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
(Reg. no. 2010/022733/08) Applicant

And

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

Judgment delivered: 23 May 2022 (electronically)

LEAVE TO APPEAL JUDGMENT

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1. On 22 December 2021, this Court dismissed the respondent's collateral challenge raised as a defence to the applicant's application seeking payment of the waste tyre management fee in terms of the REDISA plan. Pursuant to such dismissal, the respondent applied for leave to appeal the judgment and order granted on 22 December 2021. The parties are referred to as in the main application.

2. The grounds of appeal are summarized as follows:

2.1 that the Court erred in paragraph 8 of the judgment when it found that the respondent had signed the deed of adherence and in doing so, it had undertaken to adhere to the plan;

2.2 that the finding at paragraph 73 of the judgment is incorrect;

2.3 that the finding at paragraph 54 of the judgment with regard to the consideration of the dictum in *Merafong City v Anglogold Ashanti Ltd 2017 (2) SA 211 (CC)* was incorrect. In addition, the respondent takes issue that the Court was wrong to find that the delay in bringing the collateral challenge was relevant in the matter, and that the respondent's delay was unreasonable; alternatively, that I had failed to exercise a judicial discretion when determining whether or not the delay was unreasonable and that the delay ought to have been excused in the circumstances;

2.4 the further ground of appeal is that I failed to apply the *Plascon-Evans* rule in that the applicant could only succeed if the facts stated by the respondent, taken together with the admitted facts by the applicant, justified the granting of the relief sought in the application.

3. The respondent also contends in its application that compelling reasons such as public interest and access to Courts exist as to why this Court should grant leave to appeal.

4. The respondent's counsel submitted that the deed of adherence did not apply to the REDISA plan and referred me to paragraph 12 of the respondent's answering affidavit. The applicant's counsel's counter argument was that the argument is feeble as it was common cause between the parties that the respondent had indeed signed the deed of adherence, and in so doing, had agreed to be bound by the plan.

5. *Ex facie* the deed of adherence (annexure FA3), the respondent confirmed on 18 January 2012 that it subscribed to the plan and undertook to act in compliance with, and abide by it at all times, to deliver the monthly returns to the applicant and to comply with any administrative requirements as advised by the applicant from time to time. The managing director, Mr. Kruger, signed the deed of adherence on behalf of the respondent.

6. The respondent's response was an admission to subscribe and comply with the plan but it contended that the plan referred to in the deed of adherence was not the REDISA plan (ostensibly forming the subject matter of the applicant's application. It denied that the applicant had made out a case that the former had failed to comply with its obligations as set out in the deed of adherence. It is noted that there was no specific defense or response to paragraph 12 of the answering affidavit.

7. On the averment that the plan referred to in the deed of adherence was not the one referred to in the application, my response is as follows: firstly, the respondent admitted signing the deed of adherence, being bound by the REDISA plan and being obliged to adhere to the obligations in terms thereof. This is apparent *ex facie* the document. Secondly, in respect of the submission that the plan was withdrawn, I refer to the judgment of *Retail Motor Industry Organisation and Another v Minister of Water and Environmental Affairs and Another 2014 (3) SA 251 (SCA) [the RMI judgment)*, where the SCA addressed the powers of the Minister of Environmental Affairs in respect of the approval and withdrawal of the July and November 2012 plans. Paragraphs 14 to 33 of the SCA's judgment refer: in summary, the REDISA plan was approved in November 2011 and on 26 January 2012, the Minister withdrew such approval.

8. At paragraph 27 of the SCA's judgment, it held that the empowering legislation did not authorize the Minister to revoke the approval of the plan once granted. In my view, this is an important point as it counters any contention that the plan in respect of which the deed of adherence referred to, was withdrawn. To this

extent, the argument cannot succeed as any suggested withdrawal of the plan, after its approval, was not competent because the Minister had no authority to withdraw it after his/her approval. In the circumstances, by signing the deed of adherence, and thus having expressly undertaken to comply and abide with the plan at all times, my view remains that the respondent was indeed bound by the plan especially in light of the above findings by the SCA in the *RMI* judgment. The argument that the deed of adherence did not apply to the plan cannot be sustained and there is no basis for a finding that this argument enjoys prospects of success on appeal.

