THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case No's: 1260/2017 and 188/2018

In the matter between:

RECYCLING AND ECONOMIC DEVELOPMENT

INITIATIVE OF SOUTH AFRICA **APPELLANT**

and

THE MINISTER OF ENVIRONMENTAL AFFAIRS **RESPONDENT**

AND

Case No's: 1279/2017 and 187/2018

In the matter between:

KUSAGA TAKA CONSULTING (PTY) LTD **APPELLANT**

and

THE MINISTER OF ENVIRONMENTAL AFFAIRS **RESPONDENT**

Neutral citation: *Recycling and Economic Development Initiative of South Africa v The Minister of Environmental Affairs* (1260/2017 and 188/2018) and *Kusaga Taka Consulting (Pty) Ltd v The Minister of Environmental Affairs* (1279/2017 and 187/2018) [2018] ZASCA 01 (24 January 2019)

Coram: Cachalia, Saldulker, Van der Merwe and Molemela JJA and Rogers AJA

Heard: 1 and 2 November 2018

Delivered: 24 January 2019

Summary: Application to wind up solvent companies in terms of s 81 of Companies Act 71 of 2008 (the 2008 Act); whether Minister of Environmental Affairs may invoke s 157(1)*(d)* of the Act for standing in the public interest – whether *ex parte*

proceedings and failure to disclose material facts warrants discharge of provisional orders – whether just and equitable for companies to be wound up.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Henney J sitting as court of first instance): judgment reported *sub nom Minister of Environmental Affairs v Recycling and Economic Development Initiative of South Africa NPC* 2018 (3) SA 604 (WCC).

The following order is made in case no's 1260/2017 and 188/2018:

(a) The appeal succeeds with costs including the costs of two counsel.

(b) The order of the court a quo on 15 September 2017 finally winding up the appellant (Redisa) is set aside and replaced with the following:

'The order of 1 June 2017, placing the respondent (Recycling and Economic Development Initiative of South Africa) under provisional liquidation is discharged and the Minister's application is dismissed with costs, including the costs of two counsel.'

The following order is made in case no's 1279/2017 and 187/2018:

(a) The appeal succeeds with costs including the costs of two counsel.

(b) The order of the court a quo on 15 September 2017 finally winding up the appellant (KT) is set aside and replaced with the following:

'The order of 8 June 2017 placing the respondent (Kusaga Taka Consulting (Pty) Ltd) under provisional liquidation is discharged and the Minister's application is dismissed with costs, including the costs of two counsel.'

JUDGMENT

Cachalia JA (Saldulker and Van der Merwe JJA and Rogers AJA concurring)

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Introduction

[1] This appeal arises from two consolidated applications in the Western Cape Division of the High Court Cape Town,[1] in which two solvent companies were placed under final liquidation at the instance of the Minister of Water and Environmental Affairs.[2] For convenience I shall hereafter refer to the said Minister as 'the Minister' or as the 'Environment Minister' where it is necessary to distinguish between ministers of different departments. The first, Recycling and Economic Development Initiative of South Africa (Redisa), is a non-profit company; and the second, Kusaga Taka Consulting (Pty) Ltd (KT), a private company. They are the appellants. The Minister opposes both appeals.

[2] Redisa was responsible for the implementation of a waste tyre recycling scheme – the only one of its kind in South Africa – under the 'Redisa Plan' since 2012.[3] The Plan entailed the creation and management of a national network for collecting waste tyres, storing them and delivering them to recyclers for processing. This was envisaged as the beginning of a nascent waste tyre recycling industry, and the foundation of secondary industries for the use of products created by recyclers. The Plan was funded from a waste tyre management fee that tyre manufacturers paid to Redisa in terms of the Waste Tyre Regulations[4] promulgated under the Environment Conservation Act 73 of 1989 (ECA). The operative provisions of the ECA have been repealed, but the regulations remain valid under the National

[1] Henney J; the case is reported *sub nom Minister of Environmental Affairs v Recycling and Economic Development Initiative of South Africa NPC* 2018 (3) SA 604 (WCC).
[2] The Minister was Ms Edna Molewa, who passed away on 22 September 2018.
[3] The 'Redisa Plan' was promulgated by the Minister in November in November 2012 under the National Environment Management: Waste Act 59 of 2008. It was described as an instrument of 'subordinate legislation' by this court in *Retail Motor Industry Organisation & another v Minister of Water and Environmental Affairs* [2013] ZASCA 70; 2014 (3) SA 251 (SCA) para 30.
[4] Environment Conservation Act (73/1989): Waste Tyre Regulations, 2008, GN R149, *GG 31901*, 13 February 2009.

Environmental Management: Waste Act 59 of 2008 (the Waste Act). They provide for the preparation, content, approval and review of waste tyre management plans, referred to as 'integrated industry waste tyre management plans', which are 'industry waste management plans' under the Waste Act. Their purpose is to control the management of waste tyres and direct the manner in which waste tyres are to be collected and remediated.

[3] On 29 November 2012, the Minister approved an 'industry waste tyre management plan' that Redisa had conceptualised and submitted to her under the Waste Act. This is the 'Redisa Plan' hereafter 'the Plan'. It was the product of several years of development by its creators and was published in the Government Gazette on 30 November 2012. As the Minister states, it is or was, at the time of the proceedings in the court a quo, 'currently the only waste management measure in place for the management of waste tyres'. The Redisa Plan operates indefinitely, subject to a review conducted every five years. The first was in November 2017. Redisa contracted KT to manage the implementation of the Plan. The Minister approved all of this and publicly commended its implementation 'as an important case study on how (to) . . . turn waste to worth'.

[4] But, three weeks after making this statement, on 1 June 2017, the Minister sought and obtained an *ex parte* 'extremely urgent' provisional order; first against Redisa and then against KT, on the same basis, a week later. When Redisa and KT learnt of this, they applied, also urgently, for the provisional orders to be discharged. The applications were heard on 5 and 6 July 2017 and judgment was given on 15 September 2017 finally winding-up both entities, on 'just and equitable' grounds. In addition, the court ordered that their assets be distributed to the Waste Management Bureau (WMB), a public body established under the Waste Act. In this regard the court a quo seems to have overlooked the fact that the Minister had abandoned this extraordinary relief at the beginning of the hearing. The order was patently unlawful as it amounted to an arbitrary deprivation of Redisa's and KT's assets in violation of s 25 of the Constitution. The orders were formally abandoned after the judgment.

[5] In finding that it was just and equitable to wind-up the appellants, the court a quo upheld the Minister's broad contention that certain of Redisa's directors had not disclosed their relationship with or significant shareholding in KT and that this had enabled them to misappropriate public funds by using KT as their vehicle to unlawfully channel funds collected by Redisa under the Plan for their personal benefit. It also upheld the Minister's second ground for winding up Redisa, which was that Redisa's business plan on 23 May 2017 had acknowledged that it would have to begin to 'wind down' from 1 June 2017, if the Department of Water and Environmental Affairs (the Department) allocated insufficient funds to meet its operational requirements. So, once Redisa was wound up, KT had to follow as its existence was entirely dependent upon the money it generated through the Plan. The reasons for the cessation of Redisa's funding as contemplated in the Plan will be explained below.

[6] The appellants applied for leave to appeal against the judgment and orders on several grounds: First, they said, the factual findings of impropriety against them were not sustainable having been comprehensively refuted in their answering papers; secondly, they asserted, there were no proper grounds for the resort to *ex parte* proceedings on the basis of bald assertions that they would dissipate public funds or tamper with evidence if notified of the application; thirdly, and crucially, they pointed out that having elected to proceed *ex parte*, the Minister had failed in her strict duty to disclose all relevant material to the court. In particular, they emphasised that she had not disclosed that her application to wind up Redisa was the latest in a series of attempts by her to close down Redisa and terminate the Redisa Plan, which Redisa had challenged by way of review on three occasions in the high court. The first was successful and the two other applications were pending and well advanced when she launched this application. The Minister's conduct, they complained, warranted, without more, a discharge of the provisional orders against them. They also contended that it was in any event not shown that it was just and equitable to order their winding-up. Finally, they argued that the court a quo had erred in conferring standing on the Minister, purportedly in terms of s 157(1)*(d)* of the Companies Act 71 of 2008 (the 2008 Act), to wind up the two solvent companies.

[7] The court a quo granted leave to appeal to this court only on the fourth ground the *locus standi* point, but refused leave on the other grounds. This court subsequently granted leave on those grounds as well. It is now necessary to explore the facts in more detail. As most of the facts are common to both applications it will be convenient to recount them in a single narrative.

Background

The Redisa Plan

[8] The Waste Act is intended to give effect to the environmental rights in s 24 of the Bill of Rights. Its objects include providing for reasonable measures for recycling and recovering waste, treating and safely disposing of waste as a last resort, and promising ecologically sustainable development while promoting justifiable economic and social development.

[9] Section 6 obliges the Minister to establish a binding national waste management strategy to give effect to the objects of the Act. Part 7 of Chapter 4 provides for the establishment of 'industry waste management plans', which can be formulated by a private entity or by an organ of state. They regulate how an industry's waste is to be avoided, minimised, recycled, developed and disposed of.

[10] Waste tyres are an environmental problem and pose health risks if not disposed of safely. Approximately one million waste tyres are generated each month in South Africa. In addition, a large stockpile of waste tyres has accumulated over a few decades. The purpose of the Plan is to manage this problem.

[11] The Plan was self-funding. Regulation 9(1)(k) of the Waste Tyre Regulations required producers to pay a fee to Redisa of R2,30 (excluding VAT) per kg of manufactured or imported tyres, for the collection, storage and processing of waste tyres. This endured until February 2017, when the regulation was repealed, the circumstances of which are discussed later.

[12] Redisa was obliged to report to the Minister at regular intervals on certain key metrics and to submit annual audits to explain Redisa's finances and the 'extent of the independence of the Redisa Board'. It did so. Its audited financial statements were unqualified.

The management contract with KT

[13] The Plan explicitly states that an 'external management company' shall be responsible for its implementation and management. Redisa's memorandum of incorporation (MOI) also provides for this. The rationale for the appointment of a management company was to ensure 'confidentiality through the separation of functions [which] . . . is of vital importance to the competitiveness of the entire industry'.

[14] The functions to be performed by the management company are extensive and include: managing Redisa's financial affairs; monitoring compliance by tyre manufacturers; furnishing consolidated management accounts and reporting; managing Redisa's operations; implementing and managing a National Centralised Computer System (NCCS); and reporting annually to the Department on all aspects of the Plan. The Plan stipulates that 20 per cent of the levies collected from tyre manufacturers, ie of the R2,30 per kg, will be allocated to administration (of which KT's management fee would form part). The Minister was obviously aware of all of this from the outset.

[15] Pursuant to the management agreement, KT employed more than 100 administrative employees, who were engaged on a full-time basis in the administration of the Plan. It administered some 440 contracts between Redisa and more than 120 transporters, depot operators and waste tyre processors, and also roughly 3 000 waste tyre collection points throughout South Africa. It did so by arranging depots to collect waste tyres; co-ordinated the transportation of waste tyres (via transporters) to waste tyre processors; and managed the distribution of the final processed products.

[16] KT used sophisticated proprietary hardware and software to track and monitor all waste tyres from their initial collection to their processing into end-products. It also provided training to the various participants in the Plan, including transporters, depot operators and processors, and monitored their compliance (and the compliance of tyre manufacturers) with environmental and other aspects of the Plan.

[17] The management contract between KT and Redisa provided for Redisa to pay KT a management fee of 18 per cent of the total levy from tyre manufacturers, which was less than the 20 per cent stipulated under the Plan. The Minister could not but have been aware of this from the beginning. The remaining two per cent of the 20 per cent, which the Plan earmarked for administration, would cover Redisa's separate overheads.

[18] KT's evidence was that it received fees strictly in accordance with the management agreement. The Minister disputed this in her replying affidavit on the basis of a 'cursory' and 'preliminary' report by a firm called Accountants @ Law (Pty) Ltd (A@L) – dealt with in detail below – in which it was claimed that management fees amounted to 19.24 per cent. In Redisa's rebutting affidavit – filed in response to the Minister's new evidence – it was pointed out that A@L's calculation was incorrect, and that properly calculated, fees paid to KT amount to 17.64 per cent of Redisa's turnover. This dispute of fact aside, it was thus common cause that the fees KT received from Redisa fell within the 20 per cent allocation the Minister had approved.

[19] The management agreement contemplated that KT would incur start-up costs in respect of the Plan, which would be passed on to Redisa. KT also invoiced Redisa for expenses and disbursements made on Redisa's behalf, but which fell outside of the scope of the administration and implementation of the Plan. These were invoiced on a 'strict cost basis' – ie, on the basis that these costs were simply passed on to Redisa without a mark-up – and were reflected as such in KT's annual financial statements. KT's income and expenditure was audited by external auditors, and, like Redisa, it received unqualified audits each year. This too the Minister could not dispute.

[20] It is common cause that three of Redisa's executive directors, Mr Herman Erdmann, Ms Charlene Kirk and Ms Stacey-Inger Davidson, are indirect shareholders of KT. Also not in dispute is that none of Redisa's directors are directors of KT (or *vice versa*), and there is not and never has been any overlap between the Redisa and KT boards.

[21] Further, Mr Erdmann of Redisa and Mr Christopher Crozier of KT both testified in their affidavits that the Minister and officials within the Department were well aware that certain of Redisa's executive directors had interests in KT. According to them, this was discussed with officials in the Department before the Plan was promulgated.

[22] Redisa's directors' report for the financial year ended 28 February 2014, which was provided to the Minister, corroborates their testimony. It reads thus:

'The executive directors are shareholders of Kusaga Taka Consulting Proprietary Limited, which has been contracted as service provider by REDISA to support it in the implementation of the Plan that has been promulgated by Gazette. The executive directors excused themselves and the non-executive directors concluded the contract. *This interest had furthermore been declared to the relevant government institutions and industry bodies beforehand*.' (My emphasis.)

[23] The notes to Redisa's audited financial statements for the same year also disclosed the relationship between Redisa's executive directors and KT, in these terms:

'The management company, Kusaga Taka consulting Proprietary Limited is related to [Redisa] as the executive directors of Redisa are shareholders of this company.'

[24] Faced with this evidence, the Minister conceded in argument before the court a quo that her claim to have become aware of the relationship between Redisa's directors and KT only in May 2016, was wrong. The Minister also alleged in her founding affidavit that a copy of the management contract between Redisa and KT had been withheld by the parties.

[25] This too was misleading. The Minister did not disclose that in a letter from Redisa to her dated 30 November 2016 (which was attached to her founding affidavit in both the Redisa and KT applications), Redisa informed her that a copy of the management contract had been provided to iSolveit and the Department on 17 March 2016, 21 July 2016 and 7 September 2016. The Minister did not reply to this letter. The Minister's founding affidavit did not draw the court's attention to this portion of the letter, which contradicted what she had said in her affidavit, even though she had dealt with other aspects of the letter in detail. There remains a dispute of fact on the papers as to whether the management contract was withheld from the Minister and the Department. But, in accordance with the rule regarding evidence in motion proceedings, Redisa's version must be accepted.

[26] As I have said, the Plan provided for Redisa to fund its operations from the tyre levy collected from producers. Midway through the first five-year period of the Plan, however, the government began exploring changes to the funding model for waste management plans in general, of which Redisa's Plan was at the time the only one in operation so far as we know. The legislative foundation for this new model was s 13A of the National Environmental Management: Waste Amendment Act 26 of 2014 which came into force on 2 June 2014. This section required the Environment Minister, in concurrence with the Minister of Finance, to publish in the *Government Gazette* a pricing strategy to achieve the objectives of the Act in relation to waste management. Section 17 of the Amendment Act stipulated that existing industry waste management plans were subject to the provisions of the Amendment Act and the pricing strategy, and that a plan operator had to align its plan with the provisions of the Act and the pricing strategy.

[27] Redisa opposed the change in the funding model but it was eventually implemented. The principal instruments by which this was achieved were the National Pricing Strategy (the Strategy) promulgated on 11 August 2016 and amendments to the Waste Tyre Regulations which were promulgated on 2 December 2016. A new regulation, 9(1)(jA), required that a waste management plan (meaning, practically speaking, the Redisa Plan) had to be aligned to the Strategy for waste management charges. The effect of this was that as from 1 February 2017 Redisa was no longer entitled to collect tyre levies from producers. Instead, it became dependent on an allocation of funds from the Department (which in the event was not forthcoming). Since tyre levies in terms of the Plan were payable several months in arrears, the last payments Redisa were entitled to receive were in May 2017.

[28] During the latter part of 2016, Redisa launched two review applications in the North Gauteng Division of the High Court, the first application directed at the Strategy, the later, at the amended regulations. Those review applications were pending when the ex parte orders were made for the provisional winding-up of Redisa and KT.

The iSolveit 'review' (and events leading to the ex parte applications)

[29] In February 2016, the Department appointed a firm called iSolveit Consulting to conduct an 'audit on Redisa for alignment with the Amendment Act'. ISolveit is not an accredited auditing firm.

[30] In her founding affidavit, the Minister alleged that she and the Department had only 'discovered during May 2016, when the Department received a report from iSolveit Consulting' that certain of Redisa's executive directors have an interest in KT. This was not correct. In reply, and in response to the answering papers, she adjusted her version, accepting that the executives' interest had been known since at least receipt of Redisa's financial statements for the 2014 financial year.

[31] Between February and June 2016, iSolveit audited Redisa and sought documentation from it. On 11 June 2016, iSolveit provided the Department with a document misleadingly called a 'Final Report', a copy of which was provided to Redisa on 13 June 2016. The report was not final. It claimed that Redisa had not provided certain documents, which is disputed.

[32] Following this, Redisa provided iSolveit and the Department with further documentation and information. Mr Erdmann and Ms Davidson, two of Redisa's directors, say that on 21 July 2016, while Redisa was compiling information and documentation for submission, Dr Padayachee of iSolveit advised them that continued participation in the review was a 'waste of time' because the Minister was intent on removing Redisa's ability to collect a fee through the tyre levy. Neither the Minister, nor Dr Padayachee, denied this allegation. More disturbingly, Dr Padayachee does not deny another allegation made by Redisa, that iSolveit sought a R1 million 'sponsorship' from Redisa.

[33] On 12 August 2016, iSolveit produced another document titled 'Key Findings Report', which it said was based on a 'cursory perusal' of the documentation supplied by Redisa. It states that upon receipt of additional information, 'further recommendations' would be made. Redisa maintained that it had provided all of the information requested at that stage. On the same day, Redisa met with the Department. Nonetheless, Redisa was asked to furnish further information and documentation; it insists it did so on 2 and 7 September 2016.

[34] During October 2016, the Department's Director-General wrote to Redisa about its alleged non-cooperation with the iSolveit audit. Redisa firmly denied this. Thereafter, on 1 November 2016, in a letter dated 31 October 2016, the Minister informed Redisa of the Department's 'conclusions' regarding Redisa's performance in light of 'the iSolveit report'. She said that Redisa had deviated from the Plan, had not complied with certain regulatory instruments, and was guilty of a 'lack of accountability'. The Minister called upon Redisa, within 15 working days, to produce

‘written reasons, substantiated with documentary evidence’, why she should not withdraw the Plan.

[35] The Minister granted Redisa an extension until 30 November 2016 to respond. Redisa met the deadline with a comprehensive response. However, on 29 November 2016, the day before the response was due and thus without having considered such response, the Minister issued a ‘directive’, purportedly in terms of s 32(1)*(a)* of the Waste Act, in which she supposedly took control of Redisa and its operations. The directive required Redisa, except with her approval, to cease ‘any process for the acquisition or disposal of its assets’; refrain from concluding ‘any new contract with any party whatsoever’, and desist from incurring ‘any liabilities whatsoever’.

[36] In response to the directive Redisa instituted urgent proceedings in the Western Cape Division of the High Court to interdict its implementation pending a review to set it aside. The Minister disingenuously argued *in limine* that she was not aware of the directive in question because Redisa had erroneously said in its notice of motion that the directive was dated 14 November 2016, instead of 29 November 2016. The Western Cape Division (Davis J) trenchantly criticised the point taken as a ‘form of litigation’ that was ‘extremely disturbing coming from a Minister of State’. Redisa’s application for interdictory relief was granted with costs on 28 December 2016. The Minister subsequently withdrew the directive.

[37] Neither the Minister nor iSolveit responded to Redisa’s submissions of 30 November 2016. The first time that Redisa had sight of iSolveit’s report, dated 3 February 2017 (upon which the Minister relied in June 2017 for *ex parte* relief), was when it received the Minister’s founding affidavit, after the provisional winding-up order had been made.

[38] As I have said, the Strategy was promulgated in August 2016 and the amended regulations in early December 2016, both of which were attacked in the review proceedings Redisa had instituted in the North Gauteng Division.

[39] The Minister filed lengthy, but incomplete answering affidavits, which delayed the finalisation of these applications. Redisa was about to file replying affidavits in both matters when the Minister obtained the *ex parte* provisional order, effectively stymieing the litigation in both matters.

[40] On 22 February 2017, an Appropriation Bill was published. It envisaged that Redisa was to receive R210 million from the Department by way of funding from the new tyre tax. However, it did not receive any amount and was expected to survive on its reserves until an uncertain future date when its funding model was resolved.

[41] On 23 May 2017 Redisa presented a business plan to the Department in which it explained that unless the funding issues were resolved, Redisa would scale back its operations from 1 June 2017 and that it had already informed stakeholders that it would have to 'wind down' its operations. The Minister said in her founding affidavit that the document reflected an alarming and sinister dissipation of cash, which prompted her to institute the *ex parte* proceedings on 1 June 2017. But, as I shall show below, she understood that the difficult financial position in which Redisa found itself was directly related to her attempts to cut off its funding source – the tyre levy – and she also misrepresented Redisa's actual financial position.[5]

[42] At the presentation Redisa undertook to present a transitional business plan to support a request for transitional funding of R220 million. The plan would also deal with its alignment with the amended Waste Act, the Strategy and the amended Waste Tyre Regulations, for the Minister's consideration. The business plan was delivered to the Department on 31 May 2017, but was not attached to the Minister's founding papers.

[5] Below paras 73-74.

[43] On 30 May 2017, at the same time she deposed to her founding affidavit in the Redisa winding-up application, the Minister wrote to Redisa, advising of her intention to amend the Plan, and calling upon it to 'participate in the public participation phase of this process' by submitting comments. But, on her own version she had already decided to institute winding-up proceedings against Redisa, which she would have known, would have the effect that Redisa would not be able to participate in this process. On 31 May 2017 Redisa published notices indicating that it was suspending its services as from 1 June 2017.

[44] This, then, is the background to the Minister's *ex parte* application to wind-up Redisa first, and then KT. It is convenient now to consider the complaint by the appellants regarding the Minister's use of *ex parte* proceedings and her failure to disclose material facts to the court. I deal with the principles relating to non-disclosure first.

Disclosure – legal principles

[45] The principle of disclosure in *ex parte* proceedings is clear. In *NDPP v Basson*[6] this court said:

'Where an order is sought *ex parte* it is well established that the utmost good faith must be observed. All material facts must be disclosed which might influence a court in coming to its decision, and the withholding or suppression of material facts, by itself, entitles a court to set aside an order, even if the non-disclosure or suppression was not wilful or *mala fide* (*Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at 348E–349B).'

[46] The duty of the utmost good faith, and in particular the duty of full and fair disclosure, is imposed because orders granted without notice to affected parties are a departure from a fundamental principle of the administration of justice, namely, *audi alteram partem*. The law sometimes allows a departure from this principle in the

[6] *National Director of Public Prosecutions v Basson*; 2002 (1) SA 419 (SCA) para 21.

interests of justice but in those exceptional circumstances the *ex parte* applicant assumes a heavy responsibility to neutralise the prejudice the affected party suffers by his or her absence.

