1984 (Act No. 69 of 1984), were taken against the company, its directors or prescribed officers, or other persons in control of the company for substantially the same conduct, resulting in an administrative fine, or conviction for an offence."

[166] It is clear that section 81 of the Companies Act does not directly grant the Minister the necessary standing to bring an application for the winding-up of a solvent company. The category or categories of persons or entities that can bring such an application is restricted in terms of this section. These are either: the company itself; its directors and shareholders; a business rescue practitioner; a creditor where the company's business rescue proceedings have ended in the

manner as contemplated in section 132 (2) of the Act; or the Commission or Panel under the conditions and circumstances as set out in section 81.

[167] In dealing with the interpretation of any document including a statute, which includes the interpretation of section 157 (1), a court has to be mindful of the decision in **Natal Joint Municipal Pension Fund v Endumeni Municipality**[48] where Wallis JA stated the following about the present state of the rule of interpretation:

"*The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the 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 provisions in the light of the document as a whole and the circumstances attendant 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 to 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 all 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 instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the*

[48] 2012 (4) SA 593 (SCA) para 18.

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 document." (Emphasis added)

[168] The Minister argues that her standing to bring the application is based on the provisions of section 157 (1)(d). At this stage it would be appropriate to deal with the provisions of section 157 of the Act which has the heading "**Extended standing to apply for remedies**". It states:

"157. (1) When, in terms of this Act, an application can be made to, or a matter can be brought before, a court, the Companies Tribunal, the Panel or the Commission, the right to make the application or bring the matter may be exercised by a person –

(a) directly contemplated in the particular provision of this Act;

(b) acting on behalf of a person contemplated in paragraph (a), who cannot act in their own name;

(c) acting as a member of, or in the interest of, a group or class of affected persons, or an association acting in the interest of its members; or

(d) acting in the public interest, with leave of the court." (Emphasis added)

[169] I do not agree with the submissions of the Respondents that section 157 (1)(d), due to the fact that it is listed under Chapter 7 of the Companies Act which deals with remedies and enforcement, do not extend to other applications that may be brought in terms of the Companies Act, more especially to applications under section 81 (1) of the Act. I also do not agree that because section 157 (1) forms part

of Chapter 7 it should be restricted to alternative procedures for addressing complaints or securing rights contained in section 156.

[170] I also do not agree that it does not provide the basis to extend the categories of persons authorised to apply for the winding-up of a solvent company under Part G of Chapter 2. On a plain reading of section 156, it does not only deal with alternative procedures for addressing complaints or dispute resolution or securing rights. And whilst it makes provision for alternative procedures for addressing complaints or securing rights to a person referred to in section 157, it also grants such a person the right to apply for appropriate relief to the division of the High Court that has the jurisdiction over the matter. See in this regard section 156 (c).

[171] In my view section 157 (1) is clear where it states, "*when, in terms of this Act, an application can be made to, or a matter can be brought before, a court … the right to make the application … may be exercised by a person." (Emphasis added)*

[172] If regard is to be had to the words in section 157 (1) which states "*when in terms of this Act application can be made to a court",* it would be absurd and nonsensical to exclude an application which can be made in terms of section 81 (1) of the Act. There is no other provision in the Act or rule of interpretation which would exclude an application in terms of section 81 (1) that can be found in the words "*when an application in terms of this Act"* can be made before a court. I also do not understand the provisions of section 156 to exclude such an interpretation. I agree with Mr Muller that the words of section 157 do not restrict the remedies available to the applicants contemplated in section 157 (1) (a)-(d) to only those remedies in

terms Chapter 7. I agree with the submission that the introductory phrase "*when in terms of this **Chapter**, an application can be made to a court"*, that instead, the phrase reads "*when in terms of this **Act,** an application can be made."*

[173] What would then be the purpose of section 157, if such an interpretation on a clear and plain understanding of the words of a section cannot be given to it? The section permits the categories of persons to make an application to a court when the circumstances as set out in subsections (a) to (d) are present or is justified. If an interpretation is given to section 157 (1), to exclude persons other than those mentioned in section 81 (1) and not include persons as mentioned in subsections (a)-(d), it would defeat the purpose of Chapter 7 which grants certain remedies and enforcement of rights to people other than those mentioned in any other provision of the Act. And in particular those mentioned in section 81 (1) of the Act.

[174] The title of section 157, clearly intends to extend locus standi to the categories of people referred to in subsection 1 (a) to (d), which makes provision as stated in the title "*Extended standing to apply for remedies",* this is an indication of a clear intention to extend locus standi to bring applications or bring matters before a court in instances where such a person or persons mentioned in subsections (a)-(d), explicitly in terms of other provisions of the Act, do not have such standing. I am also in agreement with Mr Muller that this provision gives effect to one of the stated goals of the Act which is to promote compliance with the Bill of Rights in the sphere of company law. Which accords with section 39 (2) [49] of the Constitution which

[49] **Section 39 (2)**: "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

influenced the formulation of section 157, which in turn resemble section 38[50] of the Constitution.

