THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE
Case No: 145/13

In the matter between:

RETAIL MOTOR INDUSTRY ORGANISATION **First Appellant**

CIRCUIT FITMENT CC **Second Appellant**

and

MINISTER OF WATER AND ENVIRONMENTAL AFFAIRS **First Respondent**

RECYCLING & ECONOMIC DEVELOPMENT INITIATIVE OF SOUTH AFRICA NPC **Second Respondent**

Neutral citation: *Retail Motor Industry Organisation v Minister of Water & Environmental Affairs* (145/13) [2013] ZASCA 70 (23 May 2013)

Coram: Mpati P, Nugent, Tshiqi JJA & Plasket and Saldulker AJJA

Heard: **08 May 2013**

Delivered: **23 May 2013**

Summary: **Administrative law – *functus officio* principle – integrated industry waste tyre management plan subordinate legislation – *functus officio* principle does not apply – not necessary for new public participation process when plan that had been subjected to it republished – who may draft plan – not restricted to tyre producers –plan may only regulate management of waste pneumatic tyres – references to solid tyres severable.**

ORDER

On appeal from: North Gauteng High Court, Pretoria (Bam AJ sitting as court of first instance)

1 Save to the extent set out in paragraph 2, the appeal is dismissed with costs, including the costs of two counsel.

2 The order of the court below is amended to read:

'(a) Save to the extent set out in paragraph (b), the application is dismissed with costs, including the costs of two counsel.

(b) Every reference to solid tyres in the second respondent's Integrated Industry Waste Tyre Management Plan, approved by the first respondent and published in Government Notice 988 in *Government Gazette* 35927 of 30 November 2012, is set aside.

JUDGMENT

PLASKET AJA (MPATI P, NUGENT and TSHIQI JJA and SALDULKER AJA concurring)

[1] This appeal concerns the regulatory framework for the environmentally compliant management of tyres that are no longer fit for their purpose and the powers and functions of the Minister of Water and Environmental Affairs, the first respondent (the Minister), in relation to integrated industry waste tyre management plans. (Although referred to in the papers as IIWTMPs, I shall refer to them simply as plans.) Such plans are of importance from the perspective of the fundamental right, enjoyed by everyone, 'to an environment that is not harmful to their health or well-being' entrenched in s 24(*a*) of the Constitution and the Minister's obligations in terms of s 7(2) of the Constitution to 'respect, protect, promote and fulfil' this and the other rights contained in s 24.

[2] The application that is the subject of this appeal stems from earlier proceedings. I shall deal more fully with those proceedings later in this judgment but a brief explanation of the background is necessary at this stage.

[3] The National Environmental Management: Waste Act 59 of 2008 (the Waste Act) empowers the Minister to approve and publish plans, drafted and submitted to her by private persons or bodies, to manage waste in any industry that generates waste. These plans impose obligations on participants in those industries. In this case the Minister approved and published a plan drafted by the Recycling and Economic Development Initiative of South Africa (REDISA), the second respondent. The appellants, the Retail Motor Industry Organisation (RMI) and Circuit Fitment CC, challenged the validity of the approval of the plan in an application for judicial review. Pending the outcome of the review, they sought an interim interdict preventing the implementation of the plan. The application for interim relief came before Tuchten J who found that, prima facie, one item of the plan, which he found to be material, was invalid. On that basis, he granted the interim interdict.

[4] The Minister then withdrew the plan and published the same plan minus the offending item. The appellants contend that she was not entitled to withdraw the plan and, because that plan remained in existence until set aside in the review proceedings, she was not entitled to publish the second plan. What is advanced by the appellants is thus the curious contention that, although they allege that the initial plan is invalid, it must remain extant until such time as it is set aside by them, and that the Minister may not short-circuit the process by simply withdrawing an invalid plan and substituting it with a valid plan. Meanwhile, of course, the invalid plan will not be capable of implementation in view of the interim interdict and the process of finalising REDISA's plan will grind to a halt. This is clearly the objective that is sought to be achieved.

