IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: 16077/19

In the matter between:

RECYCLING AND ECONOMIC DEVELOPMENT INITIATIVE OF SOUTH AFRICA NPC
(Registration no. 2010/022733/08) **Applicant**

and

TUBESTONE (PTY) LTD **Respondent**
(Registration no. 2000/028590/07)

Judgment delivered electronically on 22 December 2021

PANGARKER AJ

Introduction and background

1. The applicant is a non-profit company which was developed to implement the Integrated Industry Waste Tyre Management Plan *(the plan)*[1] which was promulgated by the Minister of Water and Environmental Affairs *(the Minister)* in November 2012[2] in terms of the National Environmental Management: Waste Act[3]. The applicant was at all material times an organ of State and the plan, an instrument of subordinate legislation[4]. The respondent is a private company which has as its business the importation, production and manufacturing of tyres.

2. The purpose of the plan, seen against the backdrop of the Act, was to ensure the disposal and/or recycling of waste tyres which has harmful effects on the environment. The objectives of the Act may be seen as the regulation of waste management in order to, *inter alia,* protect health and the environment by providing reasonable measures to combat pollution and ecological degradation and to secure an ecologically sustainable development. In terms of clause 2.1 of the plan, the Department of Environmental Affairs (DEA) has the task and role to protect the environment and public health.

3. The plan has its genesis in section 28 (1) of the Act which vests the Minister with a discretion to require a person or by notice in the Government Gazette, require a category of persons or an industry that generate waste, to prepare and submit an industry waste management plan to him/her for approval. Section 28 must be read with the Waste Tyre Regulations, 2008[5] which regulate the content of such plan.

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[1] Referred to by the parties as the REDISA Plan

[2] Government Notice 988 published in Government Gazette 35927 of 12 November 2012

[3] 59 of 2008

[4] *Retail Motor Industry Organisation v Minister of Environmental Affairs 2014 (3) SA 251 (SCA) par 30 – RMI judgment*

[5] Government Notice 31901 published in Government Gazette of 13 February 2009

4. The applicant was administered for purposes of implementing the plan and it was required to have a Memorandum of Incorporation governing its activities. Producers of tyres, such as the respondent, were required in terms of Regulation 6 and clause 4 of the plan to subscribe to the said plan. Failure to subscribe would result in an offence in terms of Regulation 17(1). Subscribers to the plan were required to sign a Deed of Adherence acknowledging compliance with the plan, the provision of monthly subscriber returns and compliance with administrative requirements. The respondent was a subscriber to the plan[6].

The applicant's case

5. The applicant alleged that the respondent undertook in its Deed of Adherence to act in accordance with the plan and to submit monthly returns. The Deed of Adherence was signed by the respondent's managing director, Mr. Kruger, on 18 January 2012. In terms of clause 17 of the plan, a waste tyre management fee *(the fee)* was levied on all subscribers thereto and would be calculated to cover the cost of waste tyre management, which included tyres produced or imported into South Africa. The fee was also levied on products containing tyres. The fee would be levied at R2,30/kg tyres excluding VAT. Subscribers' monthly returns, indicating the mass of disposed tyres for a specific period, were followed by the applicant issuing invoices and collecting payment of the fees.

6. The principle motivating the fee was that all tyres disposed of must be subject to payment of the fee. Subscribers were to pay by electronic funds transfer (EFT) 90 days after delivery of their monthly declarations to the applicant. Clause 28.2 of the plan deals with the applicant's compliance monitoring of a subscriber's obligations, including the failure to pay the fee, which equated to non-compliance with the plan. This non-compliance would result in certain actions being taken by the applicant, such as

[6] FA3

reporting the subscriber to the DEA or SARS[7].

7. The primary issue in this application relates to the respondent's non-payment of waste tyre management fees pursuant to its issuing of returns to the applicant for October to December 2016 and the respondent's collateral challenge. The applicant subsequently issued invoices for this period totaling R2 479 335[8]. The applicant claims that the invoices are overdue and that the respondent is liable to it for payment of the amounts as per the invoices. On 1 August 2019, the applicant's attorney addressed a letter of demand seeking payment in respect of the outstanding invoices on the basis of the respondent's non-compliance with its obligations in terms of the plan[9]. The applicant's case is that the respondent, as a subscriber to the plan, is required to pay the fees to the applicant.

The respondent's collateral challenge

8. The respondent admits the existence of the plan, the conclusion and signing of the Deed of Adherence, that it was a subscriber to the plan and that it undertook to adhere to the plan. The respondent's case is that the applicant is not entitled to compel compliance with the plan and demand payment of the fee. Its case is premised on the following contentions: with reference to clause 17 of the plan relating to the fee, the cost determination factors would be as set out in clauses 17.1 and 25.1, meaning that the fee would be reviewed annually, all subscribers would be notified thereof and it was subject to change depending on actual costs and the number of tyres manufactured and imported.

9. Furthermore, the respondent agrees that in terms of clause 40, the fee was set at

[7] Clause 28.2.3 of the plan
[8] FA5.1 – FA5.4

R2,30/kg. The respondent devotes part of its answering affidavit to references to a Western Cape High Court judgment which granted a final winding up order against the applicant and its management company, Kusaga Taka (Proprietary) Ltd *(KT)*[10] in proceedings initiated by the Minister. The order was successfully appealed in the Supreme Court of Appeal (SCA) in the reported judgment *Recycling and Economic Development Initiative of South Africa NPC v Minister of Environmental Affairs* (the REDISA judgment)[11].

10. The respondent confirms that in terms of the *Retail Motor Industry*[12] judgment, the plan constituted subordinate legislation and that it was binding on subscribers as well as the applicant. It admits that when the plan was approved in November 2012, the waste tyre management fee was determined at R2,30/kg. The fee was an estimate and the applicant had to revise the figure on the first anniversary of the plan and thereafter the fee had to be based on actual costs in year one and projected fluctuating variable costs, taking into account all other influencing factors, and the CPI.