[175] Justice Jafta in the article titled **Critical analysis of the extended legal standing provisions under section 157(1) of the companies act 71 of 2008 to apply for legal remedies**[51] says the following:

"*At common law, legal standing is ordinarily linked to the party's own interest. It must be the identified interest of the party instituting the proceedings which forms the subject matter of the case. Legal standing, therefore, is limited to this narrow class of litigants. Barring the few exceptions, no party is entitled to institute proceedings on behalf of another party where none of its own interests are affected.*

But where a claim is grounded in statute, legal standing is determined with reference to the relevant statute and its purpose. The issue is decided in the light of both the facts and the statute conferring the right or interest which the applicant seeks to protect. For instance, if a statute contains a prohibition that was enacted in the interests of a particular group or class of persons, any member of the group would be entitled to institute proceedings to enforce the prohibition, without proof of damages suffered personally by him or her.

Therefore, in passing the Companies Act, Parliament must have been aware of the narrow approach to standing at common law and the fact that in the case of a

[50] **Section 38**: "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are–
(a) anyone acting in their own interest;
(b) anyone acting on behalf of another person who cannot act in their own name;
(c) anyone acting as a member of, or in the interest of, a group or class of persons;
(d) anyone acting in the public interest; and (e) an association acting in the interest of its members."

[51] Jafta n 21 at 36.

statutory claim, legal standing is determined with reference to the relevant statute. It cannot be gainsaid that the aim of the legislature, encapsulated in s 157, was to alter the common-law position on legal standing and expand the class of persons who may institute legal proceedings. The section has revolutionised legal standing in matters where the Act applies." (footnotes omitted)

[176] Whilst the provisions of section 157 (1)(a) to (d) is similar to the provisions of section 38 of the Constitution and whilst both provisions seeks to broaden the standing of persons as mentioned in the respective provisions, the purpose of section 38 of the Constitution, in my view, is totally different to that of section 157 (1) of the Companies Act. The purpose of section 38 is to broaden the standing of persons who may approach a competent court in which they may seek relief where a right in the Bill of Rights has been infringed or threatened. Whereas section 157 (1) seeks to broaden the standing of persons who would ordinarily not have such standing to bring a matter before the court in terms of the Companies Act. Put differently, the extended standing in section 157 (1) clearly has not as its purpose to extend or broaden standing of persons to approach a court in which it may seek relief where a right in the Bill of Rights has been infringed or threatened.

[177] It seeks to give standing to persons not ordinarily clothe with such standing to bring a matter before a court or make an application to a court in terms of provisions of the Companies Act. Section 38, therefore, deals with standing in a constitutional context, whereas section 157 (1) deals with standing in terms of the provisions of the Companies Act. In both provisions, however, the common law requirements for legal standing have been substantially broadened. Jafta says the following in this regard: "*Although s 157 of the Companies Act is not a carbon copy of s 38 of the*

Constitution, there are striking similarities between these provisions. Consequently, decisions which construe s 38 would be helpful to the interpretation of s 157. However, because s 157 forms part of a statute it should not be approached as if it were a provision in the Constitution. Its interpretation is regulated by s 39(2) of the Constitution. Section 39(2) obliges courts 'to promote the spirit, purport and objects of the Bill of Rights' when they interpret legislation.

As the heading of s 157 suggests, its purpose is to extend legal standing in proceedings brought in terms of the Companies Act. The meaning assigned to it must achieve this purpose. Put differently, the section must be given a purposive interpretation. Over and above that, the interpretation must advance the objects of the Companies Act, for the section does not expand legal standing simply for the sake of wider standing. It does so in order to promote the goals of the Act."[52] *(footnotes omitted)*

[178] After having found that those persons or categories of persons as mentioned in section 157 (1)(a) - (d), may bring an application, or matter before a court, the question that still needs to be answered is whether the Minister in terms of the provisions of section 157 (1)(d) could bring this application for the winding-up of Redisa and KT in the "*public interests"*. CF Swanepoel ("Swanepoel") in an article titled **The judicial application of the "interests" requirement for standing in constitutional cases: "A radical and deliberate departure from the common law"** [53] discusses albeit in a constitutional context the requirements of public interests. The learned author after having referred to various cases discusses what a

[52] Jafta n 21 at 37.
[53] 2014 *De Jure* 63.

court would consider in determining what entails the broader public interests in the application of section 38.