[47] The applicant must thus be scrupulously fair in presenting her own case. She must also speak for the absent party by disclosing all relevant facts she knows or reasonably expects the absent party would want placed before the court. The applicant must disclose and deal fairly with any defences of which she is aware or which she may reasonably anticipate. She must disclose all relevant adverse material that the absent respondent might have put up in opposition to the order. She must also exercise due care and make such enquiries and conduct such investigations as are reasonable in the circumstances before seeking *ex parte* relief. She may not refrain from disclosing matter asserted by the absent party because she believes it to be untrue. And even where the *ex parte* applicant has endeavoured in good faith to discharge her duty, she will be held to have fallen short if the court finds that matter she regarded as irrelevant was sufficiently material to require disclosure. The test is objective.[7]

[48] As Waller J said in *Arab Business Consortium*,[8] points in favour of the absent party should not only be drawn to the Judge's attention, but must be done clearly:

'There should be no thought in the mind of those preparing affidavits that provided that somewhere in the exhibits or in the affidavit a point of materiality can be discerned, that is good enough.'

[49] The *ex parte* litigant should not be guided by any notion of doing the bare minimum. She should not make disclosure in a way calculated to deflect the Judge's

[7] See eg *Thomas A Edison Ltd v Bullock* [1912] HCA 72; (1912) 15 CLR 679 at 681-2 per Isaacs J; *Bank Mellat v Nikpour* [1985] FSR 87 (CA) at 89 per Lord Denning MR, at 92 per Donaldson LJ and at 93 per Slade LJ; *Siporex Trade SA v Comdel Commodities Ltd* [1986] 2 Lloyd's Rep 428 at 437 per Bingham J; *Arab Business Consortium International Finance and Investment Co v Banque Franco-Tunisienne* [1996] 1 Lloyd's Rep 485 (QB) at 489; *Aristocrat Technologies Australia Pty Ltd v Allam* [2016] HCA 3 para 15.

[8] Above fn 6 at 491.

attention from the force and substance of the absent respondent's known or likely stance on the matters in issue. Generally this will require disclosure in the body of the affidavit. The Judge, who hears an *ex parte* application, particularly if urgent and voluminous, is rarely able to study the papers at length and cannot be expected to trawl through annexures in order to find material favouring the absent party.

[50] In regard to the court's discretion as to whether to set aside an *ex parte* order because of non-disclosure, Le Roux J said in *Schlesinger v Schlesinger*[9]

'. . . [U]nless there are very cogent practical reasons why an order should not be rescinded, the Court will always frown on an order obtained ex parte on incomplete information and will set it aside even if relief could be obtained on a subsequent application by the same applicant.'

[51] This is consistent with the approach in English law, that if material non-disclosure is established a court will be 'astute to ensure that a plaintiff who obtains [an *ex parte* order] without full disclosure, is deprived of any advantage he may have derived by that breach of duty'.[10]

[52] As to the factors that are relevant in the court's exercise of its discretion whether or not to set aside an *ex parte* order on grounds of non-disclosure, in *NDPP v Phillips*[11] this court said that regard must be had to the extent of the non-disclosure, the question whether the Judge hearing the *ex parte* application might have been influenced by proper disclosure, the reasons for non-disclosure and the consequences of setting the provisional order aside.

The Minister's breach of disclosure duty

[9] *Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at 350B.
[10] *Brink's-Mat Ltd v Elcombe & others* [1988] 3 All ER 188 (CA) at 193 and cases there cited.
[11] *Phillips & others v National Director of Public Prosecutions* 2003 (6) SA 447 (SCA) para 29.

[53] The Minister's founding papers in the Redisa application run into almost 200 pages and the annexures another 800. It is voluminous and difficult to read. The case made out by the Minister and upon which the court granted the provisional order in the Redisa application was broadly this: Redisa and KT were involved in a covert scheme to divert and misappropriate public funds. They did this by witholding information from the Minister and the Department pertaining to the management contract between the parties and the financial interests that certain of Redisa's directors had in KT. The extent of the misappropriation became apparent only when Redisa presented its business plan to the Department on 23 May 2017 revealing that cash and reserves were being rapidly depleted, which prompted the *ex parte* application.

[54] The Minister's founding affidavit, however, fell far short of the disclosure required in *ex parte* proceedings. Where she made disclosure, it was one-sided. There was also material non-disclosure. She dealt at great length with the contents of the reports, adverse to Redisa, which she had obtained from iSolveit and WMB. To the extent that she disclosed responses from Redisa or reports it had obtained from PricewaterhouseCoopers (PwC), she glossed over them or picked out points that could be used against Redisa, largely ignoring the rest. In her treatment of minutes of operational and other meetings, she highlighted aspects she regarded as adverse to Redisa, disregarding everything else.

[55] The unrelentingly adverse picture the Minister painted of Redisa in her founding affidavit is not consistent with several public utterances she made, the latest barely weeks before she obtained the *ex parte* order, lauding the innovation and viability of the Plan. She did not disclose these public accolades. In her replying affidavit she said that her misplaced praise was based on false information supplied by Redisa in respect of its performance. This is difficult to credit. By the time the Minister made her last statement, on 10 May 2017, she had iSolveit's final report and both reports issued by the WMB. In fact, by then she had all the documents on which she relied in her founding affidavit apart from the presentation of 23 May 2017.

[56] But there are more serious instances of inadequate disclosure. These examples, by no means exhaustive, are taken from the Redisa application. Save in one respect, these criticisms apply equally to the KT application.

The Western Cape and Gauteng litigation

[57] As appears from the earlier narrative there were three instances where Redisa had instituted review proceedings against the Minister, one in the Western Cape, and two in Gauteng. In each case the review was prompted by Ministerial decisions that posed an existential threat to Redisa and were important to understand how and why Redisa was now facing a threat to its financial viability. Crucially they were part of a series of attempts by the Minister to take over or close down Redisa. She did not disclose this.

[58] The Western Cape litigation arose from the Minister's directive in which she purported to take control of Redisa. In granting interdictory relief the court issued a stinging rebuke for the way the Minister had conducted the litigation. It is discussed earlier in this judgment.[12] Subsequently the Minister withdrew the directive. In terms of an agreed order, Redisa then withdrew its review application on the basis that the Minister would pay its costs.

[59] The Minister referred to the directive briefly, only to say that a report, which Mr Erdmann had made to the Redisa Board claiming that he had provided the Department with the information requested in the directive, was false. She did not describe the contents of the directive and made no reference whatsoever to these court proceedings and their outcome.

[60] It was argued on the Minister's behalf that the litigation in the Western Cape Division was not germane to the relief claimed in the founding papers. But that is not

[12] Above para 36.

correct. The Minister's object in the liquidation application was to preclude Redisa's board from managing its business and to have Redisa's net assets transferred to the WMB. The directive was her first – in the event unsuccessful – attempt to seize control of Redisa. She must or ought reasonably to have realised that Redisa, if given notice of the liquidation application, would allege that the liquidation application was simply another stage in the Minister's unjustified attempt to remove Redisa from the management of waste tyres.

[61] The Gauteng litigation is also mentioned earlier in my judgment.[13] One major theme of the Minister's founding affidavit was Redisa's failure to align itself to the new funding model brought about by the promulgation of the Strategy and the amended regulations. Another was the scaling down of its operations because its funding had dried up, culminating in the notices Redisa circulated on 31 May 2016.[14]

[62] In her founding affidavit the Minister referred to a Redisa circular of 30 January 2017 in which Redisa had informed manufacturers and importers that they remained bound by the Plan and had to pay tyre levies in respect of the period up to and including January 2017 (the latter levies being due for payment in April 2017). She concluded her brief summary of the circular by saying: 'According to [Redisa], all of this had to be complied with pending litigation aimed at having the change in the funding model set aside'.

[63] What the Minister did not disclose, and which the Judge seized with this application would not have learnt without navigating her way to the annexed circular, was that by way of the circular Redisa had notified all interested parties that it had received legal advice that the government's decision to change the funding model was unlawful, irrational and procedurally unfair and that Redisa had already instituted two Gauteng applications in the latter part of 2016 to challenge the Strategy and amended regulations respectively. The Minister launched the

[13] Above paras 28, 38 and 39.
[14] Above para 43.

liquidation application about four months after the circular had been issued. She did not disclose that the review proceedings in Gauteng were reasonably advanced – she had already filed answering affidavits, albeit late, and Redisa was on the verge of filing its replying papers.

[64] The Minister did not alert the court to the fact that a provisional liquidation order would have had a material effect on the Gauteng litigation. It would mean that Redisa no longer had control of the litigation; that the litigation would be suspended until the appointment of final liquidators; and that whether the litigation continued at all would depend on liquidators who might have less incentive to do so than Redisa. Crucially it would have a direct impact on Redisa's funding and the case being made for its provisional liquidation. It follows that the Minister's contention in this court that the litigation was not a relevant matter for disclosure, has no merit.

[65] In the KT application the Minister did disclose the pending review proceedings in Gauteng, but not their consequences. By then the damage was done. It was Redisa's provisional liquidation, rather than KT's, that brought a halt to the Gauteng litigation. The fact that Redisa had been provisionally liquidated would have satisfied the Judge who heard the *ex parte* application for KT's provisional liquidation that it should follow suit.

The non-disclosures regarding the relationship between Redisa and KT

[66] As I pointed out earlier, the Minister's founding affidavit portrayed Redisa and KT as having been involved in a covert scheme to divert and misappropriate public funds. She claimed that Redisa had refused to provide a copy of the management contract to iSolveit and withheld information regarding the financial interests that certain of Redisa's directors had in KT. She repeatedly described the fees Redisa's directors earned as 'staggering'. These serious allegations would have weighed heavily with both Judges when they ordered the provisional liquidation of the two entities.

[67] The Minister failed to draw the court's attention to the fact that the Plan expressly contemplated, indeed required, that its operations were to be outsourced to a management company; that the Plan stated the reasons for this outsourcing; and that in terms of this model the management company would have extensive involvement in the implementation of the Plan.

[68] The Minister told the court, albeit in passing towards the end of her affidavit and after she had already poisoned the waters, that the Plan allowed for management fees of up to 20 per cent of Redisa's turnover but claimed instead that the management fees Redisa had paid to KT were about 26 per cent of gross revenue. This was wrong. It was common cause, once all affidavits had been filed, that the management fees came to around 18 per cent. The founding affidavit did not disclose that the assertion that KT had supposedly been paid 26 per cent was made in iSolveit's final report of 2 February 2017 and that – despite the lapse of four months until the launching of the *ex parte* application – the final report was not given to Redisa for comment. ISolveit's 26 per cent figure was supposedly based on Redisa's 2015 financial statements. ISolveit does not explain how it calculated its figure. The financial statements in question in fact reflect revenue from tyre levies of R575.065 million and management fees of R108.347 million (around 18.8 per cent of revenue).

[69] The Minister attached to her founding affidavit Redisa's audited financial statements for the year ended 28 February 2015 and noted as one of her concerns that the amount of R108.347 million was paid in management fees to KT. She did not attach or refer to the financial statements for the year ended 28 February 2014 that disclosed management fees of R107.572 million. The directors' report in the 2014 financial statements recorded the interest of the executive directors in KT and that they had recused themselves when the appointment was discussed. It was also stated that the interest had been declared to the relevant government institutions and industry bodies beforehand. The interest of the executive directors in KT was

repeated in a note saying: ‘Transactions with related parties take place on terms no more favourable than transactions with unrelated parties’.

[70] The 2015 financial statements repeated these disclosures, as did the 2016 financial statements. These recordals were not drawn to the court’s attention. The Minister also failed to present Redisa’s assertions on these matters in its letter of 30 November 2016 fairly. One of the comments in the interim iSolveit report on which Redisa commented was an assertion that Redisa had failed to provide a breakdown of the management fees paid to KT. In response, Redisa said that all this information had been made available to the Department in the monthly management meetings and monthly reports. Redisa attached a sample report. The income statement reflected revenue from tyre levies and the KT management fee. By simple calculation one can see that the management fee in each month was exactly 18 per cent of the revenue.

[71] The letter of 30 November 2016 dealt at length with the reasons for KT’s appointment and the way in which potential conflicts of interest were managed in accordance with good corporate governance, as KPMG had confirmed. Redisa also stated that the structure had always been fully disclosed to the Department. The question is not whether all of these statements are correct. In *ex parte* proceedings the Minister was bound to disclose them fairly.

[72] The Minister repeatedly claimed in her founding affidavit that Redisa had deliberately refused to supply iSolveit with a copy of the management contract. Having regard to all the affidavits, it is not possible to resolve the factual dispute as to whether the management contract was or was not supplied. What is clear is that the Minister failed, in her founding affidavit, fairly to present what she knew Redisa’s position to be. Among the material to which she did not draw the court’s attention were the following:

(i) The Minister claimed, with reference to the iSolveit interim report of May 2016, that Redisa had failed to supply proof of its contractual relationship with KT. ISolveit

did not in fact make such a complaint. The relevant part of iSolveit's report claimed that it had not been privy to the contractual agreements between Redisa and KT on the one hand and their staff and management on the other.

(ii) The reason that iSolveit did not claim to not have received the management contract may be explained by other documents that the Minister did not disclose. From a Redisa letter of 7 September 2016 the Minister attached to her founding affidavit, it appeared that one Shirish Bhoola attended at Redisa's offices over the period 16-18 March 2016 as part of the iSolveit investigation. Following the visit, Mr Bhoola e-mailed Ms Davidson, one of Redisa's directors on 30 March 2016, requesting a copy of KT's annual financial statements. On 1 April 2016 Ms Davidson replied, stating that KT and Redisa were independent companies and that their relationship was governed by a management contract, 'a copy of which you have seen'. KT's financial statements were thus not in Redisa's possession. Ms Davidson suggested that Mr Bhoola direct his enquiry to KT. In a follow-up e-mail, Ms Davidson supplied the relevant contact details.

(iii) The above e-mail exchanges were or should have been known to the Minister because they were attached as part of Redisa's letter of 30 November 2016. There is no indication that Mr Bhoola refuted them.

(iv) At a meeting on 15 July 2016 iSolveit requested Redisa to furnish copies of various documents. The management contract was among those requested. On 21-22 July 2016 Redisa supplied much of the requested information in a series of e-mails. Other documents were delivered by courier. Redisa's case is that the management contract was provided on this occasion and again on 7 September 2016 in response to a further complaint from the Department.

(v) In its letter of 30 November 2016, and by way of its interpolated comments on the Minister's letter of 31 October 2016, Redisa said that the management contract was provided to iSolveit during a site visit on 17 March 2016, resubmitted electronically on 21 July 2016 and again with the letter of 7 September 2016. The Minister did not draw the court's attention to these statements or to the fact that the statement regarding the March 2016 visit accorded with the e-mail exchanges between Mr Bhoola and Ms Davidson.

The presentation of 23 May 2017

[73] The Minister claimed in her founding affidavit that it was Redisa's presentation of 23 May 2017 that prompted her to bring the urgent *ex parte* liquidation application. The Minister's portrayal of this document was that it reflected an alarming and sinister dissipation of cash. The Minister said that this presentation reflected Redisa's cash balance to be only R150 million. The reason this was supposedly a cause of concern is that Redisa's presentation to the National Treasury in February 2016 had shown cash balances of R276.5 million, while Redisa's monthly report to the Department of February 2017 showed reserves as at January 2017 of R426.339 million, which did not include the further collection of levies payable in arrears for the period February-May 2017. This was even more disturbing, according to the Minister, bearing in mind that Redisa had always collected more than R151 million per month in tyre levies.

[74] These allegations would also have weighed heavily with the court considering the application for a provisional winding-up order. But they were seriously misleading and in certain respects plainly wrong, for the following reasons:

(i) The February 2016 presentation referred to cash on hand of R48.587 million and cash investments of R227.895 million, totalling R276.482 million. The presentation described the cash investments of R227.895 million as a fund required to meet Redisa's contingent liability (or remediation reserve) arising from its ongoing obligation to remediate tyres for which fees had already been received from producers.

(ii) The figure of R426.339 million as at January 2017 was the total of Redisa's current assets, comprising cash of R59.220 million, cash investments of R206.144 million and accounts receivable of R160.975 million. This appeared from the report. So, contrary to the Minister's assertion, the figure of R426.339 million indeed included the arrear levies (accounts receivable) that Redisa anticipated collecting over the period February to May 2017. Operational cash on hand was R59.220 million while the cash investments earmarked for the remediation reserve stood at R206.144 million.

(iii) As the Minister knew, Redisa had no further source of funding after 1 February 2017. Accordingly, its operating expenditure for the months February to May 2017 would in the first place have been met from the cash on hand in January 2017 and from cash received as producers paid the arrear levies.

(iv) What was left after these sources were exhausted were the cash investments (remediation reserve) which, as at January 2017, had been R206.144 million. This is precisely what Redisa's presentation of 23 May 2017 said: Redisa was 'currently operating off its remediation reserve'. This is the cash balance mentioned in the presentation.

(v) So, if any comparison was to be made, it should have been between a remediation reserve of R206.144 million as at January 2017 and a reduced reserve of R150 million as at 23 May 2017. Nothing sinister about that reduction has been demonstrated.

(vi) The Minister's statement that Redisa always collected more than R151 million per month in tyre levies is simply wrong. The Minister had multiple documents in her possession showing that monthly collections were around R40 million.

[75] During the presentation on 23 May 2017 Redisa told the Department that a detailed transitional business plan would be delivered as soon as possible. This was done on 31 May 2017 to support a request for transitional funding of R220 million. The Minister did not annex this document to her founding papers. In her replying affidavit she said she was unaware of it when she signed her founding affidavit due to her being abroad. However the Department should have drawn it to the attention of the Minister and her legal advisors. Objectively, it was a relevant document that had to be disclosed. At the hearing of the *ex parte* application on 1 June 2017 the Minister's counsel handed in supplementary affidavits attaching the circulars issued by Redisa on 31 May 2017. The circulars were deployed in support of the provisional liquidation. If those documents could have been submitted to the Judge, there was no excuse for the transitional business plan to not also have been handed up. The transitional plan set out at some length Redisa's assertions as to the successes it had achieved and the dire consequences for waste tyre management if it were not able to continue operating the Plan.

The Minister's letter of 30 May 2017

[76] Although the Minister attached her letter to Redisa of 30 May 2017 to her founding affidavit, she did not mention it in the body of the affidavit. In this letter she dealt at some length with her criticisms of Redisa. She attached to this letter a copy of iSolveit's final report of 3 February 2017 without explaining why she had waited four months to provide it to Redisa. She said it was her intention to consider the possible withdrawal of her approval of the Plan. She would in due course publish a notice to call for consultation on this intention. By way of her letter, she invited Redisa to participate 'in the public participation phase of this process and to timeously submit to the Department your comments in this regard'.

[77] As I said previously, the Minister signed her founding affidavit for Redisa's liquidation on the same day.[15] Clearly, Redisa would be unable to participate in the process envisaged by the letter for as long as it was under liquidation. It was at any rate the Minister's duty to disclose to the court that she had issued this invitation to Redisa. The court may well have sought an explanation for the apparently contradictory courses the Minister was following.

[78] There were other instances of material non-disclosure, for example in relation to:

(i) Supposedly excessive executive remuneration of Redisa's directors (the PwC benchmarking reports of June 2013 and the explanations contained in the letter of 30 November 2016 were not disclosed, including that executive remuneration had been set by a committee on which the executive directors did not serve).

(ii) The supposed unlawful exporting and insufficient local recycling demand to absorb all surplus tyres (the detailed minutes of a meeting held on 15 September 2016 were not annexed; the Minister made claims about the WMB reports where she wrongly confused capacity with demand).

[15] Above para 42.

(iii) The supposed unlawful establishment of the Product Testing Institute (PTI) in Coega (the Minister failed to disclose the report furnished to her in that regard in December 2013 and Redisa's repeated statements that the Minister had known about the project from at least that time; that in Redisa's view the project was permitted by clause 25.12 of the Plan; that it had been described by Redisa's non-executive chairman as 'one of the most fundamental outcomes of the Redisa legacy'; and that in a recent meeting with the Department the remark had been made that the establishment of the PTI was a game changer).

[79] I shall not burden this already burgeoning judgment with other instances of non-disclosure. However, before addressing the consequences of the Minister's failure to make proper disclosure, I must turn to the other issue identified earlier, namely the use of *ex parte* proceedings to obtain provisional orders.

Ex parte **proceedings**

[80] It is a fundamental principle of the administration of justice that relief should not be granted against a person without allowing such person to be heard. Very rarely is a case so urgent that there is no time to give notice. In other cases, there may be a reasonable and substantiated apprehension that giving notice would defeat the applicant's legitimate purpose in seeking relief, for example because the respondent would dispose of property or evidence that the applicant wishes to claim or have preserved. In cases of this kind a court may be willing to dispense with the need to give notice but this power should be exercised with great caution and only in exceptional circumstances.[16] The procedure adopted is even more objectionable if the applicant's case rests largely on untested hearsay, which it was in this case.

[81] This approach also accords with the way in which English courts deal with *ex parte* applications. In *Re First Express Ltd*[17] Hoffmann J said the following of the claimant's use of ex parte proceedings:

[16] *Knox D'Arcy Ltd & others v Jamieson & others* 1996 (4) SA 348 (SCA) at 379I-380B.
[17] *Re First Express Ltd* [1991] BCC 782 at 785D-G.

'I am firmly of the view that it was wrong for the application to be made *ex parte*. It is a basic principle of justice that an order should not be made against a party without giving him an opportunity to be heard. The only exception is when two conditions are satisfied. First, that giving him such an opportunity appears likely to cause injustice to the applicant, by reason either of the delay involved or the action which it appears likely that the respondent or others would take before the order can be made. Secondly, when the court is satisfied that any damage which the respondent may suffer through having to comply with the order is compensatable under the cross-undertaking or that the risk of uncompensatable loss is clearly outweighed by the risk of injustice to the applicant if the order is not made.

There is, I think, a tendency among applicants to think that a calculation of the balance of advantage and disadvantage in accordance with the second condition is sufficient to justify an *ex parte* order. In my view, this attitude should be discouraged. One does not reach any balancing of advantage and disadvantage unless the first condition has been satisfied. The principle *audi alteram partem* does not yield to a mere utilitarian calculation. It can be displaced only by invoking the overriding principle of justice which enables the court to act at once when it appears likely that otherwise injustice will be caused.'

[82] This statement resonates in this case where the Minister's counsel contended that 'the *ex parte* bird had flown' and that no purpose would be served by discharging the provisional order on this ground. It was contended that a punitive costs order may be more appropriate in the circumstances. But the law would be deficient if the fundamental principle of *audi alteram partem* had to yield to a mere utilitarian analysis after the fact.

[83] Since this court is determining appeals brought against final liquidation orders, the question arises whether – if the Minister's recourse to *ex parte* proceedings was unjustified – there is anything that the Judge in the court a quo could and should have done about the fact that other single Judges in his division had granted *ex parte* provisional orders. It was argued on behalf of the Minister that the court a quo could not have discharged the provisional orders on this basis. He could not, the argument continued, sit on appeal against the decisions of his colleagues.

[84] In my view the submission is unsound. Given the centrality of the *audi* principle, which now gains added force from s 34 of the Constitution, it would be most unsatisfactory if, after hearing the respondent, a Judge could not discharge a provisional order obtained through the impermissible use of *ex parte* proceedings. Often an inappropriate recourse to ex parte proceedings is accompanied by inadequate disclosure. However, even where the applicant's disclosure cannot be faulted, her inappropriate use of ex parte proceedings should attract the same disciplinary jurisdiction. The *ex parte* litigant's duty of the utmost good faith requires not only complete and fair disclosure; it imposes a more fundamental obligation to give notice to the other side unless, objectively, the absence of notice is justified.[18]

The Minister's recourse to *ex parte* proceedings

[85] Even taking the founding papers in isolation, the Minister failed woefully to justify the *ex parte* proceedings. Her expressed concerns about the unlawful dissipation of funds were conclusions without factual foundation. Even if she had reason to suspect that Redisa's funds had in the past been used for impermissible purposes, it was entirely fanciful to suppose that, in the few days that might pass between the service of the application and the hearing of an application for provisional orders, Redisa would make illicit payments to KT or others. Its directors would have known that illicit payments made after service of the application would readily be exposed. Even if some temporary *ex parte* relief was justified (which it was not), it should have been minimally invasive. The Minister could have asked the court a quo to issue a rule calling on Redisa and KT to show cause why they should not be provisionally or finally wound up, with an interim *ex parte* order that pending the return day Redisa was to make no payments to KT and that Redisa and KT were to make no payments to KT's shareholders.