11. The respondent's argument is that the fee never changed since 2013 and thus it concludes that the applicant's board failed to review the fee either annually or at all, alternatively, the applicant's board reviewed the fee annually but resolved to maintain it at R2,30/kg. In the event that the board had failed to review the fee at all, the submission is made that the applicant acted *ultra vires* as it had failed to review and update cost estimates in light of operational experience; failed to attempt to minimize the fee; failed to ensure that the fee was based on actual costs in the first year of its inception and projected fluctuating variable costs, CPI and other influencing factors, and, the applicant had failed to fulfil its objective to contain the fee amount in real terms to be equal to or less than the initial amount. It is thus submitted that, in light of the

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[9] FA7
[10] See AA4
[11] 2019 (3) SA 251 (SCA)
[12] Supra

above, the applicant's board had deviated from the plan and had committed an offence in terms of regulation 17(1)(b).

12. The further contention is that to the extent that the applicant reviewed the fee annually, such determination of the fee was procedurally unfair. It is submitted that the annual determination of the amount payable by subscribers, constituted administrative action and thus has to be lawful, reasonable and procedurally fair. The respondent was not notified of the applicant's intention to review the fee and to the best of Mr. Kruger's knowledge and belief, the applicant did not review the fee annually as set out in the plan and in the applicant's Memorandum of Incorporation. Furthermore, the respondent advances that the applicant did not hold a public inquiry nor decided to follow a notice and comment procedure prior to the annual determination of the plan and that this was contrary to the provisions of section 4(1) and 10(1) of the Promotion of Administrative Justice Act (PAJA)[13].

13. It is contended that the provisions of PAJA are peremptory and had the applicant complied with those requirements, the annual review and determination would have been brought to the respondent's attention and the latter would have been in a position to comment on such review. It is furthermore submitted that the applicant never consulted with the Retail Motor Industry organization (RMI) which represents the interests of a large number of subscribers to the plan and which is a consumer body contemplated in clause 25.1 thereof. The averment is supported by a confirmatory affidavit of RMI's CEO who confirmed that from date of approval of the plan, the applicant never consulted it in respect of the review and determination of the fee[14]. It is submitted that the applicant's review (if any) of the fee was procedurally unfair and unlawful as it was reviewed without the knowledge of the respondent and the public and not in consultation with the relevant consumer bodies.

[13] 3 of 2000
[14] AA7

14. The opposition to the application is that the determination of the fee was not authorized by the enabling legislation because irrelevant considerations were taken into account or relevant considerations were not considered and/or the applicant's determination of the fee was irrational, arbitrary and done in bad faith. In support of this ground of opposition, it is submitted that, according to the Minister, the applicant's directors had developed a scheme to misappropriate the applicant's funds and had flagged certain payments as being suspicious[15]. In this regard, the respondent seems to rely on the Minister's affidavit in the ***REDISA*** yet admits that the SCA majority dealt with the Minister's concerns and that it found that the Minister had failed to make out a *prima facie* case in this regard[16]. The majority in the SCA also concluded that the alleged unlawful payments by the applicant to its management company KT and to certain shareholders, had been fully explained by the applicant.

15. Interestingly, though, in support of its opposition, the respondent nonetheless relies on the minority judgment of the SCA which found that there were enough facts to support the legal conclusion of an abusive corporate identity and that substantial payments had been made by the applicant to KT, contrary to the provisions of the plan and that the directors' remuneration was excessive.

16. The respondent submits that the applicant is not entitled to enforce payment of the amount which it claims as this was based on a fee of R2,30/kg which was unlawful and illegal. It is submitted that the fee is not in accordance with the plan and the applicant's Memorandum of Incorporation. It is thus denied that the respondent is legally obliged to pay the amounts as set out in the invoices. Lastly, at paragraphs 16.2 to 16.3.4, the respondent states that it had no access to the applicant's records and requests an order so that discovery in terms of uniform rule 35 may occur with the result that the application be postponed *sine die* for the process to occur.

[15] For example, payments to family members of one of the applicant's directors, deposit paid in respect of residential property, payment for security upgrade of a director's private residence, etc.

The applicant's reply

17. The applicant submits that the respondent misconceives that the fees were required to be revised and amended on an annual basis and that the applicant's failure to do so, rendered the respondent's obligation to pay the fees void. The submission in this regard is that there was no obligation on the applicant to amend the fees on an annual basis. In elaboration, the applicant contends that the fees were reviewed in consultation with the Department as required by the plan and the Department's view was that the fees should be kept at the approved rate.

18. Secondly, the respondent's attack that the fees were determined as a result of an unfair process is also rejected on the basis that the fees were determined following extensive consultation and public participation as part of the approval of plan. Because no change occurred in respect of the fees payable, in the circumstances there was no need for any consultation: had there been any change which was sought to be implemented, then this would have been followed by a consultation process.

19. Furthermore, the applicant indicates that the respondent's reliance on the submission that the fee was initially irregularly determined is predicated on the minority judgment of the SCA in *REDISA*, is improper. The applicant asserts that the majority judgment in that case had found the Minister's allegations to be unmeritorious and therefore the respondent's averments should not be given any credence. The applicant makes an important point that the respondent does not deny that in terms of the Act, the Regulations and the plan, it was required to pay a waste tyre management fee and that such fee was payable to the applicant. The applicant submits that the fee rate was approved in 2012 following a lengthy consultation process and the respondent, as a subscriber, at all times complied with its obligations to pay the fee but has belatedly waited to launch the collateral challenge, notwithstanding its previous compliance.

[16] See para 102-103 of *REDISA* judgment

20. The applicant's stance is that these are not the correct proceedings or appropriate circumstances for the respondent to raise a collateral challenge. Furthermore, the respondent does not question the invoices. The applicant is of the view that the respondent has not argued that it was not liable to pay the waste tyre management fee nor that such fees were not due to the applicant. The applicant's submission is that the respondent should have brought review proceedings that directly impugn the decision to determine the fees in the first place. The collateral challenge, it is submitted, cannot succeed as it may only be entertained in exceptional circumstances and the respondent places no exceptional circumstances before the Court which would warrant this Court coming to its assistance.

21. In the applicant's view, the respondent seems to have an issue with the quantum of the fees payable but the validity of the levying of the fees has not been disputed. Importantly, the applicant points out that the respondent's allegations arise from conduct which occurred in 2013 that there is no explanation given as to why it has taken approximately seven years for the respondent to now challenge the determination of the fees. In support hereof, the applicant submits that at least since February 2013 and up until October 2016, the respondent submitted its returns and paid fees to the applicant. The belated challenge is as a result of the respondent becoming aware and hoping that the Minister's attempts to shut down the applicant would succeed and in so doing it would avoid having to meet its obligations to the applicant in terms of the plan and the Act.