[179] In my view these principles would also find application in the determination of what the public interests would be in terms of section 157 (1)(d) of the Companies Act. It would appear that the broader public interests, as identified by Swanepoel which would find application in this case could include *"the need to obtain legal certainty for the proper administration of justice*; *an interest in ensuring that public power is exercised in accordance with constitutional and legal prescripts; and the need for the rule of law to be upheld",*[54] amongst others. Especially if regard is to be had to the other purposes of the Act which is to promote compliance with the Bill of Rights, as provided for in the Constitution and in the application of company law.

[180] The further purposes of the Act relevant to this case is set out in section 7 (h), (i) and (j), which respectively provide for the formation, operation and accountability of non-profit companies in a manner designed to promote, support and enhance the capacity of such companies to perform their functions; balance the rights and obligations of shareholders and directors within companies; and encourage the efficient and responsible management of companies.

[181] If regard is to be had to these requirements, in my view, the Minister has established that she has the necessary locus standi to have brought these applications in the public interests in terms of the provisions of section 157 (1)(d). The Minister as a member of the executive took an oath to uphold the Constitution,

[54] Swanepoel n 53 at 83.

which includes the values of openness, accountability and transparency, which underpins the Constitution. She and the Department of Environmental Affairs also has a responsibility to ensure in terms of section 24 of the Constitution that everyone has the right to an environment that is not harmful to the health or well-being, and to have the environment protected for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation, promote conservation and secure ecologically sustainable development and use of natural resources or promoting justifiable economic and social development.

[182] The Redisa Plan, which she adopted, can be regarded as "*a reasonable legislative and other measures to prevent pollution and ecological degradation*" which clearly gives effect to this constitutional obligation placed upon the Minister and the Department. In this regard it is a function of the Minister to execute and protect the environmental rights of South Africans, which had been delegated to Redisa. In doing so she was acting in the broader public interest. Redisa exercised a function in terms of Chapter 3 (section 24) of the Constitution as well as a broader public function in terms section 239 thereof. In this regard, the Minister apart from the public interest therefore has as the responsible Minister a direct interest in the litigation. But given the allegations of impropriety made against Redisa an organ of state, as will be shown hereunder, the interests of justice or the public interests, compels this court to scrutinise the action even where the Minister's standing is questionable.

[183] In this regard, I refer to the judgment of Cameron J in **Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others**[55] where the learned judge said the following:

"[33] The separation of the merits from the question of standing has two implications for the own-interest litigant. First, it signals that the nature of the interest that confers standing on the own-interest litigant is insulated from the merits of the challenge he or she seeks to bring. An own-interest litigant does not acquire standing from the invalidity of the challenged decision or law, but from the effect it will have on his or her interests or potential interests. He or she has standing to bring the challenge even if the decision or law is in fact valid. But the interests that confer standing to bring the challenge, and the impact the decision or law has on them, must be demonstrated.

[34] Second, it means that an own-interest litigant may be denied standing even though the result could be that an unlawful decision stands. This is not illogical. As the Supreme Court of Appeal pointed out, standing determines solely whether this *particular litigant is entitled to mount the challenge: a successful challenge to a public decision can be brought only if 'the right remedy is sought by the right person in the right proceedings'. To this observation one must add that the interests of justice under the Constitution may require courts to be hesitant to dispose of cases on standing alone where broader concerns of accountability and responsiveness may require investigation and determination of the merits. By corollary, there may be cases where the interests of justice or the public interest might compel a court to scrutinise action even if the applicant's standing is questionable. When the public*

[55] 2013 (3) BCLR 251 (CC).

interest cries out for relief, an applicant should not fail merely for acting in his or her own interest." *(Emphasis added)*

[184] The next question to consider is whether the Minister was required to have applied for this court's leave do so before launching this application. According to the Respondents, she failed to do so. In this regard they rely on the decision of **Children's Resource Centre**[56] paragraphs 34 to 41 as well as the decision of **Mukaddam**[57] paragraphs 15 and 27. They also rely on **Jafta** (supra) at p 35. In my view these cases are distinguishable from the present, even though it deals with the question of extended standing. In both these cases the court dealt with extended standing in respect of class actions. These were also matters that were brought in action proceedings as opposed to this matter which was brought on application. The **Children's Resource Centre** case had its own peculiar difficulties in trying to determine which factors[58] a court has to take into consideration before it grants certification. Factors such as the definition of a class action, and whether a cause of action raising a triable issue, had to be determined in that case.