[5] In the urgent application with which this appeal is concerned, RMI and Circuit Fitment CC applied to the North Gauteng High Court, Pretoria for orders against the Minister and REDISA for (a) a declarator that the Minister's withdrawal of REDISA's plan on 30 November 2012 was a nullity; (b) that her approval of its amended plan on the same day be reviewed and set aside; and (c) that both the Minister and REDISA be interdicted from implementing

the amended plan. Bam AJ dismissed the application with costs but later granted the appellants leave to appeal to this court.

[6] The central issues in this appeal are: (a) whether, when the Minister withdrew REDISA's plan, she had lawful authority to do so or was *functus officio*; (b) if the Minister was able to withdraw the first plan, whether the procedural requirements for the approval of the plan that replaced it had been complied with; (c) whether the plan was invalid because it did not contain certain information; (d) whether, because REDISA is not a tyre producer, the Minister could not lawfully approve its plan; and (e) whether the plan may regulate the disposal of solid tyres as well as pneumatic tyres (and the consequences that follow if it may not). Before dealing with these issues, it is necessary to say something of the legislative framework and the facts.

The legislative framework

[7] When the Waste Act came into operation on 1 July 2009 it repealed much of the Environment Conservation Act 73 of 1989 but saved regulations made in terms of that Act,[1] including the Waste Tyre Regulations[2]. The Waste Act and the Waste Tyre Regulations are the principal legislative instruments that are of application in this appeal.

[8] Section 28 of the Waste Act allows the Minister to initiate the process of drafting plans. Section 28(1) provides:

'Where any activity results in the generation of waste that affects more than one province or where such activity is conducted in more than one province, the Minister may by written notice require a person, or by notice in the *Gazette* require a category of persons or an industry, that generates waste to prepare and submit an industry waste management plan to the Minister for approval.'

Section 28(7)(*a*) provides, however, that a 'person, category of persons or industry contemplated in subsection (1) . . . may elect to prepare an industry

[1] Waste Act, s 80(2).
[2] Government Notice 149, *Government Gazette* 31901 of 13 February 2009.

waste management plan for approval . . . without being required to do so by the Minister . . .'.

[9] Section 30 deals with the contents of plans. When the Minister acts in terms of s 28(1), she must also specify what information must be included in any plan that is drafted and submitted to her.[3] That information may include such matter as the amount of waste that is generated, the measures to be taken to prevent pollution or ecological degradation and 'any other matter that may be necessary to give effect to the objects of this Act'.[4]

[10] Section 32 deals with the submission and approval of plans. It provides, to the extent relevant to this matter:

'(1) The Minister, acting in terms of section 28(1) . . . may on receipt of an industry waste management plan-

(a) approve the plan in writing, with any amendments or conditions, and give directions for the implementation of the plan;

(b) require additional information to be furnished and a revised plan to be submitted within timeframes specified by the Minister . . . for approval;

(c) require amendments to be made to the plan within timeframes specified by the Minister . . .; or

(d) reject the plan with reasons if it does not comply with the requirements of a notice in terms of section 28(1) . . . or if a consultation process in accordance with section 31 was not followed.

(2) . . .

(3) An industry waste management plan that has been rejected in terms of subsection (1)(*d*) may be amended and resubmitted to the Minister . . .

(4) On receipt of any information or amendments requested in terms of subsection (1)(*b*) or (*c*), or any amended industry waste management plan resubmitted in terms of subsection (2) for the first time, the Minister . . . must reconsider the plan.

(5) An approval in terms of subsection (1)(*a*) must at least specify the period for which the approval is issued, which period may be extended by the Minister . . .

(6) Notice must be given in the relevant *Gazette* of any industry waste management plan that has been prepared in terms of section 28 and that has been approved by the Minister . . .