9. The second ground of appeal relates to paragraph 73 of the judgment. The respondent's submission is that the Department of Environmental Affairs never indicated that the fee need not be revised and in any event, it had no authority to authorize the applicant to deviate from the provisions of the plan. In this regard, I refer to annexure RA4 to the replying affidavit wherein the proposed amendments by the applicant, together with its motivations therefor, were set out in the latter part of 2013. When regard is had to page 350 of the record, one sees that the applicant's proposed amendment was in respect of clause 25.1 of the REDISA plan: there was a proposal for an automatic increase of the waste tyre management fee in accordance with the CPI. From its response in RA5 on 29 January 2014 (p353-355 record), the Department held the view that the plan did not need to be amended and taken through the review process.

10. It is evident to me that the Department's correspondence (RA5) indicated its determination that the plan need not be amended. The Department's response does not specifically refer to the fee but it follows logically from the heading and content of paragraph 3 of RA5, that the Department dealt with the applicant's proposed amendments to the plan and that an adjustment of the fee was one such proposed amendment. I am in agreement with the applicant's counsel that the evidence certainly indicated that the Department's view in January 2014 was that the plan need not be reviewed and this included that the applicant's proposed increase or adjustment of the fee was also not acceded to and/or not to be reviewed. In that regard the fee remained at R2,30/kg.

11. Furthermore, there is simply no basis laid for the contention that the Department had no authority to authorize the applicant to deviate from the plan. Having considered this second ground of appeal, I am not persuaded that my findings at paragraph 73 of the judgment were either incorrect or misguided and accordingly, I must conclude that there is no reasonable prospect of another Court coming to a different conclusion.

12. In respect of the third ground of appeal, I had certainly found in paragraphs 37 to 42 of the judgment, despite the submissions by the applicant to the contrary, that the respondent was entitled to raise a collateral challenge. My ultimate finding at paragraph 42, having regard to section 195 of the Constitution read with the authorities which I refer to in the judgment, was that the respondent was not precluded legally from raising a collateral challenge to the applicant's administrative decision. From paragraph 47 to 60, I deal in detail with the findings of the SCA and Constitutional Court in various authorities addressing collateral or reactive challenges.

13. The complaint by the respondent is that I had failed to consider the proper test related to collateral challenges as formulated by Cameron J in *Merafong*. The consideration of *Merafong* and its test start at paragraph 52 of the judgment, wherein paragraphs 69 to 72 of Cameron J's judgment is cited. Having had regard to the aforementioned paragraphs 69 to 72 of the Constitutional Court's judgment, I then evaluated and made certain findings from paragraph 54 of the judgment. I then continue in the subsequent paragraphs to emphasize how in my view, Cameron J then extended and qualified the distinction: on the one hand, the classical collateral challenge which provides a defense to the citizen who faces the enforcement of an administrative act or decision of general application and with which it had not previously been confronted, and on the other hand, where the administrative act is directed at the citizen and legislation provides no appeal or other remedy, then the collateral challenge is forbidden, and delay plays a role.

14. The judgment emphasized that the distinction which Cameron J drew in *Merafong* was important in the application with which I was seized with. At paragraph 61 and following, I found that delay was important in the consideration of a collateral challenge. The respondent wished me to accept a blanket approach to the question of time barring or delay and this, in my view, was not in line with the test in *Merafong*. Furthermore, the plan was not a law of general application and I set out my reasoning from paragraph 65: the respondent had become a subscriber, it had signed the deed of adherence, it had rendered returns for a lengthy period without issue or objection, and had paid the fee for more than six and a half years before it had taken an objection to the plan and refused payment for three months.

15. My findings at paragraph 66, given the facts and circumstances of the matter, most of which were not disputed, were that the decision of the applicant and the determination of the fee which the respondent was obliged to pay, were specifically directed to it as a subscriber to the plan and in those circumstances, it was not a law or decision of general application. The further finding was that this decision (regarding the fee) was most definitely known to the respondent since early 2012 or 2013. Accordingly, I find no merit in the argument that I had failed to consider the question related to the law of general application.