[185] Furthermore, as said earlier, they had the further difficulty in trying to ascertain what precisely the cause of action was in that matter. The difficulty the court had to deal with was whether there was a prima facie case made out on the papers in the absence of draft particulars of claim in order to come to a conclusion whether to certify this case and grant standing. In this case, we are dealing with motion proceedings based on affidavits. The relief being sought by the Minister was

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[56] *Children's Resource Centre* n 20.
[57] *Mukaddam* n 18.
[58] *Children's Resource Centre* n 20 paras 26 and 28.

clearly identified as set out in the papers. She further did not rely on extended standing based on section 38 of the Constitution in which she wanted to enforce a right in terms of the Bill of Rights, but based on section 157 (1) of the Companies Act, to enforce a remedy which is clearly defined in section 81 of that Act.

[186] During the provisional stage of both applications, the judges seized with the matter clearly understood that the Minister did not have standing in the ordinary course in terms of section 81, but had to be permitted on the basis of extended standing in terms of section 157 (1) of the Companies Act, to bring such an application.

[187] Based on the relief that was sought in the notice of motion it was very clear from the onset, to the judges who granted the provisional application, that this was an issue that was raised by the Minister in both applications. It is a factor which they had to consider not in isolation, but against the background of the totality of the facts before them.

[188] It is implicit, therefore, in the order they granted for provisional liquidation that they must have considered whether the Minister should be permitted to bring the application. In my view Le Grange J, as well as Cloete J, must have been mindful of what Jafta J stated in the **Mukaddam** case, where he held that: *"It is important that the rules of court are used as tools to facilitate access to courts rather than hindering it. Hence rules are made for courts and not that the courts are established for rules. Therefore, the primary function of the rules of courts is the attainment of justice. But sometimes circumstances arise which are not provided for in the rules. The proper*

course in those circumstances is to approach the court itself for guidance. After all, in terms of section 173 each superior court is the master of its process."[59]

[189] In action proceedings, which are usually more delayed than proceedings on motion, where sometimes as in this case the exigencies of the matter would dictate whether the court can ascertain on the papers whether relief should be granted without a special application or whether a separate substantive application should be brought to determine whether the matter should be certified in order to grant extended standing. It would therefore be unduly onerous in most urgent applications brought on motion to bring a separate substantive motion for certification. Such an approach would be absurd and not in the interest of justice, if in the determination of the merits of the application a court as a matter of course, has to decide whether extended standing should be granted.

[190] Further, what clearly makes this case different from the **Children's Resource Centre** case and the **Mukaddam** case is that both those cases dealt with class actions which would require a much more controlled manner of certification than a case where standing would be found on the basis of public interest. In this regard, Jafta J says: "*Courts must embrace class actions as one of the tools available to litigants for placing disputes before them. However, it is appropriate that the courts should retain control over class actions. Permitting a class action in some cases may, as the Supreme Court of Appeal has observed in this case, be oppressive and as a result inconsistent with the interests of justice. It is therefore necessary for courts to be able to keep out of the justice system class actions which hinder,*

[59] *Mukaddam* n 18 para 32.

instead of advancing, the interests of justice. In this way prior certification will serve as an instrument of justice rather than a barrier to it."[60]

[191] Nothing in these two cases made a reference to extended standing on the basis of public interest being sought and stated that prior leave should be sought in these cases. In my view, therefore, the judges' in granting the respective provisional applications had, as referred to earlier, adequate grounds to grant the orders.

Non-disclosure

[192] Given the findings I have made thus far, especially in regard to whether the Minister failed to disclose certain facts which the Respondent says were known to her, nothing turns on this point. In my view, the opposite is rather true. That is that given the facts of this case based on the papers, it was the Respondents' who were economical with the truth and failed to disclose the true nature of what really occurred between them and the Minister.

Urgency

[193] The Minister submitted that due to various factors and circumstances it was obliged to bring the application on an urgent basis. It is common cause that on 23 May 2017, Erdmann made a presentation to the Waste Management Bureau, which raised certain concerns with the Minister and the Department about the financial position of Redisa. Most of the interactions between the Department and Redisa were to discuss the alignment of the Redisa Plan to the amended Waste Act, the Pricing Strategy and amended Waste Tyre Regulations.

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[60] *Mukaddam* n 18 para 38.

[194] It is clear that Redisa vehemently objected to the proposals and to the fees being collected in future by SARS. However, prior to 23 May 2017, various submissions were made about the financial position of Redisa, with the sole purpose of trying to convince either the Minister or the Department or SARS about the negative implications it would have on Redisa if the contributions made by the tyre producers were not paid directly to it. The financial position and income seems to have fluctuated to the extent where some of the funds which it had collected were not reflected in either the submissions or the financial statements presented by Redisa. This was reflected as follows:

1) On 13 November 2015 in a submission made to the National Treasury, Redisa submitted that they generated an annual income of approximately R575 million, which would be lost to Redisa if it is not directly collected by them.

2) On 5 February 2016, a further submission was made in which Redisa stated that it would be able to continue operating without receiving any funding in the 2016 annual budget, and that they had an amount of cash and cash equivalents to the value of R276 million, which would last for approximately 7 months.