[3] Waste Act, s 30(1).
[4] Waste Act, s 30(2).

(7) . . . ’

[11] Prior to approving a plan, the Minister is required by s 72(1) to ‘follow such consultative process as may be appropriate in the circumstances’. She is, in particular, obliged to consult with other members of the cabinet whose portfolios may be affected, MECs in the provinces who may be affected, and members of the public through a public participation process, which must be conducted in accordance with s 73.

[12] The Waste Tyre Regulations impose certain obligations on tyre producers, tyre dealers and tyre stockpile owners.[5] Regulation 6(3), for instance, provides:

‘A tyre producer operating on the date of commencement of these regulations must either-

(a) prepare and submit to the Minister, an integrated industry waste tyre management plan, within 60 days of registering in terms of subregulation (1) for approval; or

(b) register with an existing integrated industry waste tyre management plan approved by the Minister; and

(c) comply with the integrated industry waste tyre management plan immediately on receiving the Minister’s approval, or comply within 60 days with an existing integrated industry waste tyre management plan approved by the Minister.’

It is clear from reg 6(3) that, potentially, more than one plan can regulate waste tyre management; if a tyre producer does not wish to conduct business in accordance with an existing plan, it may prepare its own and submit it for approval.

[13] Part 4 of the regulations deals with the contents of plans and the process to be followed from the conceptualisation of a plan to its promulgation. Regulation 9 states that a plan that is later to be submitted to the Minister must ‘at least’ deal with certain listed issues. It must, for instance,

[5] Regulations 6, 7 and 8.

identify the parties to the plan,[6] indicate 'how the waste hierarchy will be given effect',[7] and so on. In terms of reg 11(1), when the Minister receives a plan, she: '(a) may require additional information to be furnished and a revised plan to be submitted within a timeframe indicated by the Minister;

(b) must publish the integrated industry waste tyre management plan in the *Government Gazette* for a period of 30 days for comment;

(c) must send comments received to the person responsible for producing the plan for consideration and incorporation where relevant; and

(d) must, after incorporation of any comments, review the revised integrated industry waste tyre management plan, approve it with or without conditions, or reject the integrated industry waste tyre management plan with reasons and with a timeframe for resubmission.'

In terms of reg 11(4), when the Minister decides to approve a plan, she must publish a notice to that effect in the *Government Gazette*.

The facts

[14] In February 2011, REDISA submitted a plan that it had drafted to the Minister for her approval. In April 2011, the South African Tyre Recycling Process Corporation NPC (the SATRP) submitted its plan for approval and in December 2011 RMI did the same.

[15] In November 2011, the REDISA plan was approved and the SATRP plan was rejected. The RMI plan remained in limbo for some time. In April 2012 detailed comments were made on the RMI plan by the Department and enquiries were made of RMI. We were informed from the bar that the RMI plan was eventually submitted to the Minister two days before the hearing of this appeal.

[16] On 20 January 2012, SATRP brought an urgent application for an order suspending the implementation of the REDISA plan. On 26 January

[6] Regulation 9(1)(*a*).
[7] Regulation 9(1)(*c*).

2012, the approval of the REDISA plan was withdrawn.[8] Neither SATRP or RMI objected to the withdrawal. REDISA later submitted another plan.

[17] During April 2012, the Department convened a meeting with role players in the tyre industry, including RMI and REDISA, to inform them of progress in relation to the various plans that had been submitted to it and to 'confirm that the process would be concluded in a fair and reasonable manner in considering the respective plans that had been submitted'.

[18] By this stage, REDISA's draft plan had been published in the *Government Gazette* for public comment in terms of reg 11(1)(*b*).[9] It is common cause that a full and complete public participation process, as envisaged by s 73 of the Waste Act, was conducted thereafter. In July 2012, REDISA's plan was approved by the Minister and it was published in the *Government Gazette*.[10] (I shall refer to this plan as the July plan, it having been referred to as such by the parties.)