[18] Although this court has not yet had occasion to deal with this issue, there is authority in the respective divisions of high courts for this approach: see eg *Van Zyl v Siyaya Engine Rebuilders CC & another* [2016] ZAWCHC 137 paras 5-10 (a two-judge decision); *Molete & another v Molete & others* [2016] ZAGPPHC 258 paras 23-26 (a full court decision); *Van As No & others v Jacobs NO & others* [2017] ZAGPPHC 1162 paras 45-49. The very point raised by the Minister's submission was confronted and rejected in the Hong Kong decision *Seapower Resources International Ltd & others v Lau Pak Shing & others* [1993] HKCFI 242, an approach endorsed by the Hong Kong Court of Appeal in *Luck Continent Ltd v Leonora Yung & others* [2010] HKCA 312 paras 16-19 (and see also *Yifing Developments Ltd v Liu Chi Keung Ricky & others* [2014] HKCFI 1375; [2014] 4 HKLRD 483 para 15).

[86] The Minister's own conduct shows that the iSolveit reports did not raise sufficient concerns to cause her to act urgently or *ex parte*. The report of 3 February 2017 recommended that she consider appointing a curator or administrator for Redisa so that the funds collected were used properly; not that it be urgently liquidated. She sought to justify the use of urgent *ex parte* proceedings solely with reference to the presentation of 23 May 2017. As I have said, she drew wrong and unjustified conclusions from that presentation, and misrepresented these to the court.

Conclusion in relation to the *ex parte* proceedings

[87] A trial court has a discretion to discharge a provisional order in circumstances where the use of *ex parte* proceedings was unjustified or where there has been non-disclosure. This is a discretion in the true sense, meaning that on appeal a court will only interfere if the trial court exercised the discretion on a wrong principle or made a decision that was not reasonably open to it.

[88] In regard to non-disclosure, the court a quo said laconically that 'nothing turns on this point', adding that it was Redisa and KT, rather than the Minister, who had been 'economical with the truth'.[19] It is apparent that the learned Judge exercised no discretion at all. If he did, it was on wrong principle. To say that nothing turns on non-disclosure is to disregard the body of law I have summarised regarding an *ex parte* litigant's duties and the consequences of violating them. And even if the answering papers of Redisa and KT could be typified as lacking in candour, this was irrelevant to the question whether the Minister had failed to make proper disclosure in her founding affidavit.

[19] Above fn 1 *Minister of Environmental Affairs v Recycling and Economic Development Initiative of South Africa NPC* para 192.

[89] In regard to the use of *ex parte* proceedings, the court a quo said that the Minister had made out a sufficient case that urgent and drastic action was needed in view of the 'underhand and secretive manner' in which Redisa's executive directors had acted.[20] In my view, and having regard to the rules in application proceedings, this was not a conclusion that could reasonably be reached on the papers. On the contrary, I am firmly of the view that it was an abuse to seek provisional orders *ex parte*.

[90] The Minister's skewed disclosures and non-disclosures were extensive. They related to matters that must have influenced the Judges hearing the *ex parte* applications. Indeed I do not think *ex parte* orders would have been granted if fair disclosure had been made. The Minister gave no satisfactory explanation for her inadequate disclosures and material non-disclosures.

[91] The court a quo delivered judgment about three and a half months after the provisional orders were granted. There is nothing to indicate that discharging the provisional orders would have been an inappropriate or disproportionate response to the abuse of *ex parte* proceedings and the inadequate disclosure. I have no doubt that this is a case where the court a quo should have vindicated the principles of *audi alteram partem* and *uberrima fides* by discharging the provisional orders. The liquidators have presumably been maintaining Redisa and KT in a holding position pending the outcome of this appeal. There is no reason why we should not now make the orders the court a quo should have made.

[92] Although this disposes of the appeal, and it is not strictly necessary to deal with the other grounds of appeal, namely whether it was just and equitable to wind up the companies; and the Minister's standing in terms of s 157(1)*(d)* of the 2008 Act, it is desirable to deal with both. This is because the court a quo upheld the Minister's contention that Redisa and KT were involved in an illegal operation to siphon off public funds, which justified their winding-up. This is obviously a

[20] Ibid para 199.

profoundly serious finding against both companies; their directors; and in KT's case their shareholders as well. The locus standi point is novel and must also be dealt with as it will bear on other applications in which the government seeks to rely on this provision in order to wind-up solvent companies.

Whether the winding-up was just and equitable

[93] For present purposes I shall assume, in favour of the Minister, her standing to bring the present proceedings. To assist the reader it is necessary to recall the case made out by the Minister in her founding affidavit. It was broadly this: First, Redisa's directors had not disclosed their relationship with or significant shareholding in KT. In particular, they withheld the management contract and other information pertaining to the financial interests that Redisa's directors had in KT. This enabled them to misappropriate public funds by using KT as their vehicle to unlawfully channel funds collected by Redisa under the Plan for their personal benefit. Secondly, Redisa's presentation of their business plan on 23 May 2017 revealed a rapid depletion of its cash and reserves.[21]

[94] I pointed out that these allegations were either incorrect or unsustainable on the papers having regard to the rule on the treatment of evidence in application proceedings. In particular I have found that:

(i) Redisa reported regularly to the Minister on its finances and the extent of the independence of its board, receiving clean audits every time.[22]

(ii) KT was appointed as the management company under the Redisa Plan, and three of Redisa's executive directors are indirect shareholders of KT. There is no overlap between the two boards.[23]

(iii) The Minister and the Department were aware of the management contract between Redisa and KT throughout. They were also aware that the management

[21] Above paras 5 and 53.
[22] Above para 12.
[23] Above para 20.

fees the latter had charged fell within the 20 per cent of Redisa's revenue allowed in terms of the contract.[24]

(iv) While there was a dispute as to whether Redisa had withheld the management contract from the Minister it is unlikely that Redisa would have done so deliberately. The Plan envisaged just such a contract. Its existence was disclosed in the financial statements. The management fee stipulated in the contract was in line with the Plan.[25] But in any event, to the extent that there was a dispute of fact on the papers as to whether Redisa had given the management contract to iSolveit and the Department, this dispute had to be resolved in favour of Redisa.[26]

(v) The Minister and the Department were aware that Redisa's directors had interests in KT through their shareholding.[27]

(vi) The Minister's portrayal of the business plan that Redisa presented on 23 May 2017, which prompted her to bring the *ex parte* application, and which according to her reflected alarming and sinister dissipation of cash, was not only misleading, but wrong.[28]

(vii) Redisa's executives' remuneration was set by an independent committee on which the executive directors did not serve. They were not excessively remunerated according to the PwC benchmarking reports of June 2013 and the explanations contained in the 30 November 2016 letter.[29]

The Minister's new case

[95] Faced with a comprehensive refutation of the case made out in her founding papers, the Minister changed tack, realising that the management contract, in terms of which Redisa's payments to KT were made, posed an insurmountable hurdle to the thesis that funds were unlawfully diverted. The Minister's new case, not made out on the papers, but presented orally in the court a quo and again on appeal, was that

[24] Above para 18.
[25] Above para 70.
[26] Above para 25.
[27] Above para 21.
[28] Above paras 41, 74 and 75.
[29] Above para 78.

Redisa's directors had abused KT's corporate personality and contravened item 1(3) of Schedule 1 of the 2008 Act, and the equivalent provisions in Redisa's MOI.

[96] The gravamen of the case, as I understood it, was this: First, KT devised a scheme to have the Plan approved by the Minister. Its purpose was to improperly divert public funds earned by Redisa to KT's shareholders by receiving management fees under the management contract it had concluded with Redisa before the Plan had been approved. The management agreement was therefore not a bona fide agreement as contemplated in item 1(3) of Schedule 1 of the 2008 Act.

[97] Second, Redisa's executive directors, who indirectly own 92.5 per cent of KT,[30] abused KT's corporate personality by unlawfully diverting public funds generated by Redisa to themselves. This was done by: Paying KT a management fee of some R430 million; renting office space from KT, which in turn rents the same office space from Nine Years Investments (Pty) Ltd (NYI); Redisa paying R97 million to KTC to acquire assets including the NCCS to the value of some R76 million, even though it through the MOI contemplated that the computer systems would be owned by Redisa and managed by the management company.

[98] Third, the income derived indirectly by Redisa's executive directors, as shareholders of KT was not justifiable and contravened item 1(3) of Schedule 1 of the 2008 Act; and, finally, Redisa and KT had for all intents and purposes merged and that the persons in control of Redisa were effectively also in control of KT.

[99] The foundation for this case was the 'new substantiating evidence' raised only in reply based on the findings of the A@L referred to earlier.[31] However, before I

[30] Mr Erdmann and Ms Kirk own 90 per cent of Nine Years Investments (Pty) Ltd which in turn owned 75 per cent of KT. The other 25 per cent of KT was owned by Ms Davidson indirectly through a company called Avranet (Pty) Ltd. Mr Crozier, who was not a director of Redisa, had an indirect shareholding in KT of 7.5 per cent by virtue of owning 10 per cent of Nine Years Investments (Pty) Ltd.

[31] Above para 18.

consider this report it is necessary consider the alleged unlawfulness of the management contract as it seems to me that it constitutes the foundation of the Minister's case to wind up the two entities. Closely related to this question is the contention that Redisa's directors abused KT's corporate personality.

The abuse of corporate personality and contravention of item 1(3) of Schedule 1 of the 2008 Act

[100] Item 1(3) of Schedule 1 reads as follows:

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

(a) as reasonable –

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

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

(b) as a payment of an amount due and payable by the company in terms of a bona fide agreement between the company and that person or another;

(c) as a payment in respect of any rights of that person, to the extent that such rights are administered by the company in order to advance a stated object of the company; or

(d) in respect of any legal obligation binding on the company.' (Emphasis added.)

[101] Simply put, a non-profit company (such as Redisa) may not transfer any portion of its income or assets to another person unless it does so in accordance with a bona fide agreement between the parties and the objects of the company. So if, as the Minister now contends, the agreement was not bona fide there would be no lawful basis for any of Redisa's payments to KT spanning five years.

[102] I am afraid that this case – that the scheme was developed by the creators of the Plan to misappropriate public funds – was neither pleaded in the founding affidavit nor in reply. It does not get out of the starting blocks. First, the Minister would have had to allege and prove that the management contract between Redisa (a non-profit company) and KT was not a bona fide agreement as envisaged in item 1 of Schedule 1 of the 2008 Act, and second that its true purpose was to divert funds to Redisa's executive directors rather than to provide fair remuneration for management services to be provided by KT.

[103] Not only was this case not pleaded but to reach this conclusion a court would have to be satisfied that there is no prejudice to the parties and that the order sought – the winding-up of the two entities – can be justified on the undisputed facts. In addition the more serious the allegation – such as a conspiracy to defraud the public purse – the stronger must the evidence be before a court will find the allegation established on a balance of probability.[32] None of these requirements were satisfied and the court a quo was not justified in ignoring these principles in coming to the conclusions it did.

The A@L report

[104] I now consider the A@L report from which the Minister found new substantiating evidence to support her new case.

[105] Following receipt of Mr Erdmann's and Mr Crozier's answering affidavits on behalf of Redisa and KT respectively on 20 June 2017, the Minister's reply was due on 30 June 2017. But it is quite evident that she was unable to reply to their answers with the existing evidence at hand.

[32] Compare *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA) paras 26 and 27.

[106] So, on 23 June 2017, which was a Friday, she penned a letter to the provisional liquidators demanding that they deliver urgently, within 48 hours, ie, by Sunday at 14h00, 'any provisional report of the forensic auditor commissioned by the provisional liquidators and any other available information/documentation that would enable an assessment . . . of the Redisa Plan'. She threatened that non-compliance with her demand would be an offence under the Waste Tyre Regulations. The provisional liquidators commissioned A@L for this purpose. It is perfectly clear that the Minister's object at this stage was not to obtain any information for purposes of fulfilling her administrative functions in relation to the Plan but rather to obtain urgent information she could use in her replying papers.

[107] The deadline of 25 June was not met. A@L prepared, what it called a 'cursory and preliminary report' in the limited time available on 28 June 2017. The authors of the report say that they had not 'provided the opportunity for the various role players identified in the report to provide their explanations'. In other words they had not spoken to Redisa or KT's directors. But even worse, they had not even 'studied' the opposing affidavits in the two liquidation applications.

[108] The report therefore has little evidential value. It identifies various supposedly suspicious or unlawful transactions without any regard to Redisa's explanations. Redisa's rebutting affidavit also responded to A@L's findings comprehensively. The court a quo ignored this evidence and did not deal with explanations for the alleged unlawful payments. The following examples demonstrate this:

(i) The accommodation costs that were referred to as being suspicious were squarely addressed in Redisa's rebuttal. There, Mr Erdmann explained that Redisa's board had decided that he should relocate to Cape Town, and that a portion of the lease costs should be paid by Redisa.

(ii) The payments made by Redisa in respect of security upgrades – also flagged as suspicious and held by the court a quo to be evidence of a contravention of item 1(3) of Schedule 1 of the Companies Act – were also explained. Mr Erdmann testified that he and other directors of Redisa had received death threats, and that

ENS Forensic Services had advised that security measures be put in place at their residences. The security upgrades were a risk mitigation exercise paid for by Redisa. Mr Erdmann further explained that A@L had got its facts wrong in respect of two properties: no security upgrades were made for a property owned by the HE and ME Family Trust, and Ms Kirk's residence did not receive security upgrades as she lived in a security estate.

(iii) The issue of Redisa's intellectual property was also addressed. Mr Erdmann testified that KT paid for its Oracle computer system (being Oracle software and computer hardware), and that NYI, which is KT's majority shareholder, had laid claim to the underlying intellectual property, which it had developed. There was nothing untoward about this at all.

(iv) The allegation that KT's shareholders received unlawful dividend payments is similarly without any foundation. As stated, it is common cause that KT received fees strictly in accordance with the Plan and, as contemplated, was reimbursed for start-up costs associated with its initial implementation. The fact that KT, which had duly discharged its functions under the Plan, paid dividends to its shareholders was not unlawful. Its shareholders were entitled to receive dividends. It is perhaps worth mentioning that, according to the A@L report, Redisa paid KT management fees of R432.832 million over the years 2014-2017 and over the same period KT paid its shareholders dividends totalling R84 million, ie dividends equal to around 19.4 per cent of the management fees. Since the management fees totalled 18 per cent of the tyre levies collected, a net amount of around 3.5 per cent of the tyre levies ultimately found its way to KT's shareholders as dividends.

(v) The authors purport to find that the executives of Redisa had abused their fiduciary duties because they had not disclosed the relationship between the executives of Redisa and the management of KT, which would have created a conflict of interest. I have shown earlier that this is simply wrong.[33] Both Mr Erdmann and Mr Crozier's affidavits and the documentary evidence show that the Minister and Department were aware of the intended structure and roles of Redisa and KT and that Redisa's executive directors had interests in KT as (indirect) shareholders.

[33] Above paras 21 and 22.

[109] In short there was not one iota of evidence, let alone undisputed facts, to support the allegation that the management agreement was not a genuine, bona fide agreement and that the payments made by Redisa to KT were done in accordance with its tenor and in line with the objectives of the MOI or that the setting of tyre levy at R2.30 was a manipulation. It was not shown that Redisa or KT would have known, when the tyre levy was determined and the management agreement concluded, precisely how the implementation of the Plan would pan out. They were working on best estimates. Depending on the costs involved in administering the Plan (which were for KT's account), and the time, effort and expense that Mr Erdmann and others had put into developing and having it approved by the Department these estimates may have turned out to be more conservative or generous.

[110] The related claim regarding the abuse of KT's corporate personality must also founder:

(i) Common ownership and control of two entities may demonstrate that the separate legal personalities of the two entities are being abused.

(ii) In this case: (a) Redisa has no shareholders or members, while KT is privately owned; and (b) Redisa and KT have no common directors. There is no common ownership and control.

(iii) The Plan – which was approved by the Minister – expressly provides for the outsourcing of certain functions by Redisa to a third-party. Agreements of this nature, including with a related entity, are commonplace. The fact that a service provider, by agreement with its client, performs functions on behalf of the client does not render the service provider the client's alter ego.

(iv) The existence of the management agreement between Redisa and KT is consistent with the fact that they are two separate entities and properly treated as such by each other. KT has not received any payments from Redisa other than what is provided for under the Plan.

Loss of the substratum of Redisa and KT

[111] As to the second ground for its holding that it was just and equitable to wind up these entities, the court a quo found that, in Redisa's case, there had been a gradual disappearance of its reserves and that it had already decided to 'wind down' its operations as from 1 June 2017, as appeared from the presentation of its business plan on 23 May 2017. I showed earlier, regarding the alleged disappearance of Redisa's reserves, that the Minister had misconstrued the figures given at the presentation. And, also that the Minister's reliance on Redisa's statement that it would be winding down was misleading, because it was the direct result of her actions in removing Redisa's ability to collect the waste management fee.

[112] The court found that once Redisa's substratum had fallen away, KT should follow because it, in effect, had no independent existence without Redisa. I have already found that there was no proper ground to order the winding-up of Redisa. It follows, on the court a quo's incorrect reasoning, this was not a proper ground to wind up KT either.

[113] But even if Redisa's winding-up was justified on this ground, KT's was not. In KT's case the Minister was a stranger to the company and sought its winding-up against the wishes of its incorporators. No consideration was given to KT's shareholders,[34] or the impact of its winding-up on the Plan, or to the fact that the provisional liquidators might wish to continue with the management contract. In addition, no consideration was given to KT's assets, capital reserves or its intellectual property. Even worse, the court a quo wrongly ordered its assets and liabilities, and also its rights and obligations to be transferred to the WMB, which I have mentioned was abandoned after the judgment.

[114] The fact is that KT's controllers were entitled to continue to utilise the company for such lawful purposes as fell within its objects. It was not alleged or

[34] In *Robson v Wax Works* 2001 (3) SA 1117 (C) at 1130H-J it was held that it would generally be inappropriate for a court to wind up a company against the interests of its shareholders.

proved that KT's MOI limited its business to administering the Plan. The fact that hitherto the incorporators chose to confine KT's operations to managing the Plan does not mean that that they could be compelled, against their wishes, so to confine its operations in the future. There might be any number of reasons, including tax and reputational reasons or simple convenience, for wishing to make continued use of the company. The winding up of a solvent company on the basis that its substratum has disappeared is the sort of ground a shareholder advances where he finds that the business which he and his 'partners' chose to conduct through a corporate vehicle can no longer be pursued.[35] In those circumstances he may not wish to remain bound to his 'partners' for purposes they did not contemplate. The substratum argument is not plausibly open to an outsider.

Conclusion on just and equitable grounds

[115] The Minister has failed to show that the management contract between Redisa and KT was not *bona fide*; or that the payments made to KT in accordance with the agreement were unlawful; or that a feared loss of their substratum justified their winding up. To this I should add that another consideration for not winding up these companies on just and equitable grounds, and therefore discharging the provisional orders, was the possible impact of Redisa being successful in its Gauteng litigation against the Minister, which would restore its ability to fund its operations.

[116] There is one more reason why it was not just and equitable to wind up the appellants: the court had to be satisfied that the Minister had no alternative means to address complaints before resorting to the drastic expedient of winding up the appellants.[36] The court a quo did not address this requirement. It is discussed further in the following section.

[35] Cf *Taylor v Welkom Theatres (Pty) Ltd & others* 1954 (3) SA 339 (O) at 350A-351A; *Pienaar v Thusano Foundation & another* 1992 (2) SA 552 (BG) 582G-H; *Apco Africa (Pty) Ltd & another v Apco Worldwide Inc* 2008 (5) SA 615 (SCA) para 18.
[36] *Muller v Lilly Valley (Pty) Ltd* 2012 1 All SA 187 (GSJ).

The Minister's standing in terms of s 157(1)*(d)* of the 2008 Act

[117] This bring me to the last issue, whether the Minister was properly held to have standing to institute these proceedings in the 'public interest' in terms of s 157(1)*(d)* of the 2008 Act. This is a matter of considerable public importance and has important consequences for the winding-up of solvent companies.

[118] The Minister brought the winding-up applications in terms of s 157(1)*(d)* read with s 81(1)*(c)*(ii), which entitles a creditor to apply to court to wind up a company on the ground that it is just and equitable to do so, and s 81(1)*(d)*(iii), which permits the company, a director or a shareholder to apply for the winding-up on the same basis.

[119] The Minister contended, and the court a quo agreed, that s 157(1)*(d)* confers on her, as the Minister responsible for the Plan, standing to apply for the winding-up of the appellants. And having come to this conclusion the court found that the 'Minister has made out a case in substitution of the persons mentioned' in ss 81(1)*(c)*(ii) and 81(1)*(d)*(iii) to wind up the appellants.[37]

[120] But the Minister is not a creditor, director nor shareholder of Redisa or of KT, and does not purport to represent their interests or step into their shoes. She has no standing to wind up a company in the interests of any of these persons or for the companies themselves. Counsel for the Minister, therefore, quite properly abandoned this contention in this Court.

[121] The appellants' argument before us was that a public-interest litigant with standing in terms of s 157(1)*(d)* is entitled to rely on any of the substantive grounds for liquidating a solvent company set out in s 81(1) of the Act. Such a litigant does not step into the shoes of the class of persons specified in s 81(1) (creditor, member, director or company as the case may be) and the procedural limitations applicable to

[37] Judgment fn1 paras 216 and 218.

the specified class do not apply to the public-interest litigant. Because s 81(1) in several places provides for the liquidation of solvent companies on the just and equitable basis, the Minister – if public-interest standing were conferred on her – would be entitled to invoke the just and equitable grounds without any limitation to that concept as it might apply to a creditor, shareholder, director or the company itself. So all that the public interest litigant has to show in these circumstances is that it is just and equitable, and in the public interest, to wind up the company. I shall assume that this argument is correct.

[122] The question, therefore, is whether s 157(1)*(d)* permits the Environment Minister the right to apply to court to wind up solvent companies in the public interest on the grounds that it is just and equitable to do so in terms of s 81.

[123] Under the 1973 Act the Minister of Trade and Industry (for convenience hereafter 'the Trade Minister') had the power to institute winding-up proceedings against a company, but only after a court had declared that the affairs of the company required investigation. An investigation would be ordered if the circumstances suggested, among others, that the business was formed or being conducted for any 'fraudulent or unlawful purpose.'[38] And if it appeared to the Trade Minister from the report following the investigation that it was expedient to wind up the company, the Minister could apply to the court for its winding-up on the ground that it was just and equitable to do so.[39] The Trade Minister's power to investigate the affairs of a company was described as 'an important regulatory mechanism for ensuring probity in the management of companies' affairs . . . in the public interest'.[40]

[124] In addition, if it appeared from the report that proceedings ought to be instituted in the public interest for the recovery of damages in respect of fraud, delict or other misconduct in connection with the promotion or formation of a company or the management of its affairs, or for the recovery of any property of the company that

[38] Section 258(2)*(a)* of the Companies Act 61 of 1973 (the 1973 Act).
[39] Section 262(1) of the 1973 Act.
[40] P M Meskin *Henochsberg on the Companies Act* 61 of 1973 vol 1 Service Issue 8 at 495.

had been misapplied or wrongfully retained, the Trade Minister could do so in the name of the company.[41]

[125] It is apparent, therefore, that there was no general power for the winding-up of a company in the public interest. Only the Trade Minister, purportedly acting in the public interest, could apply to court for a company to be wound up in the circumstances discussed above. And then only after it had appeared from an inspection report that this was warranted. The inspection report was therefore a pre-condition for the exercise of this power. Those provisions have been repealed in the 2008 Act.