3) In the February 2016 annual financial statements, it was indicated that they had a reserve which included cash and assets in the amount of R665 million, which would be more than sufficient to ensure continued operations in terms of the Redisa Plan until either 30 November 2017 (the date on which the approval of the Redisa Plan expires) or for the rest of the fiscal year.

4) In a further submission dated 5 April 2016 about the implications of stopping the revenue of Redisa as from 1 April 2016 (the original date for the

implementation of the new funding model, which was later implemented with effect from 1 February 2017), in a review prepared by PwC on their behalf, the following emerged: that Redisa recorded more cash in its trial balance dated 31 January 2016 than in the bank statements over the same period; and that it would only be able to operate for a period of 8.38 months until it became factually insolvent. This presentation by PwC does not however take into account the collection of further contributions to Redisa after 4 February 2016 nor the investment income of Redisa. This would likely have increased or extended the period in which Redisa would have been able to operate, which would have enabled Redisa to operate after 1 February 2017 and carry on its business for the rest of the financial year.

5) In a further report submitted to the Department under the heading "*DEA Report 31 December 2016"* it indicated that there is an implementation reserve of R728 709 million, an item for accounts payable in the unsubstantiated amount of R28 572 million with total equity and liabilities in the amount of R757 281 million of public funds.

6) Then again in a report dated 28 February 2017, Redisa indicated to the Department, that as at 31 January 2017 an amount of R160 975 million was receivable, that it had an amount of R106 144 million as cash reserves in investments and in the bank accounts, and cash in the amount of R59 220 million available which constitute an amount of R426 339 million of public funds.

7) On 23 May 2016 Redisa once again made a presentation to the Waste Management Bureau and the Department, which alerted the Department to the fact that Redisa's directors made the following decisions:

(a) to place on hold Redisa's financial year 2018 growth business plan until funding uncertainties is resolved;

(b) that should insufficient funding be allocated as from 1 June 2017, it would commence an industry wind down to meet the directors fiduciary responsibilities;

(c) that even if it should receive a cash injection of R210 million in July 2017, it would only allow them to suspend their intention to wind down its operations to 1 October 2017; and

(d) that Redisa's cash balance in May 2017 amounted to only R150 million, and since their revenue has stopped it is currently operating off its remediation reserve and is currently incurring a monthly burn rate of R36 6 million.

[195] I am in agreement with the Minister given these facts, it is clear on the objective evidence that no justifiable explanation had been given for the depletion and disappearance of the reserves they had repeatedly confirmed they had available to be able to continue with the implementation and administration of the Redisa Plan for several months after the change in the funding model would be effected. It is clear, therefore, that somehow without proper explanation, the reserves had dissipated or the previous information given was not correct.

[196] Furthermore, subsequent to this presentation on 31 May 2017 it had informed all interested parties that as from 1 June 2017 they will no longer collect waste tyres from collection points, including micro-collectors; that Redisa's depots will remain open, but will not accept any deliveries; that deliveries to processes will continue to

schedule until further notice. And that all enquiries should be directed to the Waste Management Bureau or the Department. It was clear also that Erdmann send a notice to the contracted transporters in the downstream industry that it intends to terminate their contracts; he also informed the transporters that they will only be permitted to deliver tyres directly to the depot until 16:00 hours on Friday, 2 June 2017; thereafter no further deliveries will be accepted.

[197] I am in agreement with the Minister that this constitutes an effective repudiation of the implementation and administration of a substantial and important component of the Redisa Plan. In my view, the Minister has made out a sufficient case to launch these proceedings on an urgent basis.

Ex parte

[198] Courts are loath to grant orders against a party on an ex parte basis. It would usually discourage litigation by stealth or ambush unless there are compelling reasons to do so. In only a limited number of situations, matters can be brought ex parte. One of those would be where immediate relief is sought even though temporary nature because of imminent harm that would ensure should the relief not be granted.[61]

[199] In my view in respect of both the application against Redisa as well as KT, the Minister has made out a sufficient case why this application should be brought ex parte. It is also clear if one should have regard to the totality of the evidence, especially the underhand and secretive manner in which the directors, some of

[61] Van Loggerenberg n 29 D1-60.

whom are also shareholders in KT and the associated companies as shown above, had conducted themselves, it is clear that urgent and drastic action on the part of the Minister and the Department had to be taken after they had been made aware of the conduct of Erdmann and the other directors of Redisa and the manner in which funds had been spirited towards KT.

[200] As said earlier, the fees that were collected were public funds, which were misappropriated and diverted through KT for the benefit of Erdmann, Davidson, Crozier and Kirk. This was done secretively and in a manner which the Minister and the Department would not have been aware of.