[19] The approval of the July plan led to the urgent application that I have referred to above being launched by RMI and Circuit Fitment CC against the Minister and REDISA for an order interdicting the implementation of the plan pending a review of its approval.[11] Tuchten J granted the interim interdict on the basis that there were prospects of the reviewing court finding that the approval of the plan was unlawful to the extent that the approved version of the plan contained an item, item 15.1 (dealing with waste reduction targets), which he found to have been a material part of the plan and which was not part of the version that had been published for public comment.[12] He concluded:[13]

'If the Minister accepts that the attempt to bring into effect the Redisa Plan as approved and published on 23 July 2012 was indeed invalid on the ground advanced

[8] Government Notice 559, *Government Gazette* 34974 of 26 January 2012.
[9] Government Notice 337, *Government Gazette* 35147 of 17 April 2012.
[10] Government Notice 564, *Government Gazette* 35534 of 23 July 2012.
[11] *Retail Motor Organisation & another v Minister of Water and Environmental Affairs & another* NGP 12 November 2012 (case no. 51148/12) unreported.
[12] Paras 37, 51.
[13] Para 59.

by the applicants which I have found to carry prospects of success, then it may be, to put it no higher, that the Minister can legitimately withdraw her approval of the Redisa Plan as approved and published on 23 July 2012 and apply her mind to the version of the Plan minus item 15.1 that was put up for comment, with a view to acting in relation to that version of the Plan under reg 11(1)(d). I emphasise that I come to no conclusion on the point. The decision is for the Minister to take, not the courts.'

[20] The Minister followed the suggestion made by Tuchten J. On 30 November 2012, she withdrew her approval of the July plan[14] and then approved the plan without item 15.1.[15] (This plan is referred to in the papers as the November plan, and I shall refer to it as such.) It was this process of withdrawal and approval that led to the application that is the subject matter of this appeal.

[21] RMI and Circuit Fitment CC argued that the Minister acted unlawfully when she withdrew the July plan, that she consequently had no power to approve the November plan and even if she did, its approval was invalid on various grounds. I turn now to these issues.

The issues

Was the Minister functus officio in relation to the July plan?

[22] The first point that was argued was that the Minister was not able to withdraw the July plan once she had approved it because she was *functus officio*. This argument, it seems to me, strikes something of a disconsonant note because the Minister, by withdrawing the July plan, gave RMI and Circuit Fitment precisely what they wanted.

[23] In explaining what the *functus officio* principle means, Daniel Malan Pretorius says the following:[16]

[14] Government Notice 987, *Government Gazette* 35926 of 30 November 2012.
[15] Government Notice 988, *Government Gazette* 35927 of 30 November 2012.
[16] Daniel Malan Pretorius 'The Origins of the *Functus Officio* Doctrine, with Specific Reference to its Application in Administrative Law' (2005) 122 *SALJ* 832 at 832. See too V G Hiemstra

'The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter. . . The result is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.'

[24] The *functus officio* principle is also intended to foster certainty and fairness in the administrative process. It is not absolute in the sense that it does not apply to every type of administrative action. Certainty and fairness have to be balanced against the equally important practical consideration that requires the re-assessment of decisions from time to time in order to achieve efficient and effective public administration in the public interest. Lawrence Baxter deals with these competing factors when he explains the purpose of the principle:[17]

'Indeed, effective daily administration is inconceivable without the continuous exercise and re-exercise of statutory powers and the reversal of decisions previously made. On the other hand, where the interests of private individuals are affected we are entitled to rely upon decisions of public authorities and intolerable uncertainty would result if these could be reversed at any moment. Thus when an administrative official has made a decision which bears directly upon an individual's interests, it is said that the decision-maker has discharged his office or is *functus officio*.'

[25] It is not necessary in this judgment to define the exact boundaries of the *functus* officio principle, save to say the following: first, the principle applies only to final decisions;[18] secondly, it usually applies where rights or benefits have been granted – and thus when it would be unfair to deprive a person of an entitlement that has already vested;[19] thirdly, an administrative decision-maker may vary or revoke even such a decision if the empowering

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and H L Gonin *Trilingual Legal Dictionary* 3 ed (1992) who define *functus officio* to mean 'no longer in office (officiating); having discharged his office'.

[17] Lawrence Baxter *Administrative Law* (1984) at 372 (Baxter). See too Cora Hoexter *Administrative Law in South Africa* 2 ed (2012) at 277 (Hoexter).

[18] *President of the Republic of South Africa & others v South African Rugby Football Union & others* 2000 (1) SA 1 (CC) para 44; Baxter at 375; Hoexter at 278.

[19] Baxter at 373-375. See for example *Cape Coast Exploration Ltd v Scholtz & another* 1933 AD 56 at 65.

legislation authorises him or her to do so (although such a decision would be subject to procedural fairness having been observed and any other conditions);[20] fourthly, the *functus officio* principle does not apply to the amendment or repeal of subordinate legislation.[21]

[26] The principle does not apply to subordinate legislation for two reasons. First, in terms of the common law, legislation may be amended by the body empowered to make it.[22] Secondly, the Interpretation Act 33 of 1957 provides expressly for a deviation from the principle in the case of subordinate legislation. Section 10(3) states:

'Where a law confers a power to make rules, regulations or by-laws, the power shall, unless the contrary intention appears, be construed as including a power exercisable in like manner and subject to the like consent and conditions (if any) to rescind, revoke, amend or vary the rules, regulations or by-laws.'

[27] In this instance, the empowering legislation does not authorise the Minister to revoke an approval of a plan once granted, although reg 12 provides for the revision of plans every five years, or sooner if and when the need arises for revision. If one considers the contents of the plan, it is clear that it does not seek to vest rights or benefits in those who subscribe to it. Indeed, the opposite is true: it imposes obligations on them. So, for instance, item 4 of the plan requires subscribers to 'provide to the external accounting company a monthly declaration of their tyre production (including rejects), imports and exports' and to provide 'annual audit certificates confirming their declarations of masses of tyres imported and/or manufactured, and permit spot check audits to be conducted by REDISA's auditors'; and item 17 requires subscribers to pay a waste tyre management fee.[23] This is an indication that the *functus officio* principle may not be of application.

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[20] Baxter at 376-378; Hoexter at 278-279; L A Rose-Innes *Judicial Review of Administrative Tribunals in South Africa* (1963) at 99.

[21] Baxter at 372 says: 'One can understand the necessity for rules of general application to be changed from time to time, as changing policies and circumstances require.' See too Hoexter at 276.

[22] Hoexter at 276.

[23] See too items 8, 9, 12, 13, 24 and 26 which all impose obligations of one form or another on subscribers and other persons.

[28] I turn now to consider the nature of the approved plan, it having been argued on behalf of REDISA that it is subordinate legislation and thus excluded from the *functus officio* principle by s 10(3) of the Interpretation Act. It needs to be emphasised that the purpose of this exercise is to determine whether the *plan* is an instrument of subordinate legislation, rather than the Minister's *withdrawal of approval of the plan*.

[29] Hoexter has set out a number of characteristics of subordinate legislation that distinguish it from other species of administrative action. These are: (a) legislative action is general in its application, applying impersonally to society as a whole or a groups within it, rather than to individuals; (b) legislation is concerned with the implementation of policies, rather than the resolution of individual disputes; (c) legislation tends to operate prospectively and creates legal consequences for the period after it comes into force; (d) legislation is usually intended to remain in force indefinitely (but may be designed to lapse after a prescribed period); (e) legislation requires promulgation – usually publication in the *Government Gazette* – before it acquires the force of law; and (f) often legislation will require further administrative action in order to make it effective, such as the enforcement of a sanction.[24]

[30] The plan contains many of these features. It is general in its application, imposing obligations on all who subscribe to it and all those who will, once it is given effect, enter into contractual relationships with REDISA. It creates a system by which waste tyres will be managed over a period of time. It is concerned with the implementation of that system rather than aspiration. It operates prospectively. It has an indefinite life-span but, according to reg 12(1), it must be revised and re-submitted to the Minister every five years (or sooner if needs be). In terms of reg 11(4), an approved plan must be published in the *Government Gazette*. It contains the framework within which action will be taken to deal with waste tyres in an environmentally acceptable

[24] Hoexter at 52-53; Baxter at 349-351.

way. In my view, therefore, the plan is an instrument of subordinate legislation.

[31] The way in which the plan has been made requires brief comment. Usually legislative instruments are drafted by drafters who work for the legislative functionary concerned. That, as this case shows, is not the only way in which subordinate legislation can come into being. In this case, the drafting of plans has, in effect, been out-sourced to private individuals. Once the efforts of the drafter of a plan meet with the approval of the Minister, she gives legal effect to the plan by approving it and publishing it in the *Government Gazette*. This is an example of what Hoexter calls negotiated rulemaking.[25]

[32] My conclusion is that the July plan is legislative in nature. While it cannot be described as a set of regulations or a by-law, it can be described as rules for purposes of s 10(3) of the Interpretation Act. The Minister was empowered by the Waste Act and the Waste Tyre Regulations to approve the July plan. A power to make rules was therefore conferred on her. She exercised that power when she approved and published the July plan. She was also empowered by s 10(3) to rescind the plan. That being so, the *functus officio* principle has no application and did not prevent her from withdrawing the July plan.

Procedural propriety and the November plan

[33] It was argued on behalf of the appellants that if the Minister was not *functus officio* in relation to the July plan, her approval of the November plan was invalid because no public participation process was followed prior to its approval and publication.

[34] It is common cause that prior to the July plan being approved an unimpeachable public participation process was conducted in respect of a

[25] Hoexter at 86-87.

plan that contained everything that the July plan contained except for item 15.1. That item was never subjected to the public participation process and so, when it was added to the plan, it was the basis for the interim interdict being granted. The November plan was the July plan minus item 15.1. It was thus the exact same plan that had been the subject of the public participation process.

[35] I can see no point in commencing the public participation process again. It would serve no useful purpose. The Minister did not act in a procedurally unfair manner when she approved and published the November plan without the public participation process being run again.

The content of the November plan

[36] The point was taken that the subject matter of item 15.1 – targets – had to form part of the plan and, if they were not included, the plan would be invalid. I have my doubts whether the failure to include an item in a plan would mean that the whole plan would be invalid but the argument flounders on two more fundamental grounds.

[37] The first is factual. Every requirement mentioned in reg 9(1) of the Waste Tyre Regulations is dealt with in the November plan, including an 'annual projection of the quantities and types of tyres that are manufactured or imported that will become waste tyres and will be managed through the integrated industry waste tyre management plan'[26] and the 'timeframes in which the different types of tyres will be managed'.[27] These are the requirements that, it was argued, were not included in the plan. The argument is not factually correct. Item 5, headed 'Projected volumes', deals with the requirements of reg 9(1)(*b*) and item 15, headed 'Implementation Target Dates and Timeframe', deals with the requirements of reg 9(1)(*j*).

[26] Regulation 9(1)(*b*).
[27] Regulation 9(1)(*j*). Note that two reg 9(1)(*j*)s appear in the regulations. The first, the sub-regulation quoted, should, in fact, be reg 9(1)(*i*).

[38] Secondly, the argument is based upon a misunderstanding of the purpose of reg 9(1) and its relationship with s 32 of the Waste Act and reg 11. Regulation 9(1) informs the drafter of a plan what he or she must include in the draft for submission to the Minister. It is intended to direct the attention of the drafter to what, most likely, needs to be in the plan, and to ensure that the Minister does not have to refer the plan back for attention to be given to matters that should have been considered.

[39] Section 32 empowers the Minister to approve a plan, ask for additional information, require amendments to a plan or reject a plan, and reg 11 mirrors these powers in respect of waste tyres specifically. Together they vest a broad discretion in the Minister to fashion a plan that is suitable and appropriate. In so doing, she may take the view that certain requirements of reg 9(1) that have been dealt with in a plan are irrelevant, serve no purpose or are counter-productive. A plan that, after the Minister's amendments have been made, does not deal with an aspect that is specified in reg 9(1) because, in the Minister's view, it is not relevant to that plan, cannot be assailed on that account.

Who may submit a plan?

[40] It was argued on behalf of the appellants that it is only tyre producers who may submit plans to the Minister, that REDISA is not a tyre producer and that consequently the Minister was not able validly to approve either of its plans. It is common cause that REDISA is not a tyre producer. It is an independent non-profit company formed to administer a plan. A significant number of tyre producers had subscribed to its plan prior to its submission to the Minister for her approval.

[41] Regulations 6(3) and (4) of the Waste Tyre Regulations were said to be the legal basis for this argument. Regulation 6(3) provides that a tyre producer operating at the time that the regulations came into force had to either prepare a plan for approval by the Minister or register with an existing plan and comply with the plan concerned. Regulation 6(4) provides that a tyre producer

commencing business after the regulations had come into force 'shall not begin operations without an integrated industry waste tyre management plan approved by the Minister or without providing written confirmation to the Minister of acceptance into an existing integrated industry waste tyre management plan approved by the Minister'.

[42] These regulations do no more than impose obligations on tyre producers to either formulate their own plan for approval or to subscribe to an existing plan. They say nothing about who may draft plans for submission to the Minister. That is dealt with by s 28 of the Waste Act. Section 28(1) provides that where waste is generated in an industry that operates in more than one province, 'the Minister may by written notice require a person, or by notice in the *Gazette* require a category of persons or an industry, that generates waste to prepare and submit an industry waste management plan to the Minister for approval'. Section 28(7)(*a*) provides, however, that the person, category of persons or industry referred to in s 28(1) may elect to prepare a plan for submission to the Minister 'without being required to do so by the Minister'.

[43] Section 28 contemplates that where waste is generated in an industry, plans to manage it must be formulated, approved and applied in order to deal with the environmental harm that has been identified. Understandably, the Waste Act is more concerned with this than with who drafts plans. In other words, the identity of the drafter of a plan is not a jurisdictional fact for the valid approval of the plan. The import of ss 28(1) and (7)(*a*) is that any person, whether they are connected with an industry that generates waste or not, may draft a plan for the management of waste in that industry and the Minister may, in her discretion, approve that plan. There is, accordingly, no merit in the argument that as REDISA is not a tyre producer the Minister could not have validly approved either of its plans.

The types of tyres

[44] The final argument that was raised on behalf of the appellants is that both the July and November plans deal with pneumatic and solid tyres, but it is only pneumatic tyres that may be regulated by a plan. The plans are, so the argument proceeds, invalid because of the inclusion of solid tyres.

[45] Regulation 1 of the Waste Tyre Regulations defines a tyre to mean 'a continuous pneumatic covering made of natural rubber or synthetic rubber or a combination of natural and synthetic rubber encircling a wheel, whether new, used or retreaded'. This definition contemplates only tyres that are capable of being filled with air in order for them to suit their purpose.[28] Solid tyres are not envisaged by the definition. The regulations thus contemplate plans for the management of waste pneumatic tyres only, and not solid tyres. Whether that is a sensible distinction to draw is not the subject matter of judicial review.[29]

[46] The fact that the November plan deals with solid tyres as well as pneumatic tyres does not necessarily mean that the entire plan must be set aside. If the bad can be severed from the good, the bad can be set aside and the good left intact. The correct approach to the question of whether the bad in an instrument of subordinate legislation can be severed from the good was set out as follows by Centlivres CJ in *Johannesburg City Council v Chesterfield House (Pty) Ltd*:[30]

'The rule, that I deduce from *Reloomal's* case is that where it is possible to separate the good from the bad in a Statute and the good is not dependent on the bad, then that part of the Statute which is good must be given effect to, provided that what remains carries out the main object of the Statute. In *Arderne's* case the main object

[28] The *Concise Oxford English Dictionary* defines the word pneumatic to mean 'containing or operated by air or gas under pressure'.
[29] *Sinovich v Hercules Municipal Council* 1946 AD 783 at 802-803: 'The law does not protect the subject against the merely foolish exercise of a discretion by an official, however much the subject suffers thereby. But the law does protect the subject against stupid by-laws or regulations, however well intended, if their effect is sufficiently outrageous.'
[30] *Johannesburg City Council v Chesterfield House (Pty) Ltd* 1952 (3) SA 809 (A) at 822D-F. See too *S v Prefabricated Housing Corporation (Pty) Ltd & another* 1974 (1) SA 535 (A) at 539C-F; *S v O'Malley* 1976 (1) SA 469 (N) at 477E-G.

of the Ordinance was to raise revenue by means of taxation and the good could easily be separated from the bad. The main object of the Ordinance was, therefore, not defeated by holding that the Ordinance, shorn of its bad parts, was valid. Where, however, the task of separating the bad from the good is of such complication that it is impracticable to do so, the whole Statute must be declared *ultra vires*. In such a case it naturally follows that it is impossible to presume that the legislature intended to pass the Statute in what may prove to be a highly truncated form: this is a result of applying the rule I have suggested and is in itself not a test.'

[47] Severance is possible in this case. It is possible, textually, to separate the references to solid tyres from references to tyres as defined in the Waste Tyre Regulations. The references to tyres as defined are not dependant in any manner on the references to solid tyres, because solid tyres are always referred to expressly and separately from tyres as defined. It is a simple matter to order that any reference to solid tyres in the November plan be set aside. This does no violence to the objects of the plan. Indeed, all that it does is to leave the remainder of the plan in place and consistent with the Waste Tyre Regulations.

Conclusion and order

[48] The appellants have failed in respect of all of the grounds upon which the appeal was argued except for their partial success in relation to the inclusion in the November plan of solid tyres. The references to solid tyres are severable. They have succeeded to such a limited extent that, although the order of the court below must be amended to reflect the partial success they have achieved, the appeal must nonetheless be dismissed. It cannot be said that they have achieved substantial success and so are not entitled to costs, either in this court or in the court below. The respondents, on the other hand, have achieved substantial success and the costs order in both courts must reflect that fact.

[49] I make the following order:

1 Save to the extent set out in paragraph 2, the appeal is dismissed with costs, including the costs of two counsel.

2 The order of the court below is amended to read:

'(a) Save to the extent set out in paragraph (b), the application is dismissed with costs, including the costs of two counsel.

(b) Every reference to solid tyres in the second respondent's Integrated Industry Waste Tyre Management Plan, approved by the first respondent and published in Government Notice 988 in *Government Gazette* 35927 of 30 November 2012, is set aside.

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C Plasket

Acting Judge of Appeal

APPEARANCES:

For the First Appellant:	L W de Koning SC (with him B C Stoop) Instructed by: Barnard Inc., Pretoria McIntyre van der Post, Bloemfonein
For the First Respondent:	S Joubert SC (with him P A Swanepoel) Instructed by: The State Attorney, Pretoria The State Attorney, Bloemfontein
For the Second Respondent:	D Unterhalter SC (with him A Louw SC) Instructed by: Cliffe Dekker Hofmeyer Inc c/o Friedland Hart, Pretoria Claude Reid Inc., Bloemfontein