22. As far as legal proceedings against the applicant are concerned, the Minister's directive that it would take over the applicant's operations resulted in an interdict granted by this Division in case number 24404/2016[17] and the final liquidation orders (which were set aside on appeal by the SCA). Furthermore, the applicant contends that neither the respondent nor any other subscriber ever complained that the applicant had

[17] RA1, copy of the judgment

failed to implement the plan. Thus, it is submitted that the belated collateral challenge is not a genuine dispute but an opportunistic attempt to evade payment obligations. The applicant submits that if the respondent was genuinely concerned about the alleged failure to revise the fee and the apparent lack of consultation in respect of a determination of the fee, then it should have launched review proceedings as far back as 2013 when the plan was promulgated, but it had failed to do so. The submission is that the Court cannot entertain the collateral challenge and even if it did, there is no merit to the challenge.

23. The applicant avers that the fee was reviewed regularly and in accordance with the Act, Regulations and the plan. The applicant is furthermore on the view that the respondent is incorrect to require that the fee be revised or amended annually as this is not what is required by clause 17.1 of the plan which requires a review annually. From paragraph 19 of the replying affidavit, the applicant sets out how the fee was determined, the proposed amendments from 2013 and engagement with National Treasury. The issue of review received appropriate attention from the Department and the applicant was obliged to comply with the latter's decision not to adjust the fee for the period of the plan approved until 30 November 2017. The fee never increased from the initial rate of R2, 30/kg of tyres but it is submitted that the fee in real terms reduced by approximately 20% between 2012 and 2017 because of inflation.

24. The second argument that the determination of the fee was procedurally unfair is not accepted by the applicant which submits that there was extensive public participation in the processes. The fee review was an ongoing internal process and the cost determination factors referred to in clause 17.1 of the plan was within the applicant's own personal knowledge, and no representations from subscribers were required. It is submitted that only in circumstances where there was a proposal to amend the plan and where it affected interested parties such as subscribers, then a public participation process would be required, but as such an amendment never

occurred, there was thus no process of engagement necessary.

25. Furthermore, the applicant states that neither the plan, nor the Act and its Regulations impose any obligation on the applicant to notify subscribers of its intention to undertake a review. The review process went no further than discussions with the Minister or Department which did not wish to amend the fee. It is submitted that subscribers were at all times aware of the fee through the subscriber returns and invoices. As to the respondent's reliance on allegations related to the winding up proceedings, the SCA had dealt with the matter and had found material non-disclosures by the Minister. The applicant submits that it is incompetent and wrong for the respondent to repeat such allegations in these proceedings and that the minority findings in the ***REDISA*** judgment are not binding.

26. The applicant argues that a review of the fee could either be an increase or decrease in the fee. The fee was reviewed but remained the same. The applicant denies that the fee was unlawful and illegal for the reasons already indicated. Condonation was sought for the late replying affidavit and was granted during the hearing of the matter. The respondent's request for discovery and a postponed *sine die* of the matter was not pursued during argument.

The parties' submissions

27. The applicant's counsel submitted that it is common cause that the respondent rendered returns and that there is no dispute as to the amount owing for October to December 2016. At no stage prior to its answering affidavit delivered in November 2019, had the respondent ever raised an issue regarding the waste tyre management fee which it was obliged to pay as a subscriber to the plan. Furthermore, the respondent does not say what the increase should be and is attempting to evade payment.

28. I was referred to *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*[18] and *Merafong City v Anglogold Ashanti Ltd* [19] in respect of the respondent's collateral challenge to the applicant's administrative action or decision regarding the fee. It is submitted that in *Merafong*, the Constitutional Court set out the pre-constitutional challenges of collateral challenges. Counsel referred me to paragraphs 69 to 71 of Cameron J's judgment which I address below but essentially the submission is that a collateral challenge is a narrow defense which depends on the circumstances and a distinction would need to be made whether the ruling or decision which is being challenged, was directed in general or whether it was intended specifically at the challenging party or subject and known to it[20]. Counsel submitted further that the applicant seeks payment of a debt which was agreed upon between the parties by virtue of the plan which the respondent was obliged to comply with and in respect of the Deed of Adherence which is a contractual undertaking to comply with the plan.

29. On the question of a delay related to the collateral challenge, I am asked to determine the matter on the basis that this is not the so-called classic collateral challenge Cameron J referred to in *Merafong*. On the contrary, as the argument goes, the circumstances in this matter are that the respondent had simply sat back and done nothing to challenge the particular fee which was known to it for years and therefore the issue of delay or the lateness of the challenge is applicable. It is thus submitted that the respondent's case should be dismissed as the proceedings in this application are not the correct proceedings nor are the correct parties before the Court as only the Minister can review the fee in line with section 34 of the Act and Regulation 12.

30. It is further submitted that there was no obligation on the applicant to revise or review the initial fee and that consultation had occurred prior to promulgation of the plan. The fee did not increase with inflation and was intended to cover startup costs. In

[18] 2010 (1) SA 333 (SCA)
[19] 2017 (2) SA 211 (CC)

conclusion, the applicant's counsel submits that the delay in raising the collateral challenge is a substantial delay which is not explained by the respondent and there is no merit in the respondent's challenge. The applicant seeks an order as per the Notice of Motion, including costs of two counsel where so employed.

31. The respondent's submissions are essentially that the applicant breached the plan, that the determination of the fee was unlawful and in the circumstances, the applicant is precluded from seeking payment of the fee. On the issue of whether the Minister needed to have been joined to the proceedings, the respondent's counsel submitted that the Minister need not have been joined to the proceedings. The respondent agrees that the plan is binding on both parties, and that in terms of clause 16, in year two of the plan, the costs would be more accurate. The respondent disagrees that its case is that the fee should have been reduced, however, it is submitted that the fee was excessive and persists with the view that the review of the fee must be done annually in lieu of a consultation process.