Just and Equitable

[201] The question now to consider is whether it would be just and equitable, in respect of both Respondents to grant a final order for liquidation.

[202] In both applications, the Minister after having been granted standing in terms of section (1) (d) relies on the provisions of section 81 (1)(c)(ii) and or section 81 (1)(d)(iii) of the Companies Act. Those categories of persons therefore as referred to in these subsections of section 81 will have to be substituted by the Minister as the person or entity who brought the application. If the application should proceed in terms of the provisions of section 81 (1)(c)(ii) such an application would be on the grounds that the Minister (being substituted as one or more of the company's creditors) have applied to the court for an order to wind up the company on the grounds that it is otherwise just and equitable to do so. In this regard, the Minister is therefore regarded as a creditor.

[203] If the application should proceed in terms of the provisions of section 81 (1)(d)(iii), then such an application would be brought on the grounds of the Minister (being substituted as the company itself or one or more of its directors or one or more of its shareholders) having applied to the court for an order to wind up the company on the grounds that it is otherwise just and equitable to do so. The courts have in the past dealt with the just and equitable ground for winding-up of a company in terms of the provisions of these two subsections.

[204] In terms of section 81 (1)(c)(ii), the Minister (as the substitute for a creditor), cannot obtain an order on this ground merely because in a winding-up there will be the ordinary advantages thereof, such as having a liquidator control and investigate the company's affairs. Courts have always referred to five categories of circumstances which have to be present to determine whether it is just and equitable to liquidate a solvent company. These were as set out in **Rand Air***,* as stated above in paragraph 101. It is trite that these categories do not constitute any kind of numerus clauses and it was left open to the courts to devise other categories in future.

[205] But as pointed out by **Henochsberg**[62] it is nevertheless useful and instructive to list them in this fashion so as to illustrate the kind of thing which can be complained of under this heading. And that the courts have for a number of decades not deemed it necessary to devise further categories. The learned authors further state that it is indeed difficult to think of anything else, which could possibly fall into

[62] Delport n 16 p 326.

this genus of category. A court would be hesitant to wind up a solvent company where a creditor, or in this case the Minister, does not establish a ground falling within one of these categories.

[206] However, in **Kia Intertrade**[63] Wush J, having found that even though that specific case did not fit into any of the five categories as listed by Coetzee J in **Rand Air**, held that: "*The just and equitable ground for winding-up is not a catch-all to simply liquidate a company that is, for example, running its business at a loss or reducing its scale. But, in my opinion, where a company (a) has closed a number of branches of his business, (b) has retrenched staff to a considerable extent, (c) has virtually closed its head office, (d) is diverting funds which should be used to pay its debts to an overseas concern on grounds which are not satisfactorily explained, (e) to excuse the non-payment of its liabilities sets up a contrived and baseless counterclaim, and (f) has transferred assets outside the ordinary course of business, it is just and equitable that the creditors should be protected from further losses and that it should be prevented from disposing of assets and incurring further liabilities."*

[207] In **Cuninghame and Another v First Ready Development 249** [64] ("**Cuninghame**") it has been held that the just and equitable ground for winding-up postulates not facts but a broad conclusion of law, justice and equity. In that case, a non-profit company in terms of section 21(1) (b) and (c) of the Companies Act of 61 of 1973, conducted it business as a commercial enterprise in contravention of this section and also in contravention of its MOI, and it was held that in such a case, the company is conducting an unlawful business which should be terminated by way of a

[63] *Kia Intertrade* n 12 at 279-280.
[64] 2010 (5) SA 325 (SCA) para 3.

liquidation order. The court further held that it is therefore unnecessary to consider the further grounds as advanced by the applicant in that matter as to why the winding-up order of the respondent would be just and equitable.

[208] In **Cilliers NO and Others v Duin & See (Pty) Ltd**[65] ("**Duin & See**") this court held that liquidation in terms of the provisions of section 81 (1) (d), would be just and equitable to wind up the company where there is deadlock in the sense of a breakdown of trust between the members and the company.

[209] In **Pienaar v Thusano Foundation and Another** [66] ("**Thusano**"), the respondent an association not for gain had been incorporated in terms of section 21 of the Companies Act 61 of 1973, in order to consolidate, administer and finance an existing vast all-embracing project as known as "Drought Relief', which operated 75 depots in Bophuthatswana distributing rations to approximately 12,500 families, and rendering substantial service to families in need. The company was funded by the governments of Bophuthatswana and South Africa. Its members, including its chairperson (the Minister of Finance), its managing director (the second respondent) and the applicant, became members by virtue of being state appointees or nominees and were not members in their own right. They had no commercial or pecuniary interest in the company, nor shareholders in the commercial sense of the term. Complaints concerning the company, led to the appointment by its chairman of a board of enquiry to investigate allegations of irregular activities. At some stage the South African government discontinued its funding. An application was then made for the provisional liquidation of the company on the ground that it was just and

[65] 2012 (4) SA 203 (WCC).
[66] 1992 (2) SA 552 (BGD).

equitable to so. On the basis that the company was mismanaged, it lacked proper control, dissatisfaction with its management and specifically with the competence and ability of the second respondent, and the ensuing deadlock. And the fact that South Africa had discontinued its funding.