[126] There is no provision in the 2008 Act giving the Trade Minister the power to apply to wind up a company, whether the company is insolvent or solvent. The Minister may only, in terms of ss 190(2)*(b)*(i) and 190(2)*(b)*(ii) of the 2008 Act, direct the Companies and Intellectual Property Commission (the Commission) to investigate contraventions of the 2008 Act, which presumably include the type of allegations with which we are concerned.

[127] The Commission's power to investigate contraventions of the 2008 Act, as with the Trade Minister's power to conduct investigations under the 1973 Act, is a regulatory mechanism to promote probity in the management of a companies' affairs in the public interest. The Commission also has the power, as the Trade Minister had under the 1973 Act, to apply for the liquidation of a solvent company, on the ground that the company, or whoever controls it, is acting in a fraudulent or otherwise illegal manner.[42]

[128] If there is no specific provision giving the Trade Minister the power to wind up a solvent company, and that power has been given to the Commission (and the

[41] Section 262(2)*(a)* of the 1973 Act.
[42] Section 81(1)*(f)* of the 2008 Act. It is unclear whether the Commission has this power in respect of insolvent companies, as the 1973 Act deals with their winding-up.

Panel),[43] the question arises whether the Trade Minister, who is responsible for the administration of the 2008 Act, may invoke s 157(1)*(d)* – the public interest provision – for this purpose. If that question is answered in the affirmative it may well be that the Environment Minister also has that power, as a representative of the government. By parity of reasoning, if that question is answered negatively, it is unlikely that the Environment Minister may invoke this power either.

[129] Section 157(1)*(d)* permits 'a person' 'acting in the public interest', 'with leave of the court' to apply for 'remedies'. I shall assume, for present purposes, that 'remedies' include winding up a solvent company, although this is by no means clear. The question is whether 'a person' includes the Trade Minister. The answer appears to be 'no' because as I have pointed out the power of the Trade Minister to apply to wind up companies in the 1973 Act was removed and given to the Commission and the Panel in the 2008 Act.

[130] The 2008 Act defines 'a person' as including a juristic person. This suggests that only natural and juristic persons have standing in terms of s 157(1)*(d)*, not ministers on behalf of the government. In *Union Government v Rosenberg*,[44] the Appellate Division was faced with precisely this question. In a unanimous judgment, the court held that a 'person' does not ordinarily signify 'Government' and as used in the statute in issue in that case it did not do so either. The other indication that fortified this view, the court said, was in the Interpretation Act 5 of 1910 where, in s 3, a person was defined to include – '(a) any divisional council, municipal council, village management board or like authority; or (b) any company incorporated or registered as such under any law; or (c) any body of persons corporate or unincorporate'. No mention was made of the government. The Interpretation Act 33 of 1957 retains these categories, also without mentioning the government. The

[43] The Takeover Regulation Panel established under s 196 of the 2008 Act
[44] *Union Government v Rosenberg (Pty) Ltd* 1946 AD 120 at 126-127; *Minister of Water Affairs and Forestry & others v Swissborough Diamond Mines (Pty) Ltd & others* 1999 (2) SA 345 (T) at 353B-C.

presumption is that the definition of 'person' was re-enacted in 1957 with knowledge of the authoritative decision in *Rosenberg*.[45]

[131] Of course, there may be indications in the statute itself that 'person' includes the government as represented by a minister. But there is no such indication in the 2008 Act. It is apparent that when a minister or regulatory agency established by statute exercises a public power or performs a public function they do so per se in the public interest. When the lawmaker intends to give a minister the power to bring proceedings specifically in the public interest, it says so.[46] There is no indication in the Act, which, I have said, only gives the Trade Minister the power to direct the Commission to investigate contraventions of the Act, that the Trade Minister may apply for remedies also as a 'person' acting in the public interest outside of the regulatory framework in Chapter 7 of the 2008 Act.[47] If that is so it seems unlikely that any other government minister has that power either. The conclusion is that the Environment Minister could not rely on s 157(1)*(d)* to wind up the appellants in the public interest.

[132] But even if we assume that the Environment Minister had the right to approach a court under s 157(1)*(d)* of the 2008 Act to apply for the winding-up of a solvent company, the issue is whether the court a quo (and the court that granted the provisional orders) was correct in conferring standing on her for this purpose.

[133] Section 157 of the 2008 Act provides for 'extending standing to apply for remedies'.[48] It must be read together with s 156, which is headed 'alternative

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[45] See *Ex Parte Minister of Justice: In re R v Bolon* 1941 AD 345 at 359; *S v Theron* 1984 (2) SA 868 (A) at 877B-878C.

[46] See above para 122. There are various statutes in which government agencies are expressly given power to bring liquidation proceedings, for example 68(1) of the Banks Act 94 of 1990, s 75(2) of the Mutual Banks Act 124 of 1993, s 30 of the Cooperative Banks Act 40 of 2007, s 38B of the Financial Advisory and Intermediary Services Act 37 of 2002, s 42 of the Long-Term Insurance Act 52 of 1998, s 41 of the Short-Term Insurance Act 53 of 1998 and s 100 of the Financial Markets Act 19 of 2012.

[47] See also s 168(3), which permits the Minister to direct the Commission, as contemplated in s 190(2)*(b)*, or the Panel to investigate – (a) an alleged contravention of the Act; or (b) other specified circumstances.

[48] '**157 Extended standing to apply for remedies**

procedures for addressing complaints or securing rights'.[49] Section 156 addresses the fora in which a person seeking relief under s 157 may seek redress for a contravention of the 2008 Act. These are the Commission, the Panel, the Tribunal and the courts. Section 157(1)*(d)* allows a person 'acting in the public interest, with leave of the court' to bring a matter before any of these fora.

[134] In *Ferreira v Levin*[50] the Constitutional Court set out the criteria for evaluating whether an applicant should be given leave to act in the 'public interest'. In the

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(1) When, in terms of this Act, an application can be made to, or a matter can be brought before, a court, the Companies Tribunal, the Panel or the Commission, the right to make the application or bring the matter may be exercised by a person-
(a) directly contemplated in the particular provision of this Act;
(b) acting on behalf of a person contemplated in paragraph *(a)*, who cannot act in their own name;
(c) acting as a member of, or in the interest of, a group or class of affected persons, or an association acting in the interest of its members; or
(d) acting in the public interest, with leave of the court.
(2) The Commission or the Panel, acting in either case on its own motion and in its absolute discretion, may-
(a) commence any proceedings in a court in the name of a person who, when filing a complaint with the Commission or Panel, as the case may be, in respect of the matter giving rise to those proceedings, also made a written request that the Commission or Panel do so; or
(b) apply for leave to intervene in any court proceedings arising in terms of this Act, in order to represent any interest that would not otherwise be adequately represented in those proceedings.
(3) For greater certainty, nothing in this section creates a right of any person to commence any legal proceedings contemplated in section 165 (1), other than-
(a) on behalf of a person entitled to make a demand in terms of section 165 (2); and
(b) in the manner set out in section 165.'

[49] '**156 Alternative procedures for addressing complaints or securing rights**
A person referred to in section 157 (1) may seek to address an alleged contravention of this Act, or to enforce any provision of, or right in terms of this Act, a company's Memorandum of Incorporation or rules, or a transaction or agreement contemplated in this Act, the company's Memorandum of Incorporation or rules, by-
(a) attempting to resolve any dispute with or within a company through alternative dispute resolution in accordance with Part C of this Chapter;
(b) applying to the Companies Tribunal for adjudication in respect of any matter for which such an application is permitted in terms of this Act;
(c) applying for appropriate relief to the division of the High Court that has jurisdiction over the matter; or
(d) filing a complaint in accordance with Part D of this Chapter within the time permitted by section 219 with-
(i) the Panel, if the complaint concerns a matter within its jurisdiction; or
(ii) the Commission in respect of any matter arising in terms of this Act, other than a matter contemplated in subparagraph (i).'

[50] *Ferreira v Levin NO & others; Vryenhoek & others v Powell NO & others* 1996 (1) SA 984 (CC) para 234. '. . . This Court will be circumspect in affording applicants standing by way of s 7(4)*(b)*(v) and will require an applicant to show that he or she is genuinely acting in the public interest. Factors relevant to determining whether a person is genuinely acting in the public interest will include considerations such as: whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought, and the extent to which it is of general and prospective application; and the range of persons or groups who may be directly or indirectly affected by any order made by the Court and the opportunity that those persons or groups have had to present evidence and argument to the Court . . . .'

context of this case the evaluation includes considering: (i) the nature of the allegations advanced as to why the public interest is implicated; (ii) the relevant provisions of the 2008 Act, which provide the context of the allegations; (iii) the provisions of the 2008 Act for addressing such allegations; (iv) whether there other reasonable and effective ways in which the challenge may be brought; and (v) the range of persons or groups who may be directly or indirectly affected by any order of the court and the opportunity that those persons or groups have had to present evidence and argument to the court.

[135] At the heart of the inquiry of whether an applicant should be granted the right to seek relief in the public interest, lies a consideration of alternative remedies, and this requires a close examination of the facts of the case. In particular the prejudice that parties affected by the order may suffer if standing is granted must be taken into account.[51]

[136] In my view both applications should have failed at the *ex parte* stage of the proceedings because the Minister had not established the right to obtain this remedy – the provisional liquidation order – in the public interest. My reasons are the same as those on the strength of which I have already concluded that a combination of non-disclosure of material facts, the absence of any factual basis for urgency and the pressing need for the appellants to have been notified of the proceedings justified the discharge of the provisional orders. The courts granting the Minister the right to seek provisional orders clearly did not consider any of the criteria relevant to the determination of whether the applications were genuinely in the public interest. This is therefore a further reason why the provisional orders ought to have been discharged.

[137] The court a quo ignored the arguments proffered by the appellants regarding a consideration of alternative remedies. It was not justified in doing so. The Minister had remedies available to her under the 2008 Act to address her concerns. Since, in

[51] C Jafta (2015) 'Critical Analysis of the extended legal standing provisions under section 157(1) of the Companies Act 71 of 2008 to apply for Legal Remedies' *Journal of Corporate and Commercial Law and Practice* (2015) vol 1 at 41-42.

this part of my judgment, I am assuming that the Minister qualifies as a 'person' for purposes of s 157(1), the same assumption must be made in relation to the rest of the Act. On this basis, the Minister could have filed a complaint directly with the Commission in terms of s 168(1)[52] of the 2008 Act, or approached the Trade Minister to request that a directive be issued to the Commission to undertake an investigation in terms of s 168(3)[53] read with s 190(2)*(b)*.[54] This would have triggered the Commission's investigative powers under Part E of Chapter 7.

[138] The Minister's primary complaint was that Redisa's executive directors were abusing their fiduciary positions to enrich themselves. She could, therefore, in the public interest have sought leave to obtain an order to declare the implicated directors delinquent or under probation in terms of s 162. Alternatively, she could have brought the information she had to the attention of the Commission, the latter being an agency with express *locus standi* to seek such orders (s 162(3)). The Department itself could have sought an order (s 162(4)).[55] The Minister's complaints

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[52] '**168 Initiating a complaint**
(1) Any person may file a complaint in writing-
(a) with the Panel in respect of a matter contemplated in Part B or C of Chapter 5, or in the Takeover Regulations; or
(b) with the Commission in respect of any provision of this Act not referred to in paragraph *(a)*,
alleging that a person has acted in a manner inconsistent with this Act, or that the complainant's rights under this Act, or under a company's Memorandum of Incorporation or rules, have been infringed.'

[53] '**168 Initiating a complaint**
(3) The Minister may direct the Commission, as contemplated in section 190 (2) *(b)*, or the Panel to investigate-
(a) an alleged contravention of this Act; or
(b) other specified circumstances.'

[54] '**190 Minister may direct policy and require investigation**
(1) . . .
(2) The Minister-
(a) . . .
(b) may at any time direct the Commission to investigate-
(i) an alleged contravention of this Act; or
(ii) any matter or circumstances with respect to the administration of one or more companies in terms of this Act, whether or not those circumstances appear at the time of the direction to amount to a possible contravention of this Act.'

[55] '**162 Application to declare director delinquent or under probation**
(3) The Commission or the Panel may apply to a court for an order declaring a person delinquent or under probation if-
(a) the person is a director of a company or, within the 24 months immediately preceding the application, was a director of a company; and
(b) any of the circumstances contemplated in-
(i) subsection (5) apply, in the case of an application for a declaration of delinquency; or
(ii) subsections (7) and (8) apply, in the case of an application for probation.

against the executive directors all appear to fall within the categories of conduct which can give rise to orders of delinquency or probation.

[139] The Minister could also have sought to interdict conduct on the part of the appellants she considered unlawful or damaging to the Plan, without seeking the drastic remedy of a winding-up order. If grounds existed for an anti-dissipation interdict (which was in essence the basis on which the Minister urgently sought the companies' liquidation), she could have applied for such relief without the extreme sanction of liquidation.

[140] If the Commission found any evidence of unlawful conduct, it could have pursued a range of enforcement options: it could have invoked s 22[56] to call on the company to show cause why it should not be wound up; it could have referred the matter to the National Prosecuting Authority; it could have issued compliance notices – backed up by administrative penalties and the prospect of a winding-up order; and it could have issued a notice of non-referral, in which case the Minister would have been entitled to approach the court for relief under s 174.[57]

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(4) Any organ of state responsible for the administration of any legislation may apply to a court for an order declaring a person delinquent if-
(a) the person is a director of a company or, within the 24 months immediately preceding the application, was a director of a company; and
(b) any of the circumstances contemplated in subsection (5) *(d)* to *(f)* apply with respect to any legislation administered by that organ of state.'

[56] '**22 Reckless trading prohibited**
(1) A company must not carry on its business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose.
(2) If the Commission has reasonable grounds to believe that a company is engaging in conduct prohibited by subsection (1), or is unable to pay its debts as they become due and payable in the normal course of business, the Commission may issue a notice to the company to show cause why the company should be permitted to continue carrying on its business, or to trade, as the case may be.
(3) If a company to whom a notice has been issued in terms of subsection (2) fails within 20 business days to satisfy the Commission that it is not engaging in conduct prohibited by subsection (1), or that it is able to pay its debts as they become due and payable in the normal course of business, the Commission may issue a compliance notice to the company requiring it to cease carrying on its business or trading, as the case may be.'

[57] '**174 Referral of complaints to court**
(1) If the Commission or Panel, as the case may be, issues a notice of non-referral in response to a complaint, the complainant concerned may apply to a court for leave to refer the matter directly to the

[141] In assessing these questions, it is as well to bear in mind that the Minister at no stage said that the Plan was not a good one and that its proper implementation was not in the public interest. Redisa, as a solvent entity, was not in principle an inappropriate entity for having responsibility for the Plan. The Minister's gripe was with the perceived impropriety of certain actions of the executive directors.

[142] It bears mentioning, also, that in regard to the Minister's allegation that KT's corporate personality was being abused, this was not a ground for winding up KT. That remedy lies in s 20(9)[58] of the 2008 Act. In addition, and as I have mentioned earlier, the Commission or Panel has the power to apply for the liquidation of a solvent company, on the ground that the company, or whoever controls it, is acting in a fraudulent or otherwise illegal manner, which is broadly the allegation that was directed at Redisa's directors. But this power may only be used after a compliance notice has been issued and the company has failed to comply.

[143] The Minister had made out no case for resorting to the drastic remedy of a winding-up without having considered the extensive alternative remedies or enforcement procedures that were available to her. It was, therefore, quite clearly,

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court, but no such complaint may be referred directly to a court in respect of a person who has been excused as a respondent, as contemplated in section 170 (1) *(a)*.
(2) A court-
(a) may grant leave contemplated in subsection (1) only if it appears that the applicant has no other remedy available in terms of this Act; and
(b) if it grants leave, and after conducting a hearing, determines that the respondent has contravened the Act, may-
(i) require the Commission or Executive Director, as the case may be, to issue a compliance notice sufficient to address that contravention; or
(ii) make any other order contemplated in this Act that is just and reasonable in the circumstances.'

[58] '**20 Validity of company actions**
(9) If, on application by an interested person or in any proceedings in which a company is involved, a court finds that the incorporation of the company, any use of the company, or any act by or on behalf of the company, constitutes an unconscionable abuse of the juristic personality of the company as a separate entity, the court may-
(a) declare that the company is to be deemed not to be a juristic person in respect of any right, obligation or liability of the company or of a shareholder of the company or, in the case of a non-profit company, a member of the company, or of another person specified in the declaration; and
(b) make any further order the court considers appropriate to give effect to a declaration contemplated in paragraph *(a)*.'

not in the public interest for her to be given the right to pursue this relief in these circumstances.

An intergovernmental dispute

[144] Before this appeal was heard the parties were invited to prepare submissions on a point of law not on the papers. This was whether s 41(1)*(h)* and s 41(3) of the Constitution had any bearing on this dispute.[59] This was because it was common cause between the parties in this court that Redisa is an organ of state. That being so, the Minister, as a representative of the national government, appears to have had a duty to avoid legal proceedings against Redisa by attempting to settle the dispute first through recourse to other remedies before resorting to litigation. That duty is given effect to in s 40 of the Intergovernmental Relations Framework Act 13 of 2005, which is the law enacted for this purpose. It provides:

'40 **Duty to avoid intergovernmental disputes**

(1) All organs of state must make every reasonable effort-

(a) to avoid intergovernmental disputes when exercising their statutory powers or performing their statutory functions; and

(b) to settle intergovernmental disputes without resorting to judicial proceedings.

(2) Any formal agreement between two or more organs of state in different governments regulating the exercise of statutory powers or performance of statutory functions, including any implementation protocol or agency agreement, must include dispute-settlement

[59] '**41 Principles of co-operative government and intergovernmental relations**
(1) All spheres of government and all organs of state within each sphere must-
(a) . . .
(h) co-operate with one another in mutual trust and good faith by-
(i) fostering friendly relations;
(ii) assisting and supporting one another;
(iii) informing one another of, and consulting one another on, matters of common interest;
(iv) co-ordinating their actions and legislation with one another;
(v) adhering to agreed procedures; and
(vi) avoiding legal proceedings against one another.
(2) . . .
(3) An organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute.'

mechanisms or procedures that are appropriate to the nature of the agreement and the matters that are likely to become the subject of a dispute.

41 **Declaring disputes as formal intergovernmental disputes**

(1) An organ of state that is a party to an intergovernmental dispute with another government or organ of state may declare the dispute a formal intergovernmental dispute by notifying the other party of such declaration in writing.

(2) Before declaring a formal intergovernmental dispute the organ of state in question must, in good faith, make every reasonable effort to settle the dispute, including the initiation of direct negotiations with the other party or negotiations through an intermediary.'

[145] It is clear that the dispute[60] between the parties arose long before the Minister's resort to liquidation proceedings against Redisa. She therefore had a constitutional and a statutory duty to avoid judicial proceedings by attempting to settle the dispute. The Minister's conduct shows the opposite. She displayed considerable hostility towards Redisa over a protracted period and resorted to prior litigation by issuing a directive, which in the event was found to be unlawful. Then she resorted to the current litigation in circumstances that I have already found to be unjustified. She therefore breached her duty to avoid legal proceedings against an organ of state. The invitation in her letter of 30 May 2017, if sincere, would have been an appropriate step in seeking a non-litigious solution to the grievances stated in the letter. But I must regrettably conclude that the invitation was not sincere, since on the same day she signed her founding affidavit for Redisa's *ex parte* liquidation.

[146] This particular consideration is, of course, only directly applicable to Redisa and has the result that it was not in the public interest for the Minister to be allowed to seek its liquidation.

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[60] The dispute falls within the definition of an intergovernmental dispute is s 1 of the Intergovernmental Relations Framework Act 13 of 2005. An intergovernmental dispute means: **'**a dispute between different governments or between organs of state from different governments concerning a matter-
(a) arising from-
(i) a statutory power or function assigned to any of the parties; or
(ii) an agreement between the parties regarding the implementation of a statutory power or function; and
(b) which is justiciable in a court of law,
and includes any dispute between the parties regarding a related matter.'

Conclusion

[147] The Minister brought two *ex parte* applications on an 'extremely urgent' basis for the provisional winding-up of the appellants in terms of s 81(1)*(c)*(ii) and or s 81(1)*(d)*(iii) read with s 157(1)*(d)* of the Act, the appointment of provisional liquidators to take control of the businesses and ultimately for their final winding-up. In addition she sought orders directing the liquidators to 'distribute the entire net value of the appellants' to the WMB.

[148] She was granted the provisional winding-up orders wrongly because she had not justified her resort to *ex parte* proceedings and had not disclosed material information to the court. She had also not established any right, in terms of s 157(1)*(d)*, to pursue this relief in the public interest. The court below therefore ought to have discharged the provisional orders.

[149] In this court, counsel for the Minister also abandoned reliance on 's 81(1)*(c)*(ii) and or s 81(1)*(d)*(iii)' to sustain the finding that it was 'just and equitable' to wind-up the appellants. Instead it was contended that the Minister, as a public interest litigant, could rely on any of the substantive grounds in s 81 of the Act to apply to wind up a solvent company. On the assumption that this contention was correct, I nevertheless concluded that the Minister had, on the facts, not established grounds for the winding-up of the appellants.

[150] In the result the following order is made in case no's 1260/2017 and 188/2018:

(a) The appeal succeeds with costs including the costs of two counsel.

(b) The order of the court a quo on 15 September 2017 finally winding up the appellant (Redisa) is set aside and replaced with the following:

'The order of 1 June 2017, placing the respondent (Recycling and Economic Development Initiative of South Africa) under provisional liquidation is discharged and the Minister's application is dismissed with costs, including the costs of two counsel.'

The following order is made in case no's 1279/2017 and 187/2018:

(a) The appeal succeeds with costs including the costs of two counsel.

(b) The order of the court a quo on 15 September 2017 finally winding up the appellant (KT) is set aside and replaced with the following:

'The order of 8 June 2017 placing the respondent (Kusaga Taka Consulting (Pty) Ltd) under provisional liquidation is discharged and the Minister's application is dismissed with costs, including the costs of two counsel.'

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A Cachalia

Judge of Appeal

Molemela JA

[151] I have had the privilege of reading the majority judgment, which upholds the appeal and sets aside the orders granted by the court a quo. For the reasons that follow, I respectfully disagree with the majority judgment's analysis of evidence as well as its reasoning and conclusion. I align myself broadly with the court a quo's reasoning as set out in its detailed judgment. I would therefore dismiss the appeal with costs. For the sake of brevity, I will, as far as possible, refrain from reiterating what has already been stated in the court a quo's reported judgment.[61] Rather, I will focus on explaining why I disagree with the reasoning and conclusions of the majority judgment and will bring out the facts that support my conclusion, some of which have not been alluded to in the majority judgment or the judgment of the court a quo.

Alleged failure of the Minister to disclose material information

[61] See footnote 1 of the majority judgment.

[152] The appellants allege that the Minister failed to disclose material information in the *ex parte* application that preceded the application heard by the court a quo. The contention that the litigation that was pending in the Gauteng High Court was not disclosed lacks merit. Firstly, that litigation was mentioned in the body of the Minister's affidavit and more detailed reference to it was made in one of the annexures to that affidavit. From my perspective, the circumstances under which reference to this litigation was made in the Minister's founding affidavit are not analogous to a situation where no reference whatsoever is made to the annexure in the body of the affidavit or where the party to the litigation is not aware of what the annexure pertains to. Simply put, the two applications pending in the Gauteng High Court were sufficiently disclosed. It therefore cannot be said that there was any unnecessary trawling that the court hearing the provisional application or the court a quo had to do for purposes of establishing the facts.