16. The further complaint is that with reference to *Merafong*, the plan provides for no appeal or internal remedy. While this is correct, nothing would have prevented the respondent, clearly unhappy with the apparent failure to have the fee annually reviewed, the fact that the fee remained constant since 2013 and the failure to revise the fee in accordance with fluctuating variable costs taking into account the CPI, of taking such administrative decision on review in terms of section 6 read with section 1 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

17. The respondent's counsel referred me to *Administrative Law in South Africa (Third Edition)* by Professor Cora Hoexter *et al* and I have had regard to the authors' discussion from page 743. I agree that there is a distinction between a collateral

challenge and a review. However, I must point out that the respondent's complaints in the application about a failure to review the fee, could have been reviewed in terms of PAJA because PAJA allows for several remedies and is also available to the aggrieved citizen in circumstances where the administrative body fails to take action. Similarly, the remedies and orders available in terms of PAJA do not necessarily mean or entail that if reviewed, the fee would be set aside. At the risk of repetition, the respondent's main bone of contention was the apparent failure to review the fee annually, the perceived non-compliance with the plan by REDISA, the consistency of the fee and the failure to vary or change it in terms of the CPI.

18. In my view, review proceedings would not have been inappropriate in the circumstances but the respondent failed or elected not to pursue this remedy. To the extent that I have considered the authorities and academic work provided, I respectfully remain unconvinced from the facts and circumstances of this matter and the argument, that the plan was a law of general application, that this was a case of a classical collateral challenge, that there was no other remedy available to the respondent and that delay did not play a part. My judgment had indeed considered all these issues and the question of reasonableness of the delay with reference to the authorities I cited. Furthermore, from paragraph 69 of the judgment, I had exercised the judicial discretion regarding the issue of reasonableness of the delay against the backdrop of the various factors specific to the matter. In light of the clear exercise and application of such judicial discretion, I hold the view that there exists no reasonable prospect that a higher Court would conclude that I had failed to exercise my discretion judicially or at all.

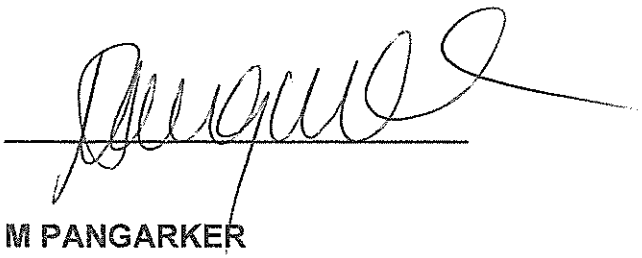
19. On the ground related to *Plascon-Evans*, my comment is that on the material aspects or facts of the matter, the respondent raised no disputes of fact. The respondent had at all times complied with its obligation in terms of the plan until late 2016 when it had failed to make payment of the fee notwithstanding providing returns; neither the plan nor its obligations as subscriber were disputed, and the collateral challenge was raised only in the answering affidavit in 2019 on the basis that the applicant had failed to review the fee annually and failed to consult with

consumer bodies and the like. In my view, there is no reasonable prospect of success on this ground.

20. Insofar as section 17(1)(a)(i) of the Superior Courts Act 10 of 2013 is concerned, the respondent has failed to convince the Court on proper grounds that it has reasonable prospects of success on appeal (see *Ramakatsa and Others v African National Congress and Another [2021] ZASCA 31 at par 10)*. As to some other compelling reason why the appeal should be heard, the respondent submits that the decision on appeal would not only impact the respondent but also other subscribers to the plan and the general public. I disagree: as indicated in my judgment, the public interest required the finality of administrative decisions, the consultation process had been concluded and SARS had taken over the collection of the waste tyre management fee in 2017.

21. Furthermore, I had found that the delays in reaching finality on the dispute raised as a collateral challenge were considerable and the prejudice to the applicant was substantial. There was a delay of more than six years before the collateral challenge arose and furthermore, the matter did not affect the public interest but was limited to the respondent. The additional ground of appeal that there would be or is a lack of access to court (as a further compelling reason), is simply unsubstantiated. Thus, in conclusion, the reasons advanced in support of section 17(1)(a)(ii) of the Superior Court Act are remote and unsubstantiated by the facts, and in the circumstances, I hold view that there is no compelling reason why the appeal should be heard.

22. In the result, the application for leave to appeal is dismissed with costs, which include costs of two counsel where so employed.



M PANGARKER
ACTING JUDGE OF THE HIGH COURT

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

For Respondent:	Mr B Stoop SC
Instructed by:	Barnard Incorporated
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