[210] The court found that in considering whether to grant a final winding-up order on the grounds that it is just and equitable to do so, it had to be satisfied that the applicant had established this on a balance of probabilities and had to exercise a judicial discretion based on the broad principles of law, justice and equity. It further found that taking the applicant's case in its totality, there was powerful and uncontroverted facts that the government of both South Africa and Bophuthatswana, that previously subsidised the company, decided not to do so and the workforce had been discharged, that it was inconceivable that the company could discharge the vast and numerous projects to which it had committed itself without the injection of finance from its former sources.

[211] The court had to consider, and balance the justice and equity of the competing interests of the applicant, on the one hand, who was the managing director of a large state-controlled organisation, and supported by the Minister of Finance and other functionaries, who were in favour of the final liquidation for a variety of reasons. These reasons included the fact that the substratum of the company had disappeared, as well as for reasons of mismanagement and lack of confidence in the management of the company. While on the other hand, the interests of the second respondent, who was opposed to the granting of the final order. It was also a fact that the second respondent's membership of the company

derived from his employment in a government funded institution and not in his own right and he had no financial interest or stake in the company, such as was held by the government.

[212] In balancing his interests as against that of the government on any basis of justice and equity there was no comparison between the competing interests, and the interests of the government in this respect and consequently those of the public had to take precedence over the interests of the second respondent who really had no financial interest in the matter. As a substantial issue the court took into consideration that the company was in effect a state company and due weight had to be given to the wishes of the members of the government who were charged with administering and being responsible for the company.

[213] The court took into consideration the structure and membership of the company and the fact that the money invested in it was, in the main, taxpayers money and in such an instance, the court held it was entitled to broaden the ambit and extend the catalogue of cases where it was just and equitable to wind up a company. In doing so, it should take into account cases of this nature, where there was a wastage or indeed mismanagement of public funds and it could not countenance or permit the situation to continue. It was further of the view that if there was mismanagement and its main object was no longer capable of achievement, it was a proper case where the court might grant a final winding-up order.

[214] In its final analysis, the court came to the following conclusion: *"In the instant case there is clearly a concatenation of certain important factors, for example, the*

mismanagement of the company, loss of confidence coupled with the lack of finance, each of which would be sufficient to justify an order for the final winding-up of the company on the grounds that it is 'just and equitable' to do so. The cumulative effect of these factors, coupled with the disappearance of the substratum of the company, point overwhelmingly in the direction that on the principles of 'justice and equity' it is right and proper to place the company into final liquidation, which I have done by confirming the rule nisi."[67]

[215] In coming back to this case and in dealing firstly with the application for the liquidation of Redisa and in applying the above principles, as set out in the cases, the following facts clearly emerge:

a) That on the objective and undisputed facts, there is acrimony between the Minister and Redisa, and by extension KT, about the manner in which Redisa should be funded. This has led to a situation where the two parties are currently involved in litigation in two matters before the North Gauteng High Court.

b) That, despite numerous attempts by Redisa to persuade the Minister and the government not to implement the new funding proposal, the Minister and the National Treasury has proceeded to implement as of 1 February 2017, this new funding proposal. The parties with the Minister on the one hand and Redisa on the other are clearly deadlocked on this issue.

c) This deadlock can also further be seen in the manner which these proceedings had been conducted where the Minister and the Department has made serious allegations against Redisa and KT, and Redisa and KT on the

[67] *Thusano* n 66 at 592B-C.

other hand has made counter allegations against the Minister and the Department. There clearly seems to be a breach of trust between the two parties which would not be in the best interest of Redisa. Redisa would be dependent on the Minister and the Department, as well as National Treasury for further funding and it seems that there was reluctance to provide such funding to Redisa. This is a fact which is based on Redisa's own version. The lack of adequate funding due to the animosity and breach of trust between the two parties would ultimately lead to a situation where Redisa would find itself in dire financial difficulties.

d) Redisa had already as of 31 May 2017, started with a suspension of its services to organisations and entities which they have to support in terms of the Redisa Plan, due to the fact that it believed that it will not be adequately funded by the Department or National Treasury to proceed with its operations. They have on more than one occasion remarked in presentations they made to the Minister and/or Department as well as a National Treasury that with the existing resources they have, they may not be able to fulfil their obligations in terms of the Redisa Plan and might become insolvent.