[153] In any event, that litigation pertained to the review of the Minister's decision on the Pricing Strategy and on the amendment of the Tyre Regulations and had nothing to do with the shocking allegations of impropriety arising out of the failure to observe corporate governance and to abide by the REDISA Plan, as revealed in the iSolveit report. That litigation was clearly unrelated to the litigation brought before the court a quo. In my view, a failure to disclose such unrelated litigation could never constitute a material non-disclosure warranting the setting aside of the provisional winding-up order granted by the court a quo. This is especially so because by the time the application was argued before the court a quo, full sets of affidavits had been filed by all the parties and the issues were fully canvassed. It is also clear from the judgment of the court a quo that it applied its mind to that litigation but concluded that it was not relevant to the issue raised before it.

[154] The Western Cape litigation, before Davis J, which culminated in the withdrawal of the Minister's directive, was also alluded to in the founding affidavit, with the Minister even referring to what Erdmann had stated in the affidavit filed in that application. In my view, the lack of detail in the founding affidavit, if any, cannot be equated with non-disclosure. Further, and in any event, having gleaned the

essence of that litigation from the parties' averments in this matter, I respectfully disagree with the majority judgment's conclusion that the aforesaid litigation was germane to the issues in this matter. Davis J granted an interim order and issued a rule nisi. The remarks made in his judgment must be seen in their proper perspective, as some of them were not related to the merits of the matter. It is clear from that judgment that the remark that the justification for the directive was 'prima facie irrational' was, in the main, directed at the Minister's approach in not waiting for the extended deadline to pass before issuing the directive. The Minister's decision to withdraw the directive must be considered against the following remarks, which immediately preceded the interim order that was granted:

'I offered the [Minister] an opportunity to file a further and more detailed affidavit, which would have assisted this court in determining whether the interim relief should be granted. . . Regrettably, that invitation was declined. This means that this case was argued on an extremely detailed founding affidavit and a very skeletal answering affidavit. It is for this reason that I propose, therefore, to have an extremely short return day, in order that this matter be resolved comprehensively and fully with the benefit of comprehensive papers by both parties.'

Since there was no material non-disclosure on the part of the Minister, the approach laid down in the English law case of *Brink's-Mat Ltd v Elcombe & others*[62]*,* referred to in paragraph 51 of the majority judgment is inapposite.

The approach to disputes of fact

[155] It is trite that in motion proceedings, a court cannot draw conclusions from probabilities but is entitled to draw inferences from facts that have not been disputed or that have been admitted. As correctly stated in the majority judgment, by and large applications on motion are decided on common cause facts. In the founding affidavit the Minister inter alia asserted that KT and REDISA had created a scheme to extract money from a non-profit company (REDISA) to KT. She mentioned in broad terms that the entire scheme had been designed to circumvent statutory strictures to facilitate funnelling large sums of money from REDISA to KT. She also described REDISA as a 'front'. This was the general thrust of the Minister's

[62] *Brink's-Mat Ltd v Elcombe & others* fn 10 above.

allegations, which were substantiated in the replying affidavit. Although REDISA and KT both denied these allegations.it must be borne in mind that not every denial of allegations serves to create a material dispute of fact that warrants the dismissal of an application or a referral for oral evidence.

[156] This court, in *Wightman v Headfour*,[63] stated as follows in relation to how disputes of facts ought to be dealt with in application proceedings. It said:

'[12] Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or *bona fide* dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers: *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C.

[13] A real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. *When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied*. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, *inadequate as they may* be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a

[63] *Wightman t/a J W Construction v Headfour (Pty) Ltd & another* [2008] ZASCA 6; 2008 (3) SA 371 (SCA).

legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.' (Own emphasis.)

[157] In *Fakie NO v CCII Systems,*[64] this court further stated as follows:

'[55] That conflicting affidavits are not a suitable means for determining disputes of fact has been doctrine in this court for more than 80 years. Yet motion proceedings are quicker and cheaper than trial proceedings, and *in the interests of justice courts have been at pains not to permit unvirtuous respondents to shelter behind patently implausible affidavit versions or bald denials*. More than sixty years ago, this court determined that a judge should not allow a respondent to raise 'fictitious' disputes of fact to delay the hearing of the matter or to deny the applicant its order. There had to be "a bona fide dispute of fact on a material matter". *This means that an uncreditworthy denial, or a palpably implausible version, can be rejected out of hand, without recourse to oral evidence.* In *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd,* this court extended the ambit of uncreditworthy denials. They now encompassed not merely those that fail to raise a real, genuine or bona fide dispute of fact, but also allegations or denials that are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers.

[56] Practice in this regard has become considerably more robust, and rightly so. If it were otherwise, most of the busy motion courts in the country might cease functioning. But the limits remain, and however robust a court may be inclined to be, a respondent's version can be rejected in motion proceedings only if it is "fictitious" or so far-fetched and clearly untenable that it can confidently be said, on the papers alone, that it is demonstrably and clearly unworthy of credence.' (Footnotes omitted.) (Own emphasis.)

[158] A perusal of the court a quo's judgment shows that it was alive to the principles enunciated in the afore-mentioned authorities. It basically found, correctly in my view, that even though the appellants had tried to raise a plethora of factual disputes, the Minister had, on the basis of the undisputed evidence made a proper case for the granting of the liquidation order. For the reasons that will become

[64] *Fakie NO v CCII Systems (Pty) Ltd* (653/04); [2006] ZASCA 52; 2006 (4) SA 326 (SCA).

evident later, I hold the view that when the evidence that served before the court *a quo* is considered in totality, it cannot even remotely be said that the appellants raised a genuine dispute of fact. The appellants did not challenge a number of serious allegations made by the Minister. Most of the appellants' general denials were unsubstantiated by any facts which suggested a genuine basis for the denial. As correctly stated by the court a quo, important matters were left unanswered. It seems to me that those general denials were a tactical approach of placing an obstacle in the path of the Minister's application[65] with a view to creating a factual dispute that would be not be resoluble on the papers, thus throwing a spanner in the works of the Minister's application. However, the 'dispute' contained in the general denial turned out to have no substance.

The salient provisions of the REDISA Plan, MOI, Management Agreement and Companies Act, 2008

[159] The correct approach to the interpretation of documents is well-established.[66] Consideration must be paid to the document as a whole as well as inter-related documents, if such exist. It serves no purpose to look in isolation at specific clauses of the aforesaid documents without considering the whole document. Applying that approach to the facts of this case, it means that due consideration must be paid to the REDISA Plan, which this court[67] described as an instrument of subordinate legislation, the REDISA Memorandum of Incorporation, the Management Agreement and its amendments, which all speak for themselves. Crucially, the importance of tyre waste management plans, like the REDISA plan, was described by this court in the following terms: '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.'[68]

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[65] *Wightman v Headfour* (supra) at para 22.
[66] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA).
[67] *Retail Motor Industry Organisation & another v Minister of Water & Environmental Affairs & another* 2014 (3) SA 251 (SCA); [2013] 3 All SA 435 (SCA); [2013] ZASCA 70.
[68] Ibid para 1.

[160] Prior to approving a plan, the Minister is required by s 72(1) of the Waste Act 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.[69]

[161] Just over a year after the coming into operation of the Waste Act, KT and REDISA were registered with the Companies Intellectual Property Commission. KT was registered as a private company on 31 August 2010, while REDISA was registered as a Non Profit Company on 18 November 2010, with Erdmann, Davidson and Kirk being its promoters.[70] The three REDISA executive directors, Erdmann, Davidson and Kirk together with one of the directors of KT (Crozier) held shares in two companies that jointly held a 100% shareholding in KT. In February 2011, REDISA submitted a tyre waste management plan (REDISA Plan) to the Minister for her approval.[71] In April 2011, another non-profit company submitted its tyre waste management plan to the Minister for approval, which was subsequently rejected by the Minister. As it later turned out, REDISA and KT had, on 10 November 2011, concluded a management agreement in terms of which KT would manage the REDISA Plan. The Minister approved the REDISA Plan on 28 November 2011. Litigation ensued, culminating in the withdrawal of the Minister's approval of the REDISA Plan. REDISA later submitted another plan to the Minister, which was approved on 23 July 2012. This approval was again attacked in litigation in the Gauteng High Court. The REDISA Plan which is the subject of this particular litigation is the one approved by the Minister and published in the Government

[69] Ibid para 11.
[70] In terms of item 1(2) of Schedule 1 of the Companies Act, a non-profit company must apply all its assets and income, *however derived*, to advance its stated objects as set out in the Memorandum of Incorporation (MOI). In terms of item 1(3) of Schedule 1, a non-profit must not, *directly or indirectly*, pay any portion of its income or transfer any of its assets, regardless how the income or asset was derived, to any person who was its incorporator or who is a member or director of the company except reasonable remuneration or as a payment of or reimbursement for expenses incurred to advance the stated objects of the company or as a payment in terms of a bona fide agreement between the company and a third part or in respect of any legal obligation binding on the company.
[71] This history is set out in the judgment of this court referred to in footnote 3 of the majority judgment.

Gazette on 30 November 2012. I pause to point out that it is evident from this chronology that that the management agreement between KT and REDISA was entered into *before* REDISA's re-submission of its tyre waste management plan to the Minister for approval in April 2012. I will return later to this aspect.

[162] As stated before, the various provisions of the REDISA Plan must be interpreted in the context of the entire REDISA Plan and not in isolation.[72] In paragraph 3 of the majority judgment it is stated that 'The Redisa Plan operates indefinitely, subject to a review conducted every five years.' It is, however, critical to also mention that in terms of clause 28 of the Redisa Plan, the period of appointment of the external management company, which later turned out to be KT, is reflected as five years. In the letter written by the Minister approving the REDISA Plan dated 29 November 2012, she clearly stated that the revised REDISA Plan 'is hereby approved and will come into effect on the date of the publication in the Government Gazette and will be valid for a period of 5 (five) years from the said publication date.' As the REDISA Plan was gazetted on 30 November 2012, this means that the REDISA Plan would be valid until 30 November 2017 unless the Minister determined otherwise. It is common cause that the Minister did not extend the validity period of REDISA.

[163] Clause 2 of the REDISA Plan states as follows: 'REDISA will have a Memorandum of Incorporation (MOI) governing its activities. An organisation controlling a project of this magnitude must have sustainability. A properly drafted MOI imposes codes of conduct and governance, and guards against narrow sectoral influences or private enterprises taking over or high-jacking the aims of the organisation.' Clause 2 of the REDISA Plan further states that REDISA would adopt a MOI that would ensure the independence of the REDISA Board. According to the PWC report, the MOI was approved and duly forwarded to the Department in November 2012. The REDISA Plan further mandated REDISA to fulfil socio-economic objectives of job creation and BBBEE development. The REDISA Plan also provides as follows:

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[72] See *Natal Joint Municipal Pension Fund v Endumeni Municipality* (supra) at para 18.

'The REDISA Board will be made up of:

- two executive directors;
- one legal expert;
- one financial expert;
- five captains of industry and higher learning;
- one from the informal business sector.

No board member may represent any waste stream managed by REDISA.' (Own emphasis).

[164] The motivation for accepting the REDISA Plan is expressed by REDISA as follows in clause 2.1 of the REDISA Plan: 'The REDISA Plan is structured around there being only one waste tyre management plan, on the basis that this is the only workable approach . . . A single plan approach, with a simple and equitable system for apportioning the waste tyre management fee will level the playing field, and simplified administration and auditing will make it far less open to suspicions of behind the scene manipulation by the bigger participants.'

[165] Clause 3 of the REDISA Plan states that the main object of REDISA is 'to engage in the conservation, rehabilitation and/or protection of the natural environment, specifically by creating and procuring the implementation of the Waste Tyre Management Plan as contemplated in and pursuant to the Environmental Management Waste Act and the Waste Regulations, subject to the Approval Conditions.' The Approval Conditions are described as 'the conditions imposed by the Minister when approving the Waste Tyre Management Plan as set out in the letter addressed by the Minister to the company dated 18 July 2012 together with such further conditions as the Minister shall lawfully impose thereafter.'

[166] Significantly, clause 14 of the REDISA Plan gives the assurance that the input of all relevant stakeholders, including the Department of Environmental Affairs, would be considered in as far as the design of the National Centralised Computer System (NCCS) was concerned. The REDISA Plan further provides that the NCCS would be designed to capture information from beginning to end, would be used to

provide the primary audit trail, would ‘keep accurate records on logistics, support, and accounting of all waste tyre movement throughout the process’; would identify collection points and would also identify anomalies and variances that would trigger investigations. A perusal of the REDISA Plan makes it plain that while the management of the REDISA would be done by an external management company, the NCCS would belong to REDISA. Clause 16 provides that ‘in the initial years of operation, there will be over-recovery of operating costs from the Waste Management Fee as the number of depots, transporters and Processors will be less than the targeted final numbers. The over-recovery will be accumulated as provisions and will be used to fund establishment and set-up costs.’ The same clause further stipulates that REDISA will undertake the determination, imposition, collection, management administration of and disbursements from levies paid into the fund by subscribers.

[167] The REDISA Plan further stipulates, under the heading of External Management Company (clause 26.1.5), that ‘a detailed audit plan would be formulated in compliance with the Waste Tyre Regulations to audit amongst others, the management of REDISA within accepted accounting standards’ and ‘its compliance with the management contract’. According to clause 26.1.7, the external auditing company would ‘audit the governance structures and compliance to good corporate governance.’ As I see it, the aforesaid provisions of the REDISA Plan make it abundantly clear that the directors of both REDISA and its management company were expected to ensure compliance with good corporate governance.

[168] Notably, s 15(1)(*a*) of the Companies Act stipulates that each provision of a company’s Memorandum of Incorporation must be consistent with that Act and is void to the extent of its inconsistency. REDISA’s MOI expressly bound REDISA to the extended accountability and transparency provisions enshrined in the Companies Act. REDISA’s MOI also put stringent measures in place pertaining to its amendment. It stipulated that it could only be amended with approval of *all* directors and required that, after its first anniversary, the amendment be effected with the additional approval of an independent attorney who certified that the proposed

amendment was 'reasonable and in the interests of the good governance of the company'. Significantly, the management agreement concluded between REDISA and KT stipulated that the principles of good corporate governance set out in the King III Code of Corporate Governance (the King Code) would be observed.

[169] The independence of the board of REDISA was emphasised in both the REDISA Plan and the MOI. For its part, the King Code defines an independent director as someone who is 'independent in character and judgment.'[73] It propounds that there should be no relationships which are likely to affect or could appear to affect that independence. In acknowledging that KT had been rendering services to Redisa for a period of no less than two years prior to its signature and that those services formed a central role in the decision to appoint KT as the management company, the management agreement concluded by the appellants undeniably attests to the fact that the relationship between the two companies affected the independence of the implicated executive directors of REDISA. They were not independent directors despite REDISA having advocated for an independent board in the REDISA Plan. Furthermore, the MOI alludes to the eligibility requirements contemplated in s 69 of the Companies Act[74] and provides in detail, categories of persons who are not eligible to be appointed as the directors of REDISA.

[170] Clause 11.6 of the MOI provides as follows:

'In addition to satisfying the qualification and eligibility requirements set out in s 69 [of the Companies Act] and in order to preserve the independence of the Board as required by the Waste Tyre Management Plan, and subject to clause 11.7, the following persons may not be appointed or serve as directors of the Company-

11.6.1 Any Plan Subscriber;

[73] Clause 66, Principle 2.18 in Chapter 2 of the King III Code of Corporate Governance.
[74] Section 69(7) provides:
'A person is ineligible to be a director of a company if the person-
(a) is a juristic person;
(b) is an unemancipated minor, or is under a similar legal disability; or
(c) does not satisfy any qualification set out in the company's Memorandum of Incorporation.'

11.6.2 any other person engaged in any capacity in respect of which the Company administers the Waste Tyre Management Plan;

11.6.3 where any director is also a director of any other company or member of the governing or managing body of any other entity, whether established for commercial purposes or otherwise, any other person who is also a director of such company or member of the governing or managing body of such other entity;

11.6.4 any person who is a director or shareholder of a management company referred to in clause 19, where such appointment would result in more than 2 (two) such persons serving as directors of the company; and

11.6.5 any person who is a related person or an inter-related person (as those terms are defined in the Act) to any person referred to in clauses 11.6.1 – 11.6.4, and in the event that any person becomes disqualified from being appointed or serving as a director in accordance with the above provisions, such person shall forthwith resign as a director of the company.'

[171] It is evident from the provisions of clause 11.6.2 of the MOI that Erdmann, Davidson and Kirk were ineligible to be appointed as the directors of REDISA for as long as KT was the company carrying out the management functions for REDISA. Furthermore, in terms of clause 11.6.3 of the MOI, Erdmann, Davidson and Kirk were ineligible to be appointed as directors on account of a linked series of relationships as well as their appointment as directors of other companies, most of which were involved in the tyre waste stream. For example, Erdmann and Crozier, were also the directors of another private company known as Kusaga Taka International. The third director of Kusaga Taka International was Samuel Robertson, who is the same person who represented KT when the management agreement was amended in September 2013. Robertson, together with Erdmann, Davidson and Crozier were the directors of a non-profit company known as Circular Economy Initiative of South Africa. Erdmann, Crozier and Erdmann's son were also the directors of a private company known as NYI, a company holding the main lease and which is REDISA's landlord. NYI, which holds a 75% shareholding in KT, received R24.556 million from REDISA.

[172] Despite this and various queries set out in the iSolveit report, the implicated directors remained the executive directors of REDISA up to the date of the litigation that served before the court a quo. This, in my view, constituted a failure to manage a conflict of interest. It is evident from the various provisions of the REDISA Plan and the MOI that sufficient safeguards were built into the operation of the REDISA Plan, more so because both the REDISA Plan and the MOI cannot be amended without the input of the executive authority. However, the sustainability of the REDISA Plan obviously depended on bona fides in the management of REDISA. I will later show that bona fides in the management of REDISA proved to be the proverbial pie in the sky.

[173] As at the time of this litigation in the court a quo, Erdmann's son was also a director of KT. Both Erdmann and Davidson were, together with one S K Mosena, directors of a private company known as Borala Recycling and Innovation Plant. Both Erdman and Davidson, together with one Reza Daniels, were directors of a private company known as Imvelo Rubber Products. Both Erdmann and Davidson were, together with one B L Dube, directors of a private company known as Mafukuzela Manufactures. Erdmann, Davidson together with one Tshepo Molai were together the directors of a private company known as Ordigen. Erdmann and Davidson were together with one E V Molete the directors of a private company known as Ordipoint, which is alleged to have received a whopping R17 million from REDISA, reflected as expenses. Erdmann, Davidson and one K C Moloi were the directors of a private company known as Waste Beneficiation, which was said to be in the waste tyre beneficiation business. It is self-evident that Erdmann and Davidson's acceptance of directorships in those companies flouted the provisions of clause 3 of the REDISA Plan, which stipulated that no board member would represent any stream managed by REDISA. I have consciously not made reference to other companies alluded to in the Minister's papers but which were, according to CIPC, in the process of deregistration. I have only alluded to those described in the CIPC documents as 'in business'. Even on the acceptance Erdmann's explanation that some of the companies mentioned were dormant, I am of the view that their dormant status is immaterial: the bottom line is that the Erdmann, Davidson and / or

Kirk were the directors of those companies in contravention of the REDISA Plan and the MOI.

[174] Erdmann was also one of the directors of a non-profit company known as Product Testing Institute, which received R61 852 000.00 from REDISA. Erdmann and Davidson were also the directors of a private company known as REDISA SPV Holdings. Erdmann, Davidson and Kirk were also the directors of a non-profit company known as REDISA Academy. It is quite evident that Erdmann, Kirk and Davidson held multiple directorships in various companies which were formed subsequent to the publication of the REDISA Plan. All the above-mentioned facts are undisputed and self-evident from the REDISA Plan and REDISA's MOI. Erdmann, Davidson and Kirk were also ineligible in terms of clause 11.6.5 of the MOI because they were inter-related persons as contemplated in sections 1, 2 and 75(1)*(*b*)* of the Companies Act.

The untenable conflict of interest

[175] It is appropriate to preface the discussion on conflict of interest by giving a brief historical background pertaining to the importance of a director's common-law duty to avoid a conflict of interest.

[176] Lord Herschell in *Bray v Ford* [1896] AC 44 at 51 issued this warning: 'Human nature being what it is, there is a danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than duty and thus prejudicing those who he is bound to protect.' In *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 at 178-179, Innes CJ reasoned that the test pertaining to conflict of interest 'rests upon the broad doctrine that a man, who stands in a position of trust towards another, cannot, in matters affected by that position, advance his own interest (e.g. by making a profit) at that other's expense.'

[177] The common-law position has now been codified. Section 75(5) of the Companies Act states:

'If a director of a company, other than a company contemplated in subsection (2)(b) or (3), has a personal financial interest in respect of a matter to be considered at a meeting of the board or knows that a related person has a personal financial interest in the matter, the director –

(a) must disclose the interest and its general nature before the matter is considered at the meeting;
(b) must disclose to the meeting any material information relating to the matter and known to the director;
(c) may disclose any observations or pertinent insights relating to the matter if requested to do so by the other directors;
(d) If present at the meeting must leave the meeting immediately after making any disclosure contemplated in paragraph (b) or (c);
(e) must not take part in the consideration of the matter except to the extent contemplated in paragraph (b) and (c);
(f) while absent from the meeting in terms of the subsection
    (i) is to be regarded as being present at the meeting for the purposes of determining whether sufficient directors are present to constitute the meeting; and
    (ii) is not to be regarded as being present at the meeting for the purpose of determining whether the resolution has sufficient support to be adopted; and
(g) must not execute any document on behalf of the company in relation to the matter unless specifically requested or directed to do so by the board.'

It is clear from this provision, which must be read in conjunction with the definition of 'personal financial interest'[75] contained in s 1 of that Act, that disclosure must be made beforehand.

[178] Section 76 (3) of the Companies Act provides:

'Subject to subsections (4) and (5), a director of a company, when acting in that capacity, must exercise the powers and perform the functions of a director-

[75] 'Personal financial interest' is defined as follows:
'[P]ersonal financial interest', when used with respect to any person-
(a) means a direct material interest of that person, of a financial, monetary or economic nature, or to which a monetary value may be attributed; but
(b) does not include any interest held by a person in a unit trust or collective investment scheme in terms of the Collective Investment Schemes Act, 2002 (Act No. 45 of 2002), unless that person has direct control over the investment decisions of that fund or investment'.

(a) in good faith and for a proper purpose;

(b) in the best interests of a company; and

(c) with the degree of care, skill and diligence that may reasonably be expected of a person-

(i) carrying out the same functions in relation to the company as those carried out by that director; and

(ii) having the general knowledge, skill and experience of that director.'

Section 76 (4) of the Companies Act states:

'In respect of any particular matter arising in the exercise of the powers or the performance of the functions of a director, a particular director of a company –

(a) will have satisfied the obligations of subsection (3) *(*b*)* and *(*c*)* if –

(i) the director has taken reasonably diligent steps to be informed about the matter;

(ii) either –

(aa) the director had no material personal financial interest in the subject matter of the decision, and had no material personal financial interests in the subject matter of the decision, and had no reasonable basis to know that any related person had a personal financial interest in the matter; or the director complied with the requirements of section 75 with respect to any matter contemplated in sub-paragraph (aa); . . .'

[179] It is evident from the afore-mentioned provisions that company directors have a duty to take all necessary steps to act in the best interests of the company. Furthermore, the King Code, to which REDISA and KT bound themselves, provides that certain conflicts of interests 'are fundamental and should be avoided'.[76] Granted, it is not a completely unusual occurrence for a director of one company to be a director or shareholder of another company, and there is no law that prohibits that. However, a conflict of interests certainly arises in a situation where a director of one company is party to a decision to conclude a contract with another company in which he or she is a shareholder but fails to disclose this. This amounts to a breach of the director's fiduciary duties. A breach of fiduciary duty is mitigated if the director

[76] Clause 25, Principle 2.14 of the King III Code of Corporate Governance.

in question makes a full disclosure of his or her personal interests in a contract prior to such contract being concluded with the company. As I see it, where the contract was not disclosed before-hand, then it ought to be ratified in compliance with the MOI or the Companies Act, as the case may be.

[180] Turning to the facts of this matter, it is undisputed that there was a conflict of interest arising from indirect shareholding held by three REDISA directors in KT (Erdmann, Davidson and Kirk). Curiously, during the appeal hearing it was obliquely argued on the appellants' behalf that Erdmann, Davidson and Kirk's shareholding in KT did not in fact constitute a conflict of interest. This argument has no merit, for REDISA, on its own version, acknowledges that there was a conflict of interest. It acknowledged that it (REDISA) is 'related' to KT. The following was stated in REDISA's financial statements: 'The management company, [KT] is related to [REDISA] as the executive directors are shareholders of this company.' That relationship falls squarely within the provisions of clause 11.6.5 of the MOI, read with the provisions of s 2(1) of the Companies Act.[77]

[181] The majority judgment mentions that there was no overlap of directors between the KT and REDISA boards. While this is indeed so, it is really of no moment, in my respectful view, considering the stringent provisions of the MOI pertaining to the eligibility of directors and the provisions of s 1, s 2 and s 75 of the Companies Act with reference to the personal interests of related and inter-related persons and the element of control. Furthermore, it is clear from the provisions of the MOI that the eligibility of directors was a stringent requirement that could only be

[77] Section 2(1) provides:
'(1) For all purposes of this Act-
(a) an individual is related to another individual if they-
(i) are married, or live together in a relationship similar to a marriage; or
(ii) are separated by no more than two degrees of natural or adopted consanguinity or affinity;
(b) an individual is related to a juristic person if the individual directly or indirectly controls the juristic person, as determined in accordance with subsection (2); and
(c) a juristic person is related to another juristic person if-
(i) either of them directly or indirectly controls the other, or the business of the other, as determined in accordance with subsection (2);
(ii) either is a subsidiary of the other; or
(iii) a person directly or indirectly controls each of them, or the business of each of them, as determined in accordance with subsection (2).'

condoned if (i) it was disclosed beforehand, (ii) it is unanimously agreed to by all the remaining directors and (iii) it is not against the law or the directive issued by the Minister. Clearly, non-compliance with the provisions of MOI and the REDISA Plan relating to the independence of the board of REDISA was considered in a very serious light.

[182] As stated before, the existence of a conflict of interest caused by the appointment of KT as REDISA's external management company is not disputed. From my point of view, this conflict of interest was fundamental and went to the heart of the relationship between REDISA and KT, given the fact that KT was appointed to manage the operations of REDISA for the entire duration of the REDISA Plan, The crisp question is whether this conflict of interest was properly disclosed as required by the Companies Act and MOI. If not, the logical question would be whether the non-disclosure was subsequently ratified.

[183] The appellants' case is that the conflict of interest was disclosed to the Department and to the Minister. They have not substantiated this allegation and claim that the disclosure was done 'at informal meetings that have not been minuted'. For the reasons that will become evident later in this dissenting judgment, I find it 'palpably implausible' that such a fundamental conflict of interest would be disclosed informally to the point of not being recorded in the minutes of any meeting. Accepting that it was, this begs the question why the same Minister subsequently sent correspondence bemoaning the conflict of interest resulting from the shareholding held by the REDISA executive directors in KT. It simply defies logic that she would query this aspect if she had previously given it her blessing. Like the court a quo, my conclusion on this aspect is that the conflict of interest was not disclosed. I also find that in any event, even if it were to be accepted that such a conflict of interest was disclosed to the Minister and she did not demur, that would not assist the appellants in any way, given the specific requirements of s 75(5) and (7) of the Companies Act. The Minister simply has no powers to override the provisions of the Companies Act. Her acquiescence in the unlawful scheme would not validate the unlawful acts. The fact that a party agrees to an illegality does not make the prohibited act lawful. This much was conceded by the appellants' counsel during the exchange with the bench.

[184] REDISA's flouting of various principles of corporate governance was revealed by the iSolveit report. The majority judgment states that iSolveit is not an accredited auditing firm. This, however, does not detract from the fact that it was a special forensic accounting firm that was mandated by the Minister to do a specific task and its findings about the lack of independence of the REDISA board are self-evident. Significantly, these findings were, to a large extent, later confirmed by an accredited accounting firm, namely Ernst and Young. The fact that REDISA did not receive the final report of iSolveit and that its directors saw it for the first time as an annexure to the papers is therefore neither here nor there. This is because on REDISA's own version, in June 2016 REDISA knew that iSolveit had raised an issue about the lack of independence of its board, i.e. its hopelessly conflicted relationship with KT, as well as its non-compliance with the REDISA Plan. Those are issues that were at the crux of the initial iSolveit report. Clearly, this was information peculiarly in REDISA and KT's knowledge. The additional report was merely an elaboration on the findings. The appellants' assertion that the report was only brought to their attention during litigation is therefore of no avail. The fact of the matter is that nothing was ever done by REDISA to mitigate the conflict of interest. All it did was to maintain that it had disclosed that the REDISA Executive Directors were indirect shareholders in KT.

[185] A perusal of the management agreement reveals that it was signed on 10 November 2011. As stated before, the REDISA Plan was re-submitted to the Minister in May 2012. Logic dictates that if the identity of the management company had already been disclosed to the Minister or officials of the department, then its identity would, in the interests of transparency, have been disclosed in the REDISA Plan that was re-submitted. This was not done. Instead, the REDISA plan stated that the management company 'will be appointed for a period of five years', as if that had not yet happened by the time the REDISA Plan was re-submitted. This is one of the reasons why I agree with the court a quo's conclusion that the appellants' unsubstantiated version was far-fetched and untenable, thus liable to be dismissed by virtue of the application of the well-established *Plascon Evans* rule.

[186] The appellants disputed the Minister's assertion that the Department was not provided with the management agreement up to the time of iSolveit's intervention. However, in the joint minute signed on behalf of the Department and REDISA, it was recorded that the management contract had, at that state, not been supplied to the Minister. Whether or not the Department or the Minister became aware of the management agreement before the iSolveit report came to hand is, at the end of the day, of no consequence because that management agreement merely identified KT as the management company. It did not disclose that the three REDISA executive directors were the shareholders of KT, let alone disclosing the extent of the shareholding.

[187] As can be seen in one of REDISA's e-mails to iSolveit on 22 July 2016 (not attached to the founding papers but an annexure to the letter of 30 November 2016), REDISA purported to attach the requested management contract together with certain other requested items. One can see from the name of the attached file that it was in fact a management contract between Redisa and KT relating to multiple waste streams. Despite REDISA having previously maintained that there was only one management contract between itself and KT, it appended a management agreement that remarkably served to confirm the contrary, revealing the two companies' existing or intended involvement in other waste streams, in contravention of the provisions of the MOI and the REDISA Plan.

[188] In the REDISA Plan, REDISA mentioned that it was a non-profit company created for purposes of implementing the REDISA Plan. Section 1 of the Companies Act defines a non-profit company as a company 'incorporated for a public benefit or other object as required by item 1 (1) of Schedule 1' and the income and property of which are not distributable to its incorporators, members, directors, officers or persons related to them except to the extent permitted by item 1 (3) of Schedule 1'. I consider it significant that the Minister, in her letter setting out approval conditions, pointed out that the REDISA plan 'responds well to the requirements of an IITWMP as stated in [regulation] 9(1) of the Waste Tyre Regulations.' It is worth noting that

the same provision, inter alia requires that the identity of the party submitting the IITWMP for the Minister's consideration, be disclosed. In this instance, the party submitting the IITWMP was a non-profit company which, by its definition, is a company incorporated for a public benefit.

[189] Among the other requirements set out in Regulation 9(1) of the Waste Tyre Regulations is that the IITWMP Plan submitted for approval should specify how the levy collected would be distributed. The REDISA Plan stipulates that 20% *of the revenue collected* would cover all the costs of administering the plan. It is common cause that the management fee payable to the external management company was also included in that 20%. I therefore hold the view that the clause of the management contract providing for REDISA's collection of 18% on the *invoiced amount* was therefore a deviation from the REDISA Plan. Regulation 17(1)*(b)* of the Waste Tyre Regulations stipulates that non-compliance with the published plan constitutes a criminal offence. In terms of Regulation 17(2),the applicable penalty upon conviction, is a fine not exceeding R100 000.00 or imprisonment for a period not exceeding 10 years imprisonment or both, plus a fine not exceeding three times the commercial value of anything in respect of which the offence was committed. That the legislature has deemed it necessary to visit the contravention of the provisions of a published plan with a criminal sanction, is an indication of how seriously non-compliance is viewed.

[190] Regulation 9(1)*(p)* requires a plan to indicate the extent of auditing and reporting on the integrated industry waste tyre management plan envisaged. In compliance with that requirement, the REDISA Plan in clause 24 gave the assurance that it would be audited in terms of all existing legal and International Financial Reporting Standards (IFRS) requirements and will include compliance with the approved plan and the applicable conditions of approval. Included in that audit would also be the extent of the independence of the REDISA board.

[191] Whatever the criticism there could be against the iSolveit and A@L reports, the fact of the matter is that the revelations pertaining to the various non-compliances with the REDISA Plan, the MOI and several provisions of the Companies Act are discernible from a mere perusal of these instruments. Furthermore, the cursory nature of the A@L report does not detract from the fact that the allegations made therein pertained to aspects peculiarly within the knowledge of the shareholders and directors of KT. There is therefore no reason why the undisputed parts of both reports cannot be accepted as substantiation of the Minister's assertions. I am fortified in this view by the remarks made by the court in *Registrar of Insurance v Johannesburg Insurance Co Ltd*[78]*.* In that matter, the applicant in an application for the winding up of the respondent sought to hand up a report drawn by an accountant appointed to investigate the affairs of the respondent. The respondent had contended that the report in question constituted hearsay evidence and therefore objected to its admission. Hiemstra J reasoned as follows:

'I am not prepared to allow rules of procedure to tyrannise the Court where an important matter has to be thrashed out fully and all the facts have to be put before the court. In this particular case, because the case is complex and it cannot be fairly expected from the petitioner to have all the facts at his disposal before he launches his petition, which was in fact launched in the public interest, I will overlook the fact that an important part of the petitioner's case was put in after his original petition.

It has also been argued that much of this report is hearsay; it is stated to be unsworn hearsay in terms of the argument I have just dealt with and in some respects as double hearsay. It is true that the report contains statements by the accountants that they were informed of certain facts. Any investigation into books drawn by others who do not testify to the entries is, very strictly speaking, hearsay. But books are admissible against a party. If all the people who know about every small fact which makes up this complex case should have to make affidavits, the matter would have become quite impracticable. In a case like that, a case will relax its rules for the sake of facilitating litigation and in the interest of justice.' I echo the same sentiments.

[192] Similar sentiments were expressed in a slightly different context in *Kleynhans v Van der Westhuizen NO* 1970 (1) SA 565 (O), where the court stated:

[78] *Registrar of Insurance v Johannesburg Insurance Co Ltd* 1962 (4) SA 546 (W) at 547.

'Once a discretion has been exercised in favour of an applicant, a Court of appeal will only interfere if it comes to the conclusion that the Court a quo has not exercised its discretion judicially. . . The application for a provisional order of sequestration was placed before the Court as a matter of urgency in the interests not only of applicant but of the public generally. The ramifications of respondent's affairs were extensive and complex and it was impossible for applicant to have all the facts fully at his disposal before he launched his petition.' I align myself with these remarks and consider them to be of application in this matter.

[193] It is also noteworthy that that Erdmann's employment contract required him to promptly disclose his direct and indirect personal interests in a form which he had to update from time to time. Erdmann has not produced a written form or resolution evidencing his disclosure of interests to REDISA. Although the financial statements state that the conflicted directors recused themselves from the discussion of the appointment of KT as the management company and the non-executive directors[79] concluded the contract, this allegation has not been substantiated by the relevant resolution. Furthermore, REDISA's external auditor, KPMG, in the same financial statements, expressly stated that this information was not verified. Given that the Minister had, in her replying affidavit, specifically raised the failure of the appellants' failure to attach the relevant documents, one would have expected that these documents would have been attached to the rebutting affidavit that was subsequently filed. Surprisingly, this did not happen. The ineluctable inference is that there was no such disclosure of a conflict of interest. As stated already, this flagrant disregard of the MOI and the Companies Act is not something that the Minister is empowered, expressly or impliedly, to agree to.

[194] At paragraph 71 of the majority judgment, it is stated that 'the letter of 30 November 2016 dealt at length with the reasons for KT's appointment and the way in which potential conflicts of interest were managed in accordance with good corporate governance, as KPMG had confirmed.' However, KPMG, which was REDISA's external auditor, unequivocally stated that it had not verified whether the potential conflicts of interest were indeed disclosed in accordance with corporate

[79] Notably, none of the non-executive directors mentioned in the financial statements had been appointed at the time when the management agreement was entered into.

governance.[80] Although the MOI states that the minutes of all meetings serve as the evidence of the taking of resolutions, no minutes reflecting such resolutions were attached to the appellants' papers. Undoubtedly, this was information peculiarly within the appellants' knowledge and would have been easy to furnish. This was not done, save for a one-page document which what was referred to as 'specimen' resolution. This 'specimen' was completely unrelated to the appointment of KT as the management company. What is in fact evident from that 'specimen' is that contrary to the provisions of s 75(5)(g) of the Companies Act, the three conflicted executive directors signed that specific resolution. Furthermore, one of the executive directors who presumably ticked one of the blocks did not sign the resolution.

[195] Clearly, the requirements of s 75(5) of the Companies Act and clause 11.6 of MOI pertaining to the management of conflict of interest were not complied with. Therein lies these three executive directors' insurmountable hurdle. Another disconcerting factor evident from the 'specimen' is that despite the clear provisions of the REDISA Plan, compiled by REDISA, which expressly stipulated that the board was to consist of ten members, two of whom were to be executive directors, one legal expert, one financial expert, five captains of industry and one person from the informal business sector, that requirement was not complied with.

[196] For whatever it was worth, the appellants repeatedly harped on the fact that they had disclosed their shareholding to the 'relevant government institutions and industry bodies beforehand'. As stated before, one would have expected this to have been disclosed in the REDISA Plan, which was not the case. As correctly found by the court a quo, the irresistible inference drawn from the undisputed facts is that they did not do so. The alleged awareness of those organisations would in any event not have served to regularise non-compliance with the Companies Act and MOI. Therefore, the Minister's awareness thereof would not have legitimised non-compliance with the REDISA plan requiring independence of the board.

[80] KPMG remarked as follows on the comments made in the Directors' Report: 'As part of our audit of the financial statements for the year ended 28 February 2014, we have read the Directors' report for the purpose of identifying whether there are material inconsistencies between this report and the financial statements. This report is the responsibility of the respective preparers. *Based on reading this report*, we have not identified material inconsistencies between this report and the audited financial statements. However, *we have not audited this report and accordingly do not express an opinion on this report*.' (Own emphasis).

[197] Awareness of the 'relationship' in any event does not equate to an awareness of the nature and extent of the shareholding, which are important in assessing the extent of the personal interest and, in turn, have a bearing on the extent of the conflict of interest. The 92% shareholding of Erdmann, Davidson, and Kirk, via Nine Years Investments and Avranet meant that these three executive directors, in essence, controlled KT. This served to emasculate the requirements of the REDISA Plan and MOI pertaining to of an independent board.

[198] Further and in any event, the fact that the financial statements disclosed that some of the REDISA directors were indirect shareholders does not detract from the fact that the extent of that shareholding, which in effect meant that the three implicated executive directors controlled KT, was never disclosed in any of the correspondence issued by or at the instance of REDISA. The fact that this was not even disclosed in REDISA's answering affidavit speaks volumes with regards to REDISA's tendency to withhold material information. The extent of the shareholding came to light only as a result of the A@L report.

[199] Crucially, neither REDISA nor KT has averred that this state of affairs was ever ratified by the REDISA Board. In any event, both the MOI and the Companies Act lay down certain procedures for ratification. It could only have been done with the consent of the Minister or with leave of the court. It was not the appellants' case that this was ever done.

[200] What is also clear from the provisions of clause 11.6.1 - 11.6.5 of the MOI is that the three implicated REDISA directors were not eligible to serve as directors in REDISA and that their ineligibility and their personal interests in KT and NYI, were not condoned. Clause 11.7 provides that the ineligibility to serve as directors can be condoned if (1) the breach of the relevant criteria is disclosed to the board of directors *prior to its arising* and (2) the remaining directors unanimously agree to such condonation and (3) in exercising its power of condonation, the board is not

acting in breach of any law or the Minister's directive. The last requirement would not have been satisfied, for the REDISA Plan constituted subordinate legislation and emphasised the independence of the board. This was further emphasised in the Minister's letter dated 29 November 2012, in which the conditions of approval in respect of the REDISA Plan were set out.

[201] Section 75(7) of the Companies Act stipulates the circumstances under which a decision of the board can become valid despite the existence of a personal interest on the part of the directors. That can only happen if the decision was taken subsequent to the disclosure of the conflict of interest or if it has been declared to be valid by a court of law. It is self-evident that the appellants satisfied none of those requirements. The signature of the management agreement and its first amendment by conflicted parties was never ratified, whether in terms of the provisions of the Companies Act or in terms of the MOI. Here, too, the alleged knowledge and acquiescence of the Department would not come to the assistance of the appellants. Needless to say, the various non-compliances with the Companies Act by the REDISA board members equate to a breach of the directors' fiduciary duties.

[202] In my view, the failure to disclose in the REDISA Plan that KT had already been appointed as the external management company, coupled with the non-disclosure of the nature and extent of the shareholding constitute material non-disclosure. This resulted in an untenable and pervasive conflict of interest that went to the heart of the relationship between REDISA and KT on the one hand, and between the two companies and the Minister, on the other. This conflict of interest was matched in equal measure only by the lack of accountability and transparency which offended the objects of the Companies Act. There is absolutely nothing in the papers that shows that the three implicated executive directors addressed this conflict of interest in any way. Crucially, the fact that KT was appointed before the REDISA Plan was gazetted also means that REDISA's promises of accommodating BBBEE and black economic empowerment, as set out in the REDISA Plan, were hollow given the fact that KT was self-evidently a fiefdom of a few individuals. KT

was correctly identified as a front. The Minister's disgruntlement with this state of affairs is absolutely justified.

[203] There is a reason why the numerous non-compliances with the REDISA Plan and MOI would have taken some time to uncover. Anyone reading the MOI would have been satisfied that it was aligned to the REDISA Plan and that there were enough safeguards for accountability and transparency. This is especially so because of (i) a clause in the MOI binding the company to compliance with the unalterable provisions of the Companies Act, which include provisions surrounding the directors' fiduciary duties, (ii) to the assurance in the MOI that at least 3 directors would be 'persons not connected' as contemplated in the Income Tax Act and (iii) reiterated the grounds of disqualification of the directors. Anyone seeing the REDISA Plan and reading the MOI would have been lulled into a false sense of security, not being aware that a management agreement was already in breach of those clauses and thus seriously eroded the protection these documents seemed to confer.

The unauthorised change in the computation of the management fee

[204] At paragraph 17, the majority judgment states that 'the management contract between KT and REDISA permitted KT to a management fee of 18% of the total levy from tyre manufacturers, which was less than the 20% stipulated under the REDISA Plan. The Minister could not but have been aware of this from the beginning.' Furthermore, at paragraph 70 of the majority judgment it is stated that 'by simple calculation one can see that the management fee in each month was exactly 18% of the revenue.' For his part, Mr Crozier alleges that 'REDISA pays KT an administration fee equivalent to 18% of the levy for providing administration services (which is less than the prescribed 20% approved by the applicant).' This statement is misleading, as it creates an incorrect impression that REDISA was in fact charging less than what it was entitled to. The Minister's case is that KT received far more than it was lawfully entitled to. What is set out in the next few paragraphs shows that the Minister's assertions are correct. The court a quo's conclusions in this regard are indeed correct.

[205] What has to be borne in mind is that the 20% referred to in the REDISA plan was intended to include the administration overheads set out in clause 25 of the REDISA Plan. These included the costs related to IT, HR, marketing, training and contracts, among others. This is admitted by Mr Crozier. However, some of these overheads seem to have been left out of the computation of the management fee, with the result that the sum of the head office costs paid to KT plus the management fee paid to KT exceed 20% of the levies collected. The composition of the 20% fee was, in breach of the REDISA Plan and the MOI, unilaterally changed by the KT-REDISA management contract in so far as it stipulated that KT would be entitled to '18% of the total monthly amount invoiced by REDISA to subscribers.' No reference is made to administration costs being included in that management fee.

[206] The impact of changing the calculation or composition of the 20% management fee as stipulated in clause 25 of the REDISA Plan is self-evident from a document that was prepared by an auditing firm, PWC, at the instance of REDISA. This is the PWC Report of April 2016 (PWC report). Clause 44 of the PWC report states that the administration costs consist of head office costs based on the annual budget plus the management fee to which KT is entitled. However, a simple calculation shows that the amendment to the management agreement resulted in KT getting more than it would otherwise have been entitled to receive in terms of the REDISA Plan.

[207] The REDISA Plan had made provision for the administration (head office costs) plus the management fee to account for only 20% of the tyre levy that was collected. At paragraph 14 the majority judgment correctly interprets the 20% fee referred to in the REDISA Plan to refer to '20% of the levies collected', as clause 16 of the REDISA Plan inter alia states that REDISA will undertake its management, administration and disbursements, among others, from 'levies paid into the fund'. It is evident from the amounts paid to KT, captured in the PWC and A@L reports, that the sum of the management fee plus some head office costs exceed 20% of the collected revenue. The management agreement changed this clause in two ways: the management fee became calculable on invoiced amounts instead of revenue

collected, and separated the management fee from the rest of the head office overheads. At first blush, it seems as if nothing turns on this aspect. However, this amounted to a unilateral change to the REDISA Plan, which amounted to a contravention of the Waste Tyre Regulations. As I will demonstrate shortly, the direct result of changing the computation of the administration expenses in the manner I have just alluded to was that KT unjustifiably became entitled to more than it would otherwise have been entitled to. It became entitled to 18% of the *invoiced amount* and not the revenue or levies that were actually collected. This was a unilateral deviation from clause 16 of the REDISA Plan.

[208] The Minister correctly contended that the effect of REDISA deviating from the REDISA Plan by virtue of the management agreement was that KT became entitled to charge 18% on the amount appearing on the invoice, regardless of whether it had actually been collected or not. The fact that the 18% charge came about as a result of the provisions of the management agreement is set out as follows in the notes to the financial statements for the year ended February 2015: 'Management fees from subscribers are recognised when the following criteria are met: once an invoice is issued to a subscriber or if the amount for a subscriber can reliably be estimated at the end of each liability period'. And the following is stated in the PWC report: 'The management agreement (Annexure 19) between KT and REDISA states that the management fees are determined based on invoiced value and not revenue collected, as set out in para 50 [of the PWC report] above.'

[209] Furthermore, Ms Conceivious, who was the Chief Financial Officer of REDISA, confirmed that the management fees are not adjusted for revenue receivables written off. An example of how the ratio between KT's management fee and the head office fees became skewed is evident from clause 45 of the PWC report, which captures 'the split between Head Office and KT management costs' for January to February 2016. Significantly, the PWC report states the following at para 48 – 49: 'Based on the reasonability assessment above the total head office costs included in the estimate is overestimated by R3 757 798. Supporting information surrounding the head office costs has been listed as an outstanding in E below' (sic).

What is also clear from the figures reflected in clauses 45 and 51 of the PWC report is that in the period indicated, KT received a fee of R16 163 216.00 as its management fee for that period, which is indeed 18 per cent of the revenue collected (R89 795 642.00).

[210] If the management fee were to be calculated in accordance with the REDISA Plan, the total administration costs inclusive of KT's management fee would have been 20% of the revenue collected, which is an amount of R17 959 128.40. Out of that amount, the head office costs amounting to R8 145 565.00 would have to be deducted, which would mean that KT would be entitled to R9 813 563.40 (R17 959 128.40 – R8 145 565.00 (head office costs) = R9 813 563.40). On KT's own version, it was paid 18% of the revenue collected, which is an amount of R16 163 216. This means that the amount of R6 349 653.00 constituted an overpayment in respect of January to February 2016. KT was not entitled to this surplus payment. I therefore cannot agree with the majority judgment's conclusion that 'the management fee stipulated in the contract was in line with the Plan'.

[211] It is undisputed that the 18% calculation was used at all material times and was still the basis of the calculation of KT's management fee up to the time of the bringing of the Minister's application in 2017. It stands to reason that by the time the Minister initiated the proceedings in 2017, it had translated into a substantial amount, as REDISA had, over a period of about four years, collected revenue in the amount of R2.256 billion, of which R432 million was transferred to KT as management fees and R97.088 million as set up costs. In terms of the REDISA Plan, 20% of the revenue collected should have covered management fees as well as head office costs, but a simple mathematical calculation shows that 19.1% of the revenue collected was dedicated exclusively to KT's management fees. At paragraph 19 of the majority judgment, it is correctly stated that 'the management agreement contemplated that KT would incur start-up costs in respect of the Plan, which would be passed on to Redisa'. However, that very term of the management agreement also constituted a unilateral deviation from the REDISA Plan as clause 16 thereof expressly stipulated that the set-up costs would be paid from the over-recovery of

operating costs accumulated in the initial years. Given all these facts, the only reasonable inference that is justified by the undisputed averments made by the Minister, which are borne out by the documentary evidence, is that the insertion of the clause changing the computation of the management fee was with the sole purpose of ensuring that KT would get more than what it was entitled to receive in terms of the REDISA Plan.

[212] It is evident from the afore-mentioned facts that all surplus payments which were made in breach of the REDISA Plan were not in respect of a legal obligation of REDISA, were not bona fide and therefore constituted a contravention of item 1(1) and 1(3) of Schedule 1 of the Companies Act as well as clause 4.2 of the MOI. The afore-mentioned contraventions, which resulted in the assets of a non-profit company being distributed contrary to its objects, committed by its own promoters who, as executive directors were in charge of its operations, constituted a misappropriation of those funds. KT, as the management company of REDISA Plan, was *au fait* with the REDISA Plan. It was aware of the impropriety that could result from the inappropriate implementation of that Plan, given the warning sounded by REDISA in the introductory parts of the REDISA Plan. Notwithstanding that, it was a party to the management agreement that deviated from the REDISA Plan in various ways, including the computation of the management fee and the transactions pertaining to set-up costs were concerned. It is the one that presented the tax invoices to REDISA and received the afore-said amounts. It was therefore complicit in the misappropriation of those funds. This conclusion is clearly justified by the facts of this case. I have already highlighted various indisputable contraventions, and the golden thread of a reluctance to readily share information pertaining to serious allegations of impropriety. These lead me to conclude that the litigation initiated by the Minister in the court a quo was fully justified.

[213] At paragraph 94(iv) the majority judgment states that it is unlikely that REDISA deliberately withheld the management contract. In my view, it is more likely that they indeed deliberately withheld it, for the three executive directors knew that the date of signature of that management agreement would expose their

misrepresentation of the true state of affairs, i.e. that an external management company which had a pre-existing relationship with REDISA had already been appointed by the time the REDISA Plan was re-submitted to the Minister for approval but was not disclosed therein. Furthermore, they knew that it would cause consternation on the part of the Minister and the Department if they were to notice the unilateral changes made to the REDISA Plan and how corporate governance was eroded by effectively handing over the executive management of REDISA to KT, thus allowing it to circumvent the strictures of the Companies Act and to channel income to it. This became easy to do because in terms of the management agreement, KT was given the mandate to do book-keeping functions for REDISA. Curiously, Tania Conceivious, who was a director of KT, was also the Chief Financial Officer of REDISA.

[214] Various important provisions of the REDISA Plan, which constitute~~s~~ an instrument of subordinate legislation, were breached notwithstanding that the Waste Tyre Regulations clearly stipulated that non-compliance therewith constitutes an offence. As if that was not enough, KT also benefitted from the fact that its majority shareholder, NYI, was REDISA's landlord. This is another form of ongoing conflict of interest. The acquisition of software whose intellectual property belonged to KT and for which NYI received royalties is yet another reflection of the untenable conflict of interests underlying the relationship between KT and REDISA. Despite the clear provisions of the Companies Act, the REDISA Plan, the MOI, the King Code to which REDISA had committed itself in terms of the MOI, this untenable situation was allowed to persist despite the red flags raised in the iSolveit report. This constitutes a breach of the directors' fiduciary duties and is a serious indictment on the REDISA board of directors.

[215] Furthermore, KT had an existing 5-year lease agreement with NYI, a private company in which Erdmann and his son were directors and in which Erdmann held an 80% shareholding. On 28 June 2012 a 'sub-lease agreement was entered into, in terms of which NYI sublet the same property to REDISA and the latter would pay up to 50% of the rent for the space, plus 'additional charges set out in an Annexure,

plus an additional amount as ‘operating costs’. There is no proof that the conflict of interest arising from the conclusion of this contract was disclosed by Erdmann to the REDISA board as contemplated in his employment contract. The same applies to the two further agreements. First, an agreement in terms of which a company managed by Erdmann’s wife and his son (Westfalen) rendered certain services to REDISA. Second, an agreement in terms of which NYI became entitled to the intellectual property rights pertaining to the Oracle computer system. Here, I must hasten to add that Erdmann’s employment contract expressly prohibited him from entitlement to intellectual property rights ‘made, created or discovered by [him] in the course and scope of his employment with [REDISA] in connection with or in any way affecting or relating to the business of [REDISA], or capable of being used or adapted for use by REDISA or in connection with its business’ and stated that such intellectual property would belong to and be the absolute property of REDISA.

[216] As already stated, the relationship between REDISA and KT was characterised by substantial non-disclosure. For example, certain disclaimers were made the April 2016 PWC report. In respect of a certain amount of rental, the report states: ‘Ms Conceivious informed us that the amount is for the rental of the office building of REDISA and is paid based on a verbal agreement. No further procedures have been performed.’ In respect of consulting costs amounting to R200 000.00, paid in February and March 2016, the report states: ‘This amount could not be linked to any supporting documentation. The cost consists of consulting fees paid to Isivumo Consulting and this is performed based on a verbal agreement. No supporting documentation was supplied to us.’

[217] Having considered all the undisputed facts, as well as the applicable legal provisions, the management agreement, the REDISA Plan and the MOI, it is clear that the REDISA executive directors were in effect permanently conflicted because of their relationship with KT. It cannot be seriously reasoned that they could transcend KT’s interests by focussing exclusively on what was in REDISA’s best interests. The futility of that exercise is borne out by the various non-compliances with the MOI and the terms of the management agreement, which served to circumvent the REDISA Plan. To suggest that the untenable conflict of interests could be addressed by them recusing themselves every time a business related

decision was taken is simply incongruous with the provisions of Companies Act already alluded to, earlier, in this judgment.

[218] Whereas s 24 of the Companies Act requires a company to keep record of all its minutes and resolutions, amongst others, for seven years, the appellants did not furnish the court with any resolutions to substantiate its contentions of disclosure of the conflict of interest and recusal from participation in certain decisions. What is also disconcerting from what Erdmann referred to as a 'specimen' document evidencing their recusal in respect of areas where the executive directors were conflicted, is that the very executive directors who were recusing themselves signed the 'specimen resolution' without disclosing the interest that required them to recuse themselves. What is quite remarkable about the 'specimen resolution' is that whereas the REDISA Plan envisaged that the board of directors would consist of ten members, it was signed by only four directors (including the three who were recusing themselves) and one director did not sign. This would suggest that REDISA was operating at fifty percent of the board capacity referred to in the REDISA Plan. This was also less than the number prescribed in the MOI. On Erdmann's version, the REDISA Plan was implemented in June 2013. By then, the MOI was already in place. Despite this, various provisions thereof were not complied with.

[219] With regards to the directors' remuneration, REDISA claims that these were benchmarked by PWC. What they do not disclose is that PWC recommended that the remuneration of board members should not exceed the median. A perusal of the recommended figures shows that most directors were paid in excess of the median. Some of them were paid exorbitant sign-on fees in excess of R1 million even though these were not recommended in the PWC report. With regards to the CEO's remuneration, PWC proposed a total guaranteed package inclusive of all benefits. Despite this, Erdmann's salary was in excess of the recommended amount. The CEO's contract expressly provided how his remuneration was to be determined. However, that was not done. His salary worked out to R4 164 840.00 per annum. In addition, there were exorbitant perks. For example, an amount of R548 696.08 was paid for rental of the home he occupied. In addition thereto, an amount of

R943 522.46 was paid for private security allocated to his home and the homes of Kirk and Davidson, which were guarded day and night. The CEO's exorbitant salary obviously had a bearing on the remuneration of the other executive directors as the gap could not be too big. They too, ended up with exorbitant packages including the provision of security at their homes around the clock. Although Erdmann asserted that this was approved by the board, he provided no substantiation on this aspect. Having considered all these factors, I cannot agree with the majority judgment's opinion that the remuneration was not excessive.

An intergovernmental dispute

[220] At paragraph 145, the majority judgment opines that the dispute between REDISA and the Minister falls within the definition of an intergovernmental dispute and arose long before the Minister's resort to liquidation proceedings against REDISA. It is propounded that the Minister therefore had a constitutional duty to avoid judicial proceedings by attempting to settle the dispute. I disagree that the Minister breached her constitutional duty. It is clear from s 41 of the Constitution that accountability and transparency are foundational to the proper functioning of government. As correctly stated in the majority judgment, REDISA was an organ of state handling public funds within the legislative framework emanating from s 24 of the Bill of Rights. Erdmann correctly acknowledged that REDISA 'is performing a constitutional function and undertakes public law obligations. Given the provisions of the Waste Act, the Tyre Regulations, the REDISA Plan and the MOI, it is undeniable that the Minister was an important stakeholder in the implementation of the REDISA Plan. The iSolveit report contained serious allegations of misappropriation of public funds. Despite the Department and the Minister's numerous complaints about the lack of independence of the REDISA board and the conflict of interest, REDISA took no steps whatsoever to remedy the situation. It simply stated that the conflict of interest had been disclosed and dug its heels in. This is hardly an attitude that could be expected of an organ of state responsible handling public funds. In my view, REDISA was recalcitrant.

[221] The duty to foster good relations applied with equal force to both REDISA and the Minister. As the correspondence between the Department and REDISA

pertaining to the alleged transgressions had yielded no fruit, it would serve no purpose for the Minister to first embark on negotiations regarding the alleged contraventions of the law before launching the application at the court a quo. Moreover, two applications were already pending in the High Court, which had been initiated by REDISA against the Minister without observing the provisions of s 41 of the Constitution. Viewed in this light, the contention that the Minister ought to have observed the provisions of s 41 of the Constitution before resorting to this litigation clearly lacks any merit.

[222] Furthermore, by REDISA's own admission, the Department's protection of the environment and public health is a key government objective. Issues of non-compliance of an organ of state with various prescripts in violation of the Constitution and government objectives are serious by their nature. This is more so the case when such non-compliance involves misappropriation of substantial public funds. What was required was a court intervention. This is especially so in this case because all parties had already litigated against one another in three other matters. Expecting them to first negotiate on even more serious issues before approaching the court a quo was simply not practical, under the circumstances.

Section 157(1)*(*d*)* standing, the use of *ex parte* proceedings in winding up and the 'just and equitable' remedy

[223] The granting of an order for the winding up of a solvent company on just and equitable grounds under circumstances similar to the present is not a novel remedy and was permissible in terms of the Companies Act of 1973. It is interesting to note that in terms of the 1973 Act, acting contrary to the Memorandum of Incorporation was considered a ground to justify the winding up of a company under the just and equitable ground. Furthermore, s 258 of the 1973 Act envisaged the investigation of the company's affairs at the instance of the Minister of Trade and Industries and s 262 permitted the winding up of such a company on just and equitable grounds. Clearly, fraud and illegality were accepted as valid grounds for winding up a solvent company despite the limitations set out in s 346 of the 1973 Act with regards to the persons eligible to apply for a winding up envisaged in that provision.

[224] The just and equitable ground has been replicated in the 2008 Act. A company operated to achieve a fraudulent purpose may be wound up on the just and equitable ground.[81] Indeed, the various classes of cases recognised by the Courts as ones in which an application of the just and equitable ground may fall should not be regarded as a closed category, and the principles enunciated therein imply no fetter on the court's discretion.[82] Ultimately, every case must be considered on its own merits. When considering the meaning to be given to section 157 of the Companies Act, courts must be mindful of the fact that they are enjoined to promote the spirit, purpose and objects of that Act.[83] Like any other statute, the Companies Act should also be interpreted through the prism of the Constitution.[84]

[225] It is also trite that if any provision of a statute is capable of more than one meaning, the meaning that best promotes the spirit and purpose of this Act must be preferred. This constitutes a purposive interpretation. One of the purposes of the Companies Act is to provide for the accountability of non-profit companies in a manner designed to promote, support and enhance the capacity of such companies to perform their functions.[85] Despite the fact that in clause 26.1.5 REDISA bound itself to its management of REDISA being audited to ensure compliance with accepted accounting standards, REDISA was not accountable and was clearly not

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[81] In *re T E Brinsmead & Sons [1897] 1 Ch 406 (CA); In re The International Securities Corporation Ltd* (1908) 24 TLR 837 (Ch); *Kyle v Maritz and Pieterse Inc* [2002] 3 All SA 223 (T) at 232.

[82] *Henochsberg on the Companies Act 71 of 2008, Vol 1 Service Issue 16 at 332(6B).*

[83] Section 158 of the Companies Act provides:

'When determining a matter brought before it in terms of this Act, or making an order contemplated in this Act-

(a) a court must develop the common law as necessary to improve the realisation and enjoyment of rights established by this Act; and

(b) the Commission, the Panel, the Companies Tribunal or a court-

(i) must promote the spirit, purpose and objects of this Act; and

(ii) if any provision of this Act, or other document in terms of this Act, read in its context, can be reasonably construed to have more than one meaning, must prefer the meaning that best promotes the spirit and purpose of this Act, and will best improve the realisation and enjoyment of rights.'

[84] Section 7(a) of the Companies Act provides:

'The purposes of this Act are to-

(a) promote compliance with the Bill of Rights as provided for in the Constitution, in the application of company law'.

[85] Section 7(h) of the Companies Act provides:

'The purposes of this Act are to-

. . .

provide for the formation, operation and accountability of non-profit companies in a manner designed to promote, support and enhance the capacity of such companies to perform their functions . . .'

amenable to being reigned in. Its litany of non-compliance could not be allowed to be business as usual, especially considering that it had, in terms of clause 24 of the REDISA Plan, committed itself to the auditing of its compliance with the REDISA Plan, the Waste Act and the Waste Tyre Regulations.

[226] Furthermore, KT adopted an attitude of refusing to be accountable to the Minister on the basis of it being a private company. It seemed to be oblivious to the fact that by agreeing to be the management company of REDISA, it bound itself to the provisions of the REDISA Plan relating to accountability. In terms of clause 26.1.5, it too, as the management company, was equally bound to ensure that REDISA's management complied with acceptable accounting standards. It also had to develop an audit plan in respect of the invoicing of and payment of waste management levies. The following warning which was sounded by the Constitutional Court is equally applicable to KT, more so because of the accountability it bound itself to, in terms of the REDISA Plan:

'[85] The establishment of a company as a vehicle for conducting business on the basis of limited liability is not a private matter. It draws on a legal framework endorsed by the community and operates through the mobilisation of funds belonging to members of that community. Any person engaging in these activities should expect that the benefits inherent in this creature of statute will have concomitant responsibilities. These include, amongst others, the statutory obligations of proper disclosure and accountability to shareholders. It is clear that any information pertaining to participation in such a public sphere cannot rightly be held to be inhering in the person, and it cannot consequently be said that in relation to such information a reasonable expectation of privacy exists. Nor would such an expectation be recognised by society as objectively reasonable. This applies also to the auditors and the debtors of the company. . .'.[86]

[227] Apart from s 157(3), which categorises the persons that may bring a lawsuit grounded on derivative action, there is no other limitation stipulated in this section. Subject to obtaining the court's leave, there are no limitations to bringing an application for winding up in the public interest. The appellants' proposition that an

[86] *Bernstein & others v Bester & others NNO* 1996 (2) SA 751 (CC) at para 85.

interpretation of s 157 that grants the public interest standing would give a public interest litigator more rights than other litigants has no merit because that provision does not grant such a litigant an untrammelled right. After all, the public interest litigant must apply for leave of the court in order to enforce the remedy.

[228] It cannot be denied that the amount that was presented as reserves to the Minister was thereafter greatly reduced in subsequent communication. It is also undisputed that REDISA stated that even a cash injection of R210 million would not change the situation but would merely postpone the 'wind-down' by three months. This was obviously alarming and justified the bringing of an urgent application. To my mind, nothing precluded the Minister from approaching the court on the basis of the new disconcerting facts that had come to light since the institution of the Gauteng litigation. Collection of levies by REDISA amounted to a collection of public funds on behalf of government. This was a matter of public importance. Paragraph 42 of the majority judgment states that a transitional business plan was delivered to the Department on 31 May 2017, but was not attached to the Minister's founding papers. On REDISA's own version, this business plan was delivered a day after the Minister had already deposed to the founding affidavit. The fact that it was not attached to the Minister's affidavit is therefore unsurprising, in my view.

[229] I am satisfied that all the circumstances of this case, including the discrepancies in reflected reserves as well as the fact that REDISA had, in its notice dated 31 May 2017 threatened to stop the collection of tyre waste with effect from 1 June 2017, warranted the launching of ex parte proceedings. That state of affairs would obviously have had an adverse effect on the environment. The acceptance of hearsay evidence was also justified. In her founding affidavit, the Minister applied for hearsay evidence to be admitted and averred, among other things, that most of the evidence originated from the appellants and was largely recorded in minutes and correspondence that had not been refuted at the time. Indeed, some of the minutes attached were counter-signed by the appellants. Apart from this paper-trail, the alleged breaches of the REDISA Plan, the Companies Act and the MOI were discernible from a mere perusal of these documents in conjunction with the

management agreement. The requirements for the acceptance of hearsay evidence were indeed satisfied. The circumstances of this case were undoubtedly exceptional.[87]

[230] The Minister was also justified in launching the application on an urgent basis. She gave a variety of reasons, most of which I am in agreement with. As stated already, the stoppage of collection of tyre waste from tyre producers was imminent. Furthermore, the Minister was concerned that given the provisions of item 1(4) of Schedule 1 regarding the distribution of the net value of a non-profit company upon its dissolution, REDISA could easily transfer the assets to any one of the non-profit companies it had registered after the gazetting of the REDISA Plan, with Erdmann and Davidson being the directors in those companies. As already alluded to, REDISA had, despite being adamant that there was only one management agreement between itself and KT, unwittingly attached the wrong management agreement to its letter, which disclosed the existence of yet another management agreement, this time pertaining to other waste streams. With the announcement of an imminent 'wind down', the stage was set for the REDISA funds to be unilaterally transferred to another non-profit company registered by Erdmann, where Erdmann and his fellow directors could have exclusive say over how the funds were to be spent. Further and in any event, the Minister had asked for a rule nisi to be issued, so REDISA was always going to be given an opportunity of providing its full story.

[231] Subsequent to the granting of the provisional liquidation order, REDISA anticipated the return date of the rule nisi and asked the court a quo to reconsider the order granted *ex parte*. It filed an answering affidavit and was allowed to file a rebutting affidavit in response of the new allegations that were made in the Minister's replying affidavit. The issues were fully ventilated. The court a quo demonstrated in its judgment that in its determination of the application, it was fully aware of the details of the afore-mentioned litigation. In fairness to the court a quo, it is clear from the tenor of its judgment that it addressed itself to the issue of disclosure of

[87] *National Director of Public Prosecutions v Basson* fn 6 para 21; *Knox D'Arcy Ltd & others v Jamieson & others* fn 16 at 379I-380B.

information, for it found that the information that was allegedly withheld by the Minister was peculiarly within REDISA's knowledge. It went on to state that the appellants were the ones that were not entirely forthcoming with material information. In as far as the Minister's affidavits were concerned, there was truly no material non-disclosure to talk about. The court a quo's remark that nothing turns on non-disclosure must be seen in that light.

[232] To my mind, the only parties that are guilty of material non-disclosure are REDISA and KT, as their relationship with the Minister and the Department was largely characterised by a reluctance to disclose critical information. This is evident from their failure to provide supporting documentation to the Minister, PWC, KPMG and iSolveit. Notwithstanding the seriousness of various allegations suggesting a deliberate failure to be accountable and transparent, they chose to be very laconic in their responses. They indeed tried to create a fog in the hope of hiding or distorting the reality. [88] Their failure to meet some of the Minister's allegations left same unchallenged. There is therefore no reason why undisputed facts should not be accepted. The appellants must therefore live with the consequences of the choice they made.

[233] It must be borne in mind that the Minister was the member of Cabinet responsible for the implementation of the REDISA Plan. The Waste Act gives her the authority to monitor compliance with the Plan. Her unique role related to the implementation of and compliance with the REDISA Plan is recognised in the MOI. In terms of clause 29 of the REDISA Plan, REDISA was obliged to work 'very closely' with the Department to ensure 'ongoing improvement' of the waste tyre industry. In terms of clause 28.1.6, KT, as REDISA's management company, was obliged to report to the Department on all aspects of the REDISA Plan. The Minister was, undeniably, an important stakeholder for both REDISA and KT. Furthermore, the MOI bound REDISA to the principles of corporate governance, which in turn places a high premium on stakeholder relations. Her numerous enquiries failed to yield the desired results. The role that the Minister played in the implementation of

[88] See *Wightman v Headfour* supra at para 16.

the REDISA Plan has already been alluded to and need not be repeated. In clause 2.1 of the REDISA Plan, REDISA acknowledged the fact that the Department's task of protecting the environment and public health is a key government objective. It cannot be denied that that objective, which is evident from the Waste Act as well as the Constitution, resorts under the Minister. For all these reasons, I cannot see any reason why the Minister would not have standing to initiate liquidation proceedings in the public interest. This is especially so because, as correctly stated by Jafta J in the article mentioned in the majority judgment, the provisions of s 157 were intended to extend standing, not to limit it. I am therefore satisfied that the leave granted by the court which granted the provisional order was justified. As stated before, the matter was urgent and insisting that leave be requested in separate proceedings would truly amount to putting substance over form.

[234] The use of ex parte applications in respect of applications for winding up is not prohibited. The facts of this case in any event justified this. An important consideration here is that from the outset, the applicants prayed for a rule nisi to be issued. The winding up order that was granted was provisional, as a return date was fixed. As matters turned out, the respondents anticipated the rule nisi and filed affidavits presenting their side of the story. To expect the court a quo to have shut its eyes to the serious issues raised and to discharge the rule nisi purely on the grounds that the application was brought on an *ex parte* basis would have been an unnecessarily technical approach.

[235] At the end of the day, every case must be decided on its own facts. Serious allegations of impropriety and abuse of public funds, a lack of accountability and failure to observe corporate governance were made against an organ of state. The court a quo observed the *audi alteram partem* rule by allowing all the parties to file further affidavits. These, in my view, are important considerations that ought to be included in the basket of criteria to be taken into account by an appellate court that is evaluating the appropriateness, or otherwise, of an order granted pursuant to an *ex parte* application.

[236] The Minister comprehensively explained why she considered the winding up of both REDISA and KT to be a matter of great importance and public interest. I agree that she has made out a proper case for the granting of such an order. It must be borne in mind that a court's power to grant a winding-up order is a discretionary power, irrespective of the ground upon which it is sought.[89] The discretion must be exercised on judicial grounds.[90]

[237] As stated before, the granting of a winding-up order in circumstances analogous to the present is not a novelty. As correctly pointed out by the court a quo, a liquidation order was granted in *Pienaar v Thusano Foundation*[91] under circumstances that bear many similarities with the present case. It is also not novel in foreign jurisdictions. For example, a winding up order was granted in the public interest in *Secretary of State for Business Innovation and Skills v PAG Management Services Limited* [2015] EWHC 2404 (Ch), reported at [2015] BCC 720, where the Secretary of State had, inter alia, alleged that the respondent company had misused the insolvency legislation. In granting that remedy, which was permissible in terms of the Insolvency Act, the court found that the scheme used by the respondent company had misused insolvency legislation. By parity of reason, a winding up order is appropriate in circumstances where a company's corporate personality was abused in order to facilitate misappropriation of funds, as in the present case.

[238] In this matter, it must be borne in mind that REDISA was a non-profit company and was, as such, a company created for the public benefit as contemplated in item 1(1) of Schedule 1 to the Companies Act. Its MOI described its main object as the conservation, rehabilitation and protection of the natural environment specifically by creating and procuring the implementation of the REDISA Plan 'subject to the Approval Conditions' lawfully stipulated by the Minister. In the Approval Conditions, the Minister expressly reserved to herself the right to amend the REDISA Plan and to request the inclusion of additional information and

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[89] *F & C Building Construction Co (Pty) Ltd v Macsheil Investments (Pty) Ltd* 1959 (3) SA 841 (D) at 844. *Re J D Swain Ltd* [1965] 2 All ER 761 (CA) at 762.
[90] *Irvin & Johnson Ltd v Oelofse Fisheries Ltd* 1954 (1) SA 231 (E) at 244.
[91] *Pienaar v Thusano Foundation & another* 1992 (2) SA 552 (BG).

measures that may give effect to the objects of the Waste Act. She also expressly reserved her right to approve other IITWMPs in the future. Clearly, the Minister was an important stakeholder in the implementation of the REDISA Plan.

[239] It is undisputed that REDISA was considered to be an organ of state and that it dealt with public funds in so far as it was tasked with collection of tyre waste levies. As stated earlier, The REDISA Plan was also an instrument of subordinate legislation. The REDISA Plan was presented to the Minister by REDISA. The REDISA Plan states that REDISA was registered for purposes of implementing the REDISA Plan. The appellants averred that KT had developed a 'tailor-made bespoke system' whose only 'customer is REDISA'.

All the executive directors of REDISA (Erdmann, Kirk and Davidson) together with one of the KT directors, Crozier, together owned a 100% shareholding in REDISA via two companies. One of these companies (NYI), under the directorship of Erdmann and his son, received R24 556 000.00 from REDISA.

[240] To state that the Minister had no reason to approach the court a quo urgently because the management contract was provided to iSolveit in September 2016 fails to take into account that even though it was evident from that contract that KT was the appointed external management company, the extent of the shareholding of the REDISA directors is not set out in that contract. There is much to be said about this extent of the shareholding of these three executive directors, Erdman, Kirk and Davidson not having been disclosed in the appellants' answering affidavits. There is a reason why the extent of the shareholding was kept a closely guarded secret. It would have lifted the lid on an untenable conflict of interest and that would have put paid to KT's livelihood.

[241] At paragraph 102 of the majority judgment, it is stated as follows:

‘I am afraid that this case – that the scheme was developed by the creators of the Redisa Plan to misappropriate public funds – was neither pleaded in the founding affidavit nor in reply. It does not get out of the starting blocks.’

For the reasons set out below, I disagree with that conclusion. The following averments made in the Minister’s affidavit support the Minister’s conclusion that a scheme to misappropriate funds was indeed developed:

[85.7] An “untenable conflict of interest” is created by the fact that the executive directors of [REDISA] are shareholders of [KT]: this creates an opportunity where a separate profit company can be used as a vehicle to redirect the public funds, collected by [REDISA] for the sole purpose of giving effect to the REDISA Plan, into the pockets of the shareholders of that separate profit company.

[90.21] that the roles and relationship between [REDISA] and [KT] in terms of assets, office space, expenditure and “arm’s length trading”, independence and governance are grossly compromised;

[90.14] Payments were made to “Westfalen Management”, a private company of which Mr Erdmann’s wife and son are the directors. A copy of the CIPC search for Westfalen Management(Pty) Ltd is attached as Annexure “BM 72”.’

[242] The majority judgment at paragraph 108(iii) further states:

‘The issue of Redisa’s intellectual property was also addressed. Mr Erdmann testified that KT paid for its Oracle computer system (being Oracle software and computer hardware), and that NYI, which is KT’s majority shareholder, had laid claim to the underlying intellectual property which it had developed. There was nothing untoward about this at all.’

I disagree. On the contrary, that arrangement is in fact, a further example of an undisclosed conflict of interest. Erdmann’s employment contract prohibited him from entitlement to intellectual property rights made, created or discovered by him in connection with the business of REDISA. NYI was a company in which Erdmann held an 80% shareholding. He controlled it. Furthermore, Erdmann and his son, Alexander Erdmann, were both directors of NYI. NYI was a majority shareholder of KT. The same Erdmann was the executive director of REDISA. It is undisputed that REDISA paid royalties to Erdmann for this software. Since Erdmann stated that NYI,

as the landlord of REDISA, was not charging REDISA for rent, it has to be assumed that the R24.556 million that it received was in respect of this intellectual property.

[243] On KT's own version, its only client was REDISA. The MOI acknowledged that REDISA was a special purpose vehicle for waste tyre management as set out in the REDISA Plan. REDISA was a non-profit company incorporated for a public benefit. Yet KT purchased the Oracle software so that it could use it for the benefit of REDISA at a cost, instead of REDISA buying it, if it needed it. Both KT and NYI benefitted from this arrangement. The conflict of interest is palpable. Nowhere in the papers is there even an attempt to state that this conflict of interest was disclosed and that Erdmann recused himself when the decision to enter into that tripartite arrangement was taken. It would have been important to do so, especially because clause 7.2.1 of the management agreement requires that KT obtain REDISA board approval before incurring, on behalf of REDISA, capital expenditure in excess of R500 000.00.

[244] It is to be borne in mind that in terms of the REDISA Plan, the NCCS was the computer system that would be used for levy-collection and auditing purposes. On Erdmann's version, it was a bespoke computer data collection system. The NCCS was acquired using REDISA funds. Whereas it is clear from the REDISA Plan that the ownership of the NCCS was to vest in REDISA and that the management company would 'implement and develop' it, the management agreement deviated from the REDISA Plan by inserting a clause stipulating it would also 'develop' the NCCS. It went on to provide that the intellectual property rights relating to the NCCS 'shall vest in KT'. For some unexplained reason, NYI 'laid claim' to the intellectual property rights in contravention of Erdmann's own employment contract. This non-compliance stands irrespective of whether his claim was in respect of the NCCS or the Oracle computer system. Even if it can be accepted, in the appellants' favour, that the intellectual property rights in respect of the NCCS vested in KT, clause 13.2 of the management agreement in any event granted REDISA a 'royalty-free licence' to use the information technology and financial systems created by KT for the duration of the agreement.

[245] Furthermore, considering that the management by KT on behalf of REDISA 'for a period not lasting longer than twenty four months from the commencement date of the management agreement [May 2011], it is rather curious that KT saw it fit to purchase the Oracle computer system and make it available to REDISA at a cost, instead of buying it with REDISA funds. Even more difficult to understand is why the intellectual property rights of that Oracle computer system would be owned by KT's shareholder, NYI and not by KT.

[246] No resolution or minutes have been produced to show that the conflict of interest relating to the acquisition of the Oracle computer system was disclosed and that the three implicated REDISA directors recused themselves when that decision was taken. In my view, this tripartite arrangement, entered into without any disclosure of conflict of interest, falls foul of good corporate governance and the Companies Act. This ineluctably bolsters the Minister's assertion that there was a scheme between KT and REDISA executive directors intended at facilitating the siphoning of REDISA funds.

[247] At paragraph 95 the majority judgment states as follows:

'The Minister's new case, not made out on the papers, but presented orally in the court a quo and again on appeal, is that REDISA's directors had abused KT's corporate personality and contravened Item 1(3) of Schedule 1 of the 2008 Act, and the equivalent provisions in REDISA's MOI.'

To describe the Minister's assertions as a 'new case' is a misnomer, in my view, for the Minister's assertions in that regard are expressly made in the Minister's affidavits. All the submissions made on the Minister's behalf are foreshadowed in the affidavits and are borne out by the REDISA Plan and the MOI. It must be borne in mind that the REDISA Plan is an instrument of subordinate legislation and the MOI is the instrument that governed the REDISA Plan. The Minister's case was that the REDISA Plan, the MOI and the legal prescripts were not compliance. She made averments which, in broad terms, set out the nature of the non-compliances. It was

therefore not necessary for the Minister to have detailed every clause of the REDISA Plan and the MOI in her affidavits. What is critical is the exposition of the facts on which a legal conclusion or argument is based. The following remarks by this court in *Swart v Heine*[92] are apposite:

'In my view it is not necessary for a litigant who is relying on a statutory provision to specify it. It is sufficient if it is clear from the facts alleged by the litigant that the section is relevant and operative. This point was made clear in Fundtrust (Pty) Ltd (in liquidation) v van Deventer 1997 (1) SA 710 (A) 725H-726A, where this court stated the following: 'It is not necessary in a pleading, even where the pleader relies on a particular statute or section of a statute, for him to refer in terms to it provided that he formulates his case clearly (see *Ketteringham v City of Cape Town* 1934 AD 80 at 90) or, put differently, it is sufficient if the facts are pleaded from which the conclusion can be drawn that the provisions of the statute apply (see *Price v Price* 1946 CPD 59, *Wasmuth v Jacobs* 1987 (3) SA 629 (SWA) at 634I).'

See also *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others* 2004 (4) SA 490 (CC) para 27.

[248] In *My Vote Counts v Speaker of the National Assembly & others*,[93] the Constitutional Court stated as follows:

'It is, in any event, imperative that a litigant should make out its case in its founding affidavit, and certainly not belatedly in argument. The exception, of course, is that a point that has not been raised in the affidavits may only be argued or determined by a court if it is legal in nature, foreshadowed in the pleaded case and does not cause prejudice to the other party.' (Footnotes omitted).

[249] Fortified by those authorities, I am of the view that the following averments made in the Minister's founding affidavit support her contention that there was an abuse of corporate personality:

'[85.5] The Respondent [REDISA] alleged that the REDISA Plan was "set up on the basis that its governance structure would be independent of the tyre industry to ensure that there

[92] *Swart v Heine* [2016] ZASCA 16.
[93] *My Vote Counts v Speaker of the National Assembly &* others 2016 (1) SA 132 (CC); [2015] ZACC 31 para 277.

would be no external influence on decision making, and to promote transparency and job creation" and that "this independence has been retained throughout as confirmed by audit". The governance structure of [REDISA] may have been set up to protect it from external or outside influence from the tyre industry, but a performance audit is aimed at internal problems and systemic rot. As for transparency and job creation, these are objectives that were clearly not met whilst the alleged independence of the governance structure of [REDISA] appears - on the basis of available information, in respect of which [REDISA] had a full opportunity to provide further information to the contrary - to have been abused within a self-enriching web of various companies, entities and persons.

[85.6] With regards to the still outstanding information on the "management company" [KT], Mr Erdmann (in contravention of the reporting obligations under the REDISA Plan, while representatives and / or directors of not only [KT] but also of Kusaga Taka International (Pty) Ltd are representing [REDISA] at its meetings with the Department) is still hiding behind the alleged confidentiality of the financial information of a private profit company in his answer: "All information which REDISA was able to provide to iSolveit regarding KT has been provided as requested." Mr Erdmann also stated that "REDISA is not in a position to furnish this information about KT. KT is a separate juristic entity from REDISA. The documents are in its exclusive possession." There is with respect no rational reason whatsoever for either of the Kusaga Taka companies to withhold any information from [REDISA] Respondent as [KT] is merely the "management company" of [REDISA] and thus an agent subject to its control. Furthermore, the precise role of and relationship with Kusaga Taka International (Pty) Ltd within the governance structures erected by Mr Erdmann for the administration and implementation of the REDISA Plan have not been disclosed or clarified to date. The convenient reliance on separate juristic persons is with respect simply an excuse to withhold important and significant information from the Department.

[85.7] An "untenable conflict of interest" is created by the fact that the executive directors of [REDISA] are shareholders of [KT]: this creates an opportunity where a separate profit company can be used as a vehicle to redirect the public funds, collected by [REDISA] for the sole purpose of giving effect to the REDISA Plan, into the pockets of the shareholders of that separate profit company. Although it is stated that the implicated directors of [REDISA] recuse themselves from board meetings when decisions regarding the management company are discussed and taken, neither [REDISA] nor Erdmann has provided the Department with any minutes or other compelling evidence to show that this was indeed the case - again the Department is faced with the say-so of [REDISA] or Mr Erdmann and without any means to objectively verify this.

[85.8] Mr Erdmann further alleged that there is full transparency on what [KT] does for the staggering fee it receives, that this information has always been made available to the Department and that this information was disclosed to iSolveit Consulting. This is with respect not true. The functions entrusted or contracted out to [KT] as set out by Mr Erdmann (such as training, communication, administration, accounts, IT and HR requirements) seem duplicated in the expenses of [REDISA].

[85.9] Mr Erdmann alleged that [REDISA] and [KT] do not share office space but the relevant Lease Agreement, letting the office space to [REDISA] only, indicated that [REDISA] sublets "part of the building that occupies its entire 4th floor" (sic), which then includes the North Wing of the 4th floor occupied by [KT]. [REDISA] is thus paying for the entire 4th floor. I also refer to the Honourable Court to all of other private companies in which Mr Erdmann is a director, which also gave their physical address as the same floor leased by [REDISA]. The tyre industry is thus paying for the other companies in which Mr Erdmann has a stake. I return later to these lease agreements.

. . .

[90] The findings in the iSolveit report confirmed:

…

[90.5] that there are major conflicts of interest between [REDISA] and [KT] that undermine the integrity and therefore long-term sustainability of [REDISA]. An example of such conflict of interest is that no minutes of meetings of the Board of Directors of [REDISA] were provided as evidence of when the directors of REDISA would recuse themselves from decision-making, which negated the allegation of independence of the Board of Directors of REDISA.

[90.6] that there was a deviation from the governance obligations as contained in the REDISA Plan, in that the "management company" [KT] did not report to the Department on all aspects of the REDISA Plan and there does not appear to be an "arm's length" transacting between [REDISA] and [KT]. . . .

[90.21] that the roles and relationship between [REDISA] and [KT] in terms of assets, office space, expenditure and "arm's length trading", independence and governance are grossly compromised;

[90.22] that [REDISA] has installed an Oracle computer system in the amount of R57 million to manage its operations but the review team of iSolveit consulting was informed that [KT] owned both the hardware and the software comprising the information technology to which

the Department wanted access but which access was constantly delayed by allegations of an upgrade.

. . .

[90.50] that the directors of [REDISA] hold multiple positions in various entities established by [REDISA] and/or Mr Erdmann and the directors and/or stakeholders in [REDISA] in clear conflict with the [MOI] in which is enshrined the governance principles of REDISA

[90.51] that critical deviations from the REDISA Plan in respect of governance, operations and financial decision-making were found. The Honourable Court should with respect note that the nature of the information and documents, requested from [REDISA], is such that it should in any properly-managed company, and especially in a non-profit company such as [REDISA] assisted at great expense by a management company [KT] and with the benefit of a huge investment in a computer system, be readily available.'

[250] Clearly, there are enough facts that support the legal conclusions contended for by the Minister. The court a quo's finding on the abuse of corporate identity is fully justified, given the authorities it relied upon. That finding is in any event supported by the provisions of s 20(9) of the Companies Act. Notably, clause 3 of the REDISA Plan, defines 'Plan' as the IITWMP 'written and operated by REDISA'. However, the appellants' own description of their relationship, in the management plan, is quite telling. Even though it clearly states that there is no partnership or joint venture between REDISA and KT, it records that 'KT has been rendering services to Redisa for a period of no less than two years prior to the signature date [November 2011]' and that 'these services performed on risk have formed a central role in the decision to appoint KT to provide the services in terms of the agreement.' Clearly, KT was not an ordinary management company having an arm's length relationship with REDISA. The court a quo's conclusion that REDISA was fronting for KT was therefore justified. The three executive directors of REDISA, together with Crozier, who was also a director of KT, had 100% control over KT via their shareholding. Given that on REDISA and KT'S own versions, REDISA was KT's only client, it is fair to say that in essence, REDISA concluded an agreement with itself. The court a quo correctly stated that the facts of this case lead to an ineluctable conclusion that REDISA was the lifeblood of KT. It is worth noting that despite the lack of independence of the executive directors of REDISA being repeatedly raised as a

concern, the implicated executive directors remained on the board despite being ineligible to serve as directors. Furthermore, on the appellants' own version, there were three executive directors on the board of REDISA despite the REDISA Plan catering for only two executive directors. The reasons for all of this are not hard to find. The aim was to have sufficient influence on the board so as to facilitate that that KT be paid more money than it ought to receive as bona fide management fees. Payments were also made to other companies in which one or more of the implicated REDISA directors held directorships.

[251] The management contract allowed the three implicated REDISA executive directors to unlawfully receive profits earned from the fees generated by REDISA in addition to exorbitant salaries they received and other perks. The ineluctable inference drawn from the undisputed facts is that the payments were facilitated by the presence of the three implicated REDISA directors on the REDISA board and that those payments were not bona fide. Another inescapable inference is that the management contract was not a bona fide contract. This lack of bona fides is evident from the fact that the management function of REDISA was given to KT, a company in which Nine Years Investment (NYI) and Avranet jointly held a 100% shareholding (KT held a 75% shareholding, while Avranet held a 25% shareholding). As stated before, the shareholders of NYI were Erdmann (80%), Kirk (10%) and Crozier (10%) and the only shareholder of Avranet was Davidson.

[252] Despite the management contract dated November 2011 stipulating that KT would exclusively perform the management function for REDISA in respect of the REDISA Plan, KT subsequently entered into a 'Management and facilities provision agreement'[94] with NYI, in terms of which NYI also performed management functions and received about R868 055.00 per month. It is indisputable that both agreements violated the provisions of MOI insofar as some of the REDISA funds were being paid indirectly to its executive directors, in contravention of the provisions of item 1(3) of Schedule 1 to the Companies Act, with Erdmann receiving the lion's share in the staggering amount of R97 million within a period of four years. Significantly, neither

[94] Referred to in the A@L report and undisputed by the appellants.

Erdmann nor any of the other executive directors averred that the payments they personally received through KT, other than their remuneration as directors, fell within the exceptions set out in item 1(3) of Schedule 1 to the Companies Act. The Minister's contention that some of the money collected by REDISA ended up in the pockets of the three executive directors is therefore correct. Clearly, there was an abuse of corporate identity on many levels in order to unduly benefit Erdmann, Davidson and Kirk.

[253] An equally irresistible inference is that there was a scheme in terms of which REDISA and KT acted hand in glove with each other in running rough-shod over an instrument of subordinate legislation. The multiple directorships are also quite telling. The lame excuse that some of the companies were formed in order to empower some of the tyre processors did not account for the myriad of companies registered. In any event, clause 2 of the REDISA Plan provides that no board member may represent any waste stream managed by REDISA. Despite that, Erdmann and Davidson saw it fit to be directors in companies within the waste stream managed by REDISA. They opted for that despite the fact that clause 6.3 of the REDISA Plan limited the assistance that REDISA could give, relating to the establishment of the businesses of recycling processors, to 'training, financial support and mentoring'.

[254] Further and in any event, clause 11.6.5 of the MOI clearly stipulates that any person who subsequently becomes ineligible on the basis of the grounds stated in clause 11.6.1-11.6.5 shall forthwith resign as a director of REDISA. For its part, s 69(4) of the Companies Act provides that a person who becomes ineligible or disqualified to serve as a director while already serving as a director ceases to be entitled to continue to act as a director immediately. This means that once Erdmann, Davidson or Kirk had accepted directorships in the companies involved in any stream of waste tyre management, including being co-directors with the tyre processors, they became ineligible to continue serving on the REDISA board. Notably, only the Product Testing Institute non-profit organisation was disclosed in the financial statements. In my view, the explanations given in respect of the registration of the balance of the companies, which were described as 'in business'

in the CIPC documents, falls within the category of a palpably implausible version as described in the *Fakie* judgment.[95] The ineluctable inference is that they were part of the broader scheme to siphon funds from REDISA. Simply put, both KT and REDISA abused the corporate identity of REDISA as a non-profit company, sustained by public funds, in order to unfairly benefit KT. In the process, the three implicated directors of REDISA jointly misappropriated REDISA funds.

[255] For the avoidance of doubt, I make it clear that I accept that Item 1(3) of Schedule 1 does not preclude or prohibit payments made in terms of a contract. However, that contract must be bona fide and not a mechanism by which specific provisions of Schedule 1(3) can be circumvented. Ironically, it is REDISA itself which made the following prophetic statement in clause 2 of the REDISA Plan: ‘’A properly drafted MOI imposes codes of conduct and governance and guards against narrow sectoral influences or private enterprises taking over and hijacking the aims of the organisation.’ Regrettably, the ‘code of conduct and governance’ were largely ignored.

[256] The court a quo ordered that both REDISA and KT be liquidated despite KT being a solvent private company. Like the court a quo, I arrive at the same conclusion, albeit for slightly different reasons. Given that REDISA, a non-profit company, and KT as its management company, were recidivist in their contravention of the REDISA Plan, MOI and Companies Act, the most appropriate remedy that would simultaneously stop the bleeding and salvage what was left of the public funds was an order of liquidation in respect of both REDISA and KT. As pointed out before, Erdmann, Kirk and Davidson, who were the indirect shareholders of KT through NYI and Avranet, were the executive directors of REDISA, while Crozier, who had shareholding in NYI, was one of the directors of KT. It is clear that all the individuals who had indirect shareholding in KT were the same people who, in their capacity as directors, managed REDISA and KT, respectively. That being the case, there is no innocent shareholder who stands to be prejudiced. It is therefore befitting that what befell REDISA be extended to KT despite the latter being a solvent private company. This will send a clear message that courts take a dim view of those who knowingly

[95] *Fakie v CCII Systems* (supra) at para 55.

allow themselves to be used as conduits in unlawful schemes that drain public funds. That is the only remedy that will swiftly enable the Minister to simultaneously stop malfeasance dead in its tracks and to recover public funds from those who had unlawfully benefitted in the scheme. Moreover, since REDISA was KT's only client, there is no 'range' of persons or groups that will be adversely affected by this remedy.

[257] While the demonstrable recalcitrance of the implicated REDISA directors justifies the majority judgment's suggestion that they could be declared delinquent directors if the facts so proved, granting only that order would, in my view, be a slap on the wrist, as the transgressors would retain the benefits they had obtained in contravention of item 1(3) of Schedule 5 of the Companies Act. That would not serve the interests of justice. Indeed, given the appellants' conduct, the Minister could also have considered invoking the provisions of the Waste Act as a basis for laying criminal charges as contemplated in that Act. What is undeniable is that there was a need for swift action. All the criteria mentioned in the *Ferreira v Levin* judgment, pertaining to the determination of whether a person was acting in the public interest, alluded to in paragraph 