32. The respondent's counsel referred to the applicant's Memorandum of Incorporation[21]. The argument was that the applicant and not the Minister, reviews the plan. Furthermore, the respondent contends that prior consultations with the Minister are irrelevant and that there was no consultation regarding the fee with any consumer body. As for the ***REDISA*** judgment, the submission is that the respondent was not a party to those proceedings and that the SCA did not pronounce on the validity of the fee, but dealt with the winding applications, and that the issue in this matter was not raised in ***REDISA***.

33. The respondent's argument was that the attempt by the applicant to enforce the

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[20] The subject being the respondent

[21] AA3 – see paragraph 19.2.1 on p 157

fee is unlawful. I was reminded that with reference to *Oudekraal* and *Merafong,* there is a distinction between a situation when an organ of State raises a collateral challenge as opposed to when a subject raises it: counsel submitted that in the latter circumstances, delay does not play a part. Counsel also referred me to *3M South Africa (Pty) Ltd v CSARS and Another*[22] and *National Industrial Council for the Iron, Steel, Engineering & Metallurgical Industry v Photocircuit SA (Pty) Ltd and Others*[23]*.*

34. The further submissions are that neither the plan nor the Act provide for an appeal process. Furthermore, it was never the applicant's case in its founding papers that there is a contractual relationship between the parties based on the Deed of Adherence. The respondent is entitled to withhold performance, so it is argued, until the applicant determines an amount and the respondent does not ask that the fee be set aside but seeks a finding that the application be dismissed with costs.

35. In reply the applicant's counsel submits that the *3M* case is distinguishable from the matter at hand. I am referred to paragraph 19.8 of the replying affidavit which indicates that the plan was withdrawn at the end of September 2017 by the Minister and the basis for the fee to be collected by the applicant remained intact until an amendment to legislation which resulted in SARS being in a position to collect fees as from 1 February 2017. It is submitted that SARS collected the same fee as the applicant at the rate of R2, 30/kg.

36. It is submitted that this matter deals with fees, which were due to be paid prior to 1 February 2017. As to the Memorandum of Incorporation, the respondent's reliance on paragraph 19.6.2 thereof and the insistence that it was the applicant which was required to review the fee annually, counsel for the applicant is of the view that this argument

[22] [2010] 3 All SA 361 (SCA)
[23] 1993 (2) SA 245 (C)

does not excuse the non-payment of the fee and that the Memorandum of Incorporation is a red herring. I discuss the issues raised in the paragraphs which follow below.

Review proceedings or collateral challenge?

37. It is settled between the parties that the applicant is a non-profit company and an organ of State, and that the plan is subordinate legislation. The respondent, as a juristic entity, may be regarded as subject for purposes of its collateral or reactive challenge against an administrative decision. At paragraph 30 of *REDISA*, Plasket AJA (as he then was) stated that the plan imposed obligations on subscribers and all those who entered into contractual relationships with the applicant once the plan was implemented.

38. It is evident that this matter does not envisage a review of an administrative decision taken by the applicant and is not launched in terms of PAJA. The respondent does not seek to set aside the applicant's decision regarding the fee of R2,30kg. Furthermore, the respondent does not dispute it rendered returns for October to December 2016, as required by the plan, consequent upon which the applicant then issued its invoices which form part of its case herein. In addition, the respondent also does not dispute receipt of the applicant's invoices, neither the plan, nor that it had in fact made payment of the waste tyre management fees until September 2016.

39. The respondent's case turns on its challenge or defense to the applicant's claim for payment of R2 479 335, on the basis that the applicant unlawfully and impermissibly failed to review the fee annually, failed to consult with various consumer bodies and furthermore, failed to determine the fee on a costs recovery basis. Its case is thus that it is not liable for the payment.

40. Section 195 (1) read with sub-section (2)(b) of the Constitution[24] requires that public administration, which includes organs of State, must be governed by democratic values and principles enshrined in the Constitution, which include a high standard of professional ethics, impartiality, accountability, transparency and good human resource management. The applicant exercised a public power or performed a public function in terms of the Act[25] and as a result, the applicant is accountable for the exercise of its public powers in terms of section 195 of the Constitution. The applicant's coercive action is that it seeks to hold the respondent liable for the fee for October to December 2016.

41. As the respondent contends, for the reasons already summarized above, it is entitled to raise a collateral or reactive challenge to the validity of the applicant's administrative act[26]. This challenge or defence is raised in proceedings which are not concerned with the impeachment of the validity of the administrative act. As Maya JA (as she then was) held at paragraph 13 in *City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd*[27],

> *'[13] The validity of an administrative act is generally challenged by way of judicial review. It is, however, not uncommon for a challenge to arise, not by the initiation of such proceedings but by way of defence, as a collateral issue in a claim for the enforcement or infringement of a private law right, as the case may be. A citizen is not required to comply with an administrative act which is bad on its face as it is unlawful and of no effect. He or she is entitled to ignore it if so satisfied and justify that conduct by raising a 'defensive' or 'collateral' challenge to its validity.[28]'*

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[24] 1996
[25] See section 239 (b)(ii) of the Constitution
[26] See also the *3M* judgment, supra
[27] 2010 (3) SA 589 (SCA)
[28] Footnote 13 of the judgment: *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) at 244C.

42. A challenge to an administrative act, as in this case, may be either by review or collaterally. The authority referred to in the preceding paragraph as well as those referred to such as *Oudekraal*, *Merafong* and *3M*, support this view. It is thus not entirely correct to argue that the respondent should have proceeded by review in terms of PAJA to challenge the applicant's administrative act. More so, in circumstances where it does not seek to set aside the R2, 30/kg fee. Legally, there is no bar to raising a collateral challenge.

Failure to join the Minister of Environmental Affairs

43. In terms of section 34 read sections 28 (1) and 29(1) of the Act and Regulation 12 (1), the Minister was required to review the plan at certain intervals. Clauses 17 and 25.1 of the plan requires of the applicant to review the plan annually based on operational experience and in consultation with consumer bodies. I do not understand the respondent's case to be that a fee could not be fixed at R2, 30/kg. The submission is that the failure by the applicant to comply with clauses 17 and 25 of the plan, renders its determination of the fee for October to December 2016, as invalid.

44. I agree with the respondent that neither the Act, Regulations nor the plan make provision for the Minister to review the fee annually. In this regard, I am inclined to agree with the respondent's counsel's submission that the Minister need not have been joined nor cited as a party to these proceedings. In any event, the collateral challenge relates to or affects the applicant and the enforcement of its administrative action or failure to comply with the plan in its capacity as an organ of State. Thus, the collateral challenge, in my view, is not defective for want of joining or citing the Minister.

Does delay play a role in the collateral challenge?

45. Having regard to the authorities and the affidavits together with the submissions of counsel, I am of the view that the most important issue in this matter relates to the question of delay in raising the collateral challenge. The respondent submits that the delay in raising the collateral challenge plays no part in the matter: it is entitled to rely on the collateral challenge to seek to impugn the applicant's coercive action in enforcing the fee. The respondent relies on various authorities and publications which I consider below. The counter argument in the applicant's supplementary written submissions is that indeed, the question of delay is pertinent and relevant to the determination of the collateral challenge and due to the respondent's lack of explanation for the delay in raising such defence, the collateral challenge must fail.

46. The respondent refers to two academic works, namely, *Collateral challenge and the Rule of Law* by Dr Christopher Forsyth[29] and *Oudekraal after fifteen years: The second act (or, a reassessment of the status and force of defective administrative decisions pending judicial review)* [30] by DM Pretorius. The respondent's counsel submitted that these academics do not suggest that a subject which challenges an administrative action which it views as being unlawful, is time-barred. It is submitted that the reason for this is because the right to challenge the validity of an administrative act collaterally is an incidence of the rule of law.

Legal principles: collateral challenge and delay

47. My evaluation of the dispute regarding delay commences with the seminal judgment of *Oudekraal*. The appellant launched proceedings in the High Court in August 2001 for an order declaring the extensions granted by the Administrator of the

[29] (1999) Judicial Review, 4:3, 165-169
[30] (2020) 31 Stellenbosch Law Review 3

Western Cape Province in 1957 for the lodging of a general plan to establish a township, to have been lawfully granted and for a declaration that the development rights for a portion of the farm Oudekraal, on the slopes of Table Mountain, was in full force and effect. This occurred after the Respondent notified it in 1996 that the Administrator's approval had lapsed and that he had acted beyond his powers when granting the extension. The respondent opposed the application on the basis that the approval was invalid in circumstances where there were several *kramats*[31] in the ravines and on the slopes of the mountain[32] and their existence was not disclosed during the application for plan approval. Van Reenen J dismissed the application, holding that the Administrator had acted beyond his powers in extending the time limit allowed for the lodgment of the general plan.

48. Van Reenen J took into account the time delay of 30 months and went on to consider the second leg[33] of the enquiry relevant to a delay: whether, in the exercise of his discretion, the delay should be condoned. The learned Judge considered the period of time that had lapsed since the Administrator's decision, the extent to which the appellant or third parties might have relied upon the decision, and lastly, the consequences for the public at large were the decision to be allowed to stand.

49. On appeal, the SCA considered the circumstances in which an unlawful decision may be ignored and in which circumstances the law would recognize such acts. It furthermore considered the Court *a quo's* consideration of the delay in launching the proceedings. The SCA emphasized that a Court has a discretion and that relief may be withheld in circumstances of an undue and unreasonable delay which causes prejudice to the other party, notwithstanding that substantive grounds may be present for setting aside the administrative decision. The delay rule was based on a rationale that there

[31] Sacred burial places of Muslim spiritual leaders (who attained status equivalent to saints) who arrived in the Cape from the Dutch East Indies to escape slavery and promoted Islam in the Cape – *Oudekraal, see par 9*

[32] See paragraphs 6 to 9 of the judgment

[33] *Oudekraal, see par 37*

could be prejudice to interested parties in circumstances of an unreasonable delay and the requirement of public interest in the finality of administrative decisions and acts was an important factor in the consideration regarding delay.

50. Navsa JA in *Oudekraal* stated that the Court *a quo,* in the exercise of its discretion, was mindful to promote the spirit and object of the Bill of Rights[34]. The SCA was willing to accept that there was an unreasonable delay in the review brought by the respondents and having regard to all the facts and circumstances of the matter, the importance of the ecology of the area and the religious significance of the graves, the degree of delay was found to be unprecedented, but the delay was balanced against the unique circumstances of the case[35]. Public interest required the finality of administrative decisions and acts, thus the SCA agreed with the High Court that the decision should be based on the principle of legality[36]. The result was that the appeal was dismissed.

51. In *Khumalo and Another v MEC for Education, Kwa-Zulu Natal*[37], the MEC successfully challenged her own department's administrative action regarding a promotion of the appellants. It was held that a legality review must be brought without undue delay, failing which Courts have a discretion to refuse an application or overlook the undue delay. But as in *Oudekraal,* the discretion had to be informed by constitutional values which required of public functionaries to uphold the rule of law and redress unlawful decisions[38]. At paragraph 48 of the judgment, the Constitutional Court held that in circumstances of a considerable delay, a Court's ability to assess an instance of unlawfulness from the facts of a matter may be weakened[39]. The Court

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[34] *Oudekraal, par 38*
[35] *Oudekraal*, see para 56 and 79
[36] *Oudekraal, par 81*
[37] 2014 (5) SA 579 (CC)
[38] *Khumalo, page 580*
[39] The paragraph must be read with the preceding paragraphs 46 and 47 of the judgment where the Constitutional Court referenced the requirement in section 237 of the Constitution which states that: '*All constitutional*

found that the MEC had failed to provide any account for the delay and given the obligation she had to act expeditiously in fulfilling her constitutional obligations, the unreasonableness of her unexplained delay was considered to be serious. As to the second part of the enquiry, in the absence of an explanation for the delay, the Court considered potential prejudice to affected parties and consequences of setting aside the impugned decision. On my understanding of the judgment, notwithstanding an absence of an explanation regarding delay, the Constitutional Court nonetheless considered the merits of the legality review.

52. In *Merafong City v Anglogold Ashanti Ltd*[40] an organ of State raised a collateral challenge to an administrative ruling. Cameron J writing for the majority of the Constitutional Court[41], held the view that the approach adopted by the High Court and SCA that a collateral challenge was only available to an individual/citizen whom the public authority threatens with coercive action, pigeon-holed the issue of a collateral challenge into a rigid format which was not warranted.

53. The collateral challenge by Merafong City was lodged in August 2011 and at that stage, the particular Minister's ruling had already stood for more than six years. The Court considered the question regarding the lapse of time[42] and held that a collateral challenge should be available to a litigant where justice requires it to be but that was dependent on the facts and circumstances of each case. The important discussion for purposes of this matter and the dispute between the parties is found at paragraphs 69 to 72 of the majority judgment[43] where Cameron J states that:

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obligations must be performed diligently and without delay'; See *Gqwetha v Transkei Development Corporation Ltd and Others 2006(2) SA 603 (SCA),* where the two-pronged test applicable to the question of delay encompassed the following: (1)whether the delay is unreasonable or undue, which was a factual enquiry, and if so (2) whether the Court's discretion should be exercised to overlook such delay and hear the application

[40] 2017 (2) SA 211 (CC)

[41] See *Merafong, par 25*

[42] *Merafong, par 55*

[43] For the sake of brevity, I have excluded Footnotes 85 and 86 from the above quoted para [69] to [72] of the *Merafong* judgment

'[69] First, we must note that Merafong's reactive challenge has distinctive attributes. These render it different from those a subject raises when the state threatens imprisonment or coerces payment. In these cases, which we may call "classical" collateral challenges, delay plays no role. The subject is entitled, as of right, to scrutinise the lawfulness of coercive action because the rule of law requires that official power not be exercised against the liberty or property of a subject unless it is lawfully sourced.

[70] The virtue of "classical" reactive challenges lies precisely in the fact that they provide a defence to parties who face the enforcement of the law but who never previously confronted it. And it is for this reason that they may sometimes be disallowed. Where a statute provides for an appeal or other remedy, and the disputed decision was specifically directed to the challenging party, our courts have forbidden a collateral challenge.

[71] The point of these cases is that the ruling or decision was not directed to the world at large. It was specific. It was known to the subject. They stand in contrast to instances where the law is of general application, and is possibly unknown to the person against whom it is sought to be enforced. There, delay cannot be a disqualifying consideration[44]*.*

[72] Here, Merafong was well aware of the Minister's decision, which was specifically addressed to it. It does not dispute that it knew that a legal challenge was immediately available to it. This means that Merafong's reactive challenge is of the category that necessitates scrutiny in regard to delay.'

54. From the above, it is evident that in the classical collateral challenge, delay plays

no role and the subject is entitled to challenge the lawfulness of the coercive action because the rule of law would require that official power not be enforced against the liberty or property of such subject unless it is lawful[45]. So far, so good for the respondent's collateral challenge. However, the learned Judge extended and qualified the distinction: the classical collateral challenge provides a defence to the citizen who faces the enforcement of an administrative act or decision which is of general application and which it had never previously been confronted with, but where the act or law is specifically directed at the subject, known to it and the legislation provides no appeal or other remedy, then the collateral challenge is forbidden. This distinction becomes important in this matter. It follows from Cameron J's reasoning in *Merafong* that where the particular action or decision was known and was directed at the citizen, then the question of delay in raising the collateral challenge plays a part.

55. Shortly after *Merafong*, the Constitutional Court delivered its judgment in *Department of Transport and Others v Tasima (Pty) Ltd*[46] which also dealt with a collateral challenge faced by an organ of State. On the question of delay, at paragraph 160, the majority judgment referred to the test in *Gqwetha*[47] and cautioned again that undue delay should not be tolerated and that a Court should display *'vigilance, consideration and propriety before overlooking a late review, reactive or otherwise*'[48]. The Constitutional Court weighed up the prejudice to the parties where the Department of Transport's decision regarding the transfer of the eNatis system came under the spotlight. Ultimately, the Constitutional Court overlooked the undue delay in bringing the counter application and hence, the reactive challenge succeeded.

56. There must be a basis for the Court, in circumstances where there was a delay in raising the collateral challenge or review, to exercise its discretion to overlook the delay

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[44] My emphasis
[45] *Merafong, par 69*
[46] 2017 (2) SA 622 (CC)
[47] Supra - Footnote

as *'no discretion can be exercised in the air'*[49]. In *Gijima,* the Constitutional Court held that where a delay was inordinately long, there must be a basis for a Court to exercise its discretion and such basis should be evident from the facts placed before it or objectively available factors[50]. The delay was undue, the applicant sat idly by and only raised the challenge when Gijima instituted arbitration proceedings.

57. In the more recent decision of *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd*[51], the question of delay under PAJA and in legality challenges arose again. The Court agreed with the tests applied in the earlier decisions of *Khumalo* and *Gijima.* Whether the delay was under PAJA (a review) or under legality (a collateral or reactive challenge), the yardstick was whether the delay was unreasonable[52]. Theron J stated that *'the clock starts running from the date that the applicant became aware or reasonably ought to have become aware of the action taken'*[53]*.* My understanding from this authority and the earlier cases cited above is that there is no material distinction in the 'delay rule' test applicable to reviews of an administrative decision under PAJA and a challenge to an administrative action or decision by way of a collateral challenge in terms of the principle of legality. Naturally, the 180 day requirement in terms of a PAJA review does not apply to a collateral challenge[54].

58. In my view, paragraphs 50 to 53 of *Buffalo City* are insightful and provide guidance on the approach to delay, more especially when there is an absence of explanation regarding a delay in launching a collateral challenge. Theron J states that:

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[48] *Tasima, par 160*
[49] *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd 2018 (2) SA 23 (CC) par 49*
[50] Par 49
[51] 2019 (4) SA 331 (CC) from par 44
[52] *Buffalo City, par 49*
[53] *Buffalo City, par 49*
[54] See section 6(1) read with section 7 PAJA

'[50] The approach to undue delay within the context of a legality challenge necessarily involves the exercise of a broader discretion than that traditionally applied to section 7 of PAJA. The 180-day bar in PAJA does not play a pronounced role in the context of legality. Rather, the question is first one of reasonableness, and then (if the delay is found to be unreasonable) whether the interests of justice require an overlooking of that unreasonable delay.

[51] The second difference between PAJA and legality review for the purposes of delay is that when assessing the delay under the principle of legality no explicit condonation application is required. A court can simply consider the delay, and then apply the two-step Khumalo test to ascertain whether the delay is undue and, if so, whether it should be overlooked.

[52] The second principle relating to delay under legality is that the first step in the Khumalo test, the reasonableness of the delay, must be assessed on, among others, the explanation offered for the delay. Where the delay can be explained and justified, then it is reasonable, and the merits of the review can be considered. If there is an explanation for the delay, the explanation must cover the entirety of the delay. But, as was held in Gijima, where there is no explanation for the delay, the delay will necessarily be unreasonable.

[53] Even if the unreasonableness of the delay has been established, it cannot be "evaluated in a vacuum" and the next leg of the test is whether the delay ought to be overlooked. This is the third principle applicable to assessing delay under legality. Courts have the power in a legality review to refuse an application where there is an undue delay in initiating proceedings or discretion to overlook the delay. There must however be a basis for a court to exercise its discretion to

overlook the delay. That basis must be gleaned from the facts made available or objectively available factors'[55].

59. Thus, even where no explanation is provided for delay and the delay is unreasonable, the Court must nonetheless decide whether it could overlook the unreasonableness of the delay but it cannot do so in a vacuum. Importantly, the learned Judge states that in a legality review, Courts have the power to refuse an application where there is an undue delay in initiating proceedings or a discretion to overlook the delay. In overlooking a delay, the Court should adopt a flexible approach[56].

60. The SCA in *Valor IT v Premier, North West Province and Others*[57], held that the provincial government which acted under the principle of legality was required to bring the review of its decision within a reasonable time but it had failed to do so. Plasket JA considered the question of an unreasonable delay and reiterated that this was a factual issue which involved the making of a value judgment[58]. The learned Judge of Appeal held that the consideration of condonation in circumstances where a delay was unreasonable involved various factors such as the length of the delay, the reasons for it, the prejudice to the parties which it may cause, the fullness of the explanation and the prospects of success on the merits[59].

61. From the above discussion, it may be said with certainty that the question regarding delay is an important one when one considers a collateral challenge. I do not agree with the submission made by the respondent's counsel that with reference to the

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[55] Note, Footnotes 39 to 46 in para 50 to 53 of *Buffalo City* are excluded from the above reference. However, the learned Judge refers in these Footnotes to the judgments in *Khumalo, Gijima and Tasima*, which I have discussed above

[56] *Tasima, para 144 and 170*

[57] 2021 (1) SA 42 (SCA)

[58] *Valor IT, par 30*

[59] *Valor IT, par 30*

authors Forsyth and Pretorius, that time-barring does not apply to the subject who raises a collateral challenge. While I appreciate and recognize that the principle of legality would allow the subject to raise the challenge as a defence to the proceedings seeking to enforce the administrative action, and that it is not required to have acted in terms of PAJA, the bald submission that delay does not play a part in the collateral challenge is problematic.

62. Firstly, Dr Forsyth's work used in support of the respondent's submission that delay plays no role in collateral challenges was published in 1999. The publication explores English law and so the reliance thereon to support the respondent's view regarding delay is, with respect, tenuous. Our law has advanced substantially as can be seen from the judgments which counsel referred me to and which this judgment refers to. Our authorities have contributed substantially to the principles a Court should adopt when faced with a collateral challenge, whether delayed or not.

63. This brings me to the respondent's reliance on the publication by Pretorius. Pretorius' recent work in the Stellenbosch Law Review deals specifically with *Oudekraal* and the advent of various judgments in the 15 years since that judgment was delivered. The learned author's excellent review explores whether subjects and organs of State can ignore unlawful administrative decisions within the context of the principle of legality and with reference to *Oudekraal* and subsequent authorities of the Constitutional and Supreme Courts[60]. However, nowhere does the author discuss the question of delay in respect of collateral challenges. In my view, the work takes a certain approach and addresses fundamental issues related to collateral challenges and reviews of administrative decisions. In my view, as the review by Pretorius does not address delay, it does not assist the respondent's stance that delay plays no role in collateral challenges by a subject.

[60] It is not necessary in this judgment to address the discussion regarding *Oudekraal* and *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Laser Institute* *2014 (3) SA 481 (CC)*

64. I agree with the applicant's counsel that the respondent's collateral challenge should have been launched without any undue or unreasonable delay. The respondent's collateral challenge, however, was raised after a considerable delay. Having regard to the answering affidavit, it is notable that there is no explanation why the respondent, who takes issue with the applicant's failure to review the waste tyre management fee annually, had never raised an objection prior to November 2019.

65. My view is that the question of delay does indeed play a part in this collateral challenge. Given the facts and circumstances of the matter, it is common cause that the respondent became a subscriber to the plan and signed the Deed of Adherence in January 2012. Subsequently, it at all times rendered returns as it was required to do in terms of the plan and Regulations. Furthermore, the respondent paid the waste tyre management fee without demur after the plan was promulgated in 2012 and in January 2017, it received the first of the applicant's unpaid invoices[61]. On my calculation of the time periods, bearing in mind that payment commenced at least from February 2013, more than six and a half years passed before the respondent decided to object to or challenge the plan and the fee[62]. The respondent had paid the fee without objection for four years before it stopped making payment[63].

66. The respondent was at all times bound by the Act, the Waste Tyre Regulations and plan and there is no evidence of a dispute regarding the amounts reflected on the unpaid invoices. The non-payment of the October to December 2016 invoices amounted to non-compliance with the respondent's obligations in terms of the plan. From the objective facts, it can by no means be argued by the respondent that it only became aware of its obligations in terms of the plan much later or that it had no knowledge of the alleged failure to review the fee in 2019 when the applicant launched this application. There is simply no explanation for a delay in raising the collateral

[61] FA5.1 - FA5.6

[62] From approximately February 2013 to November 2019

challenge only in November 2019, more than six years after commencing to comply as a subscriber. As the respondent is a tyre producer, it follows that the administrative decision of setting a fee at R2,30/kg was specifically directed at it as a subscriber to the REDISA plan and not at the world at large. The decision was most definitely known to the respondent since 2012/early 2013.

67. Having regard to the absence of an explanation for its delay of several years in raising a challenge to the fee and/or plan, I must agree with the applicant's counsel that with reference to *Gijima*[64], the delay is most definitely unreasonable or undue[65]. The applicant requests that the collateral challenge should be dismissed in the absence of an explanation for the delay but being mindful of the approach of the Constitutional Court, the enquiry regarding delay does not simply end once a finding of unreasonable delay is made. I agree that the merits of the challenge can only be considered once the delay is found to be reasonable (this presupposes that an explanation was provided)[66] or if I were to overlook the unreasonable delay.

68. The unreasonableness of the delay cannot be seen in a vacuum. As to whether I should overlook the delay, I am required to adopt a flexible approach. Here, questions as to prejudice, the effect of the impugned decision or action, the consequences of a declaration of unlawfulness, the nature of the impugned decision, and whether the applicant acted in good faith[67], are relevant.

69. In deciding whether I should exercise a judicial discretion to overlook the unreasonable delay, I have regard to the following: this is a matter where, notwithstanding the fact that returns were issued by the respondent in 2016 and

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[63] From February 2013 to January 2017
[64] See para 44 and 45
[65] See *Buffalo City*
[66] *Buffalo City, par 52*

invoices were provided as far back as January 2017, the applicant has had to resort to legal action in order to compel compliance with the respondent's obligations in terms of the plan. No issue was taken with the plan and the respondent had no issue paying the fee for several years, but it seems that because of the liquidation proceedings and the applicant's successful appeal in the SCA in the ***REDISA*** judgment, the respondent dragged its feet and jumped upon the opportunity to stop paying as it was obliged to. In my view, to rely on the minority judgment of the SCA to support its challenge is incorrect.

70. Furthermore, one sees from the ***RMI*** judgment, that the subscribers had entered into contractual relationships with the applicant[68]. Had the fee been prejudicial, or the failure to review it caused prejudice or hardship to the respondent, then one would have expected the respondent to have taken action a few years ago but it failed to do so. I have to ask why, if the respondent had felt that the plan and fee were unlawful and that a consultation process had not followed, it did not act sooner to raise objections to the plan's implementation.

71. The respondent has not shown that the fee should have been amended downward in 2016. If the delay were to be overlooked, and the merits considered, it would result in a situation where the respondent is given an opportunity to challenge obligations in circumstances where it has sat back for years and paid consistently, but only sprang into action to raise a defence after the 2019 SCA judgment in ***REDISA***. The impression I gain by the respondent's support of the erstwhile Minister's allegations in the liquidation proceedings, which the SCA rejected, is that it had hoped the appeal would succeed and it would so escape payment of the outstanding fees.

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[67] See the discussion by Theron J in ***Buffalo City*** at para 55 to 62

[68] ***RMI*** judgment, par 30

72. Even accepting that the plan itself requires an annual review, what the respondent nonetheless fails to appreciate is that in terms of clause 17 which requires the fee to be reviewed annually, the plan provides that the applicant should strive at all times to minimize the fee, while still meeting its mandate and that its objective would be to contain the amount in real terms to be equal to or less than the initial amount. The respondent has simply made out no case that the applicant failed to contain the fee.

73. As the basis for the collateral challenge is the applicant's alleged failure to review the fee and that it had acted unlawfully, I hold the view that the respondent has a further insurmountable problem. In the replying affidavit, one sees from paragraph 19 onward[69], that the applicant submitted proposals to the Department to incorporate an annual increase based on changes in the CPI[70]. The response from the Department in January 2014[71] was that the plan need not have been revised at that stage and that it was decided that the fee was to remain constant at R2,30/kg. The evidence indicates that the subscribers, including the respondent, had complied in submitting returns as required in January 2015, subsequent to the applicant's proposed amendments to the plan[72]. The evidence indicates that the questions related to the review were addressed and that the applicant was in the circumstances obliged to comply with the Department's decision not to increase or adjust the fee up to the end of November 2017.

74. It is evident from the evidence that the applicant had discharged its obligations in terms of the plan. In my view, there is no evidence of bad faith on the applicant's part and on this score, issues relating to alleged mismanagement and siphoning of funds are irrelevant to this matter. I must emphasise that the public interest requires finality of administrative decisions and aside from the above facts and findings, to allow a hearing on the merits of a collateral challenge on these facts, would certainly not promote the

[69] Pages 305 – 307, record
[70] RA4
[71] RA5
[72] RA4

interests of the public. If anything, the need for finality of administrative action is another factor militating against the exercise of my discretion in favour of overlooking the unreasonable delay by the respondent. Several years have passed, a consultation process was concluded, SARS took over the collection of the fee in 2017 and still the applicant awaits payment for the October, November and December 2016 outstanding fees. The delay in reaching finality on this dispute is considerable and in my view, the prejudice to the applicant given all the circumstances I describe above, is substantial.

75. Having regard to my findings above and in view of the Constitutional Court decisions, I find no reason to exercise a discretion in favour of the respondent to overlook the unreasonable delay in raising the collateral challenge. In the circumstances, and having found the delay to be undue and unreasonable, the respondent's collateral challenge is dismissed. I am satisfied that the applicant has made out its case for the relief sought as per its Notice of Motion and costs of two counsel is justified. Lastly, the judgment is delivered in excess of the three-month period. The delay was not intentional and the parties and legal representatives are thanked for their patience and co-operation[73].

Order

76.1 The respondent's collateral challenge is dismissed.

76.2 The application is granted.

76.3 The respondent is ordered to pay to the applicant the sum of R2 479 335 (two million four hundred and seventy-nine thousand three hundred and thirty-five rand) together with interest thereon a *tempore morae* and costs, which shall

[73] The delay is as a result of a lack of typing/administrative services, time spent on research and attending to busy criminal court rolls at Bellville Regional Court after conclusion of the third term (from 20 September 2021)

include costs occasioned by the employment of two counsel.

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M PANGARKER
ACTING JUDGE OF THE HIGH COURT

For Applicant:	**Mr L Kelly with Ms R Graham**
Instructed by:	**Cliffe Dekker Hofmeyr Inc**
	Mr A MacPherson

For Respondent:	**Mr B Stoop SC**
Instructed by:	**Barnard Incorporated**
	Mr N van Rooyen