e) That on an evaluation of the reports and financial statements they have presented to the Minister since 2015, there seems to have been a gradual disappearance of the reserves they have reported in the past, which had confirmed they had available funds to continue with the implemented and administration of the Redisa Plan.

f) That as has been shown there has been an unlawful misappropriation of public funds by the directors of Redisa, namely Erdmann, Davidson and Kirk, through KT to Avranet and NYI, of which Erdmann had a substantial

shareholding in KT through NYI and Davidson through Avranet. As well as Kirk and Crozier, the CEO of KT, through NYI. These unlawful payments were in direct contravention of the Companies Act, as well as Redisa's MOI.

g) The true nature of the shareholdership of Erdmann, Davidson, Kirk and Crozier were not disclosed to the Minister or the Department as well as these unlawful payments. They were secretive and clandestine in the manner in which funding was disbursed through Redisa to KT and onto the other entities.

h) It would therefore be difficult for the Minister or the Department as well as National Treasury to fund Redisa in future if such funding which is public money would unlawfully accrue to its directors. This will lead to a situation where no funding would be given to Redisa to comply with the Redisa Plan, which would have dire consequences for the company.

These are factors and circumstances similar to those as cited in the cases of **Kia Interlude**, **Cuninghame**, **Duin & See**, **Thusano** and some of those mentioned in **Rand Air**.

[216] In my view, therefore, there is sufficient grounds in terms of the provisions of section 81 (1)(c)(ii) or section 81 (1)(d)(iii) of the Companies Act where the Minister, in substitution of those persons or entities as mentioned in these two sections, has made out a case that it is just and equitable to wind up Redisa.

[217] As regarding the question whether it would be just and equitable to wind up KT, the court will consider the following facts:

a) That KT's own existence as a company depends on Redisa and the implementation of the Redisa Plan. And as stated earlier, KT cannot

independently exist without Redisa. Redisa and the Redisa Plan is a substratum of KT.

b) It is also totally dependent on its funding or financial well-being on Redisa.

c) Should Redisa's funding, therefore, be discontinued from the Department or National Treasury, KT's lifeblood and existence will be cut off, it will therefore be difficult to function independently as a company. There is no evidence that it will be able to exist without the funding it receives from Redisa.

d) KT as a private entity through its CEO, Crozier, had been implicit in using KT as a vehicle through which money had been misappropriated to Erdmann, Davidson and Kirk, through the shareholders of KT, NYI and Avranet in direct contravention of Schedule 1, Part 3 of the Companies Act as well as the MOI of Redisa.

e) The Minister and the Department given the manner in which KT had been used as a vehicle to enrich Redisa's directors would clearly be opposed to it receiving any funding through Redisa.

These are clearly some of the grounds referred to in **Rand Air**, which among others would be the disappearance of the company's substratum, the illegality of some of its conduct in relation to the role it serves to enrich Redisa's directors and the breach of trust between it and the Minister.

[218] In my view, therefore, there is also sufficient grounds in terms of the provisions of section 81 (1)(c)(ii) or section 81 (1)(d)(iii) of the Companies Act, where the Minister, in substitution of those persons or entities as mentioned in these two sections, has made out a case that it is just and equitable to wind up KT.

[219] In the result therefore I make the following order:

(a) In respect of case number 9675/2017:

I) That the Respondent is placed in final liquidation.

II) That the liquidator of the Respondent be directed to distribute the entire net value of the Respondent to the Waste Management Bureau, a juristic person established in terms of section 34A of the National Environmental Management: Waste Act 59 of 2008, in terms of section 30(3)(b)(iii)(bb) of the Income Tax Act 58 of 1962, read with clause 8.5.2 and/or 8.5.3 of the Memorandum of Incorporation of the Respondent.

III) That the cost of the application, which cost shall include the cost of two counsel, shall be the cost in the winding-up liquidation of the Respondent.

(b) In respect of case number 10123/17:

I) That the Respondent is placed in final liquidation.

II) That the liquidator of the Respondent be directed to distribute the entire net value of the Respondent to the Waste Management Bureau, a juristic person established in terms of section 34A of the National Environmental Management: Waste Act 59 of 2008 and in terms of section 30(3)(b)(iii)(bb) of the Income Tax Act 58 of 1962. Alternatively, to the liquidator of Recycling and Economic Development Initiative of South Africa NPC (registration number 210/022733/08) as appointed by the Master of the High Court, Cape Town under Master's reference C 361/2017.

III) That the cost of the application, which cost shall include the cost of two counsel, shall be the cost in the winding-up liquidation of the Respondent.

HENNEY J

Appearances:

Case No. 9685/2017

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	J Rust
Respondent:	S F Burger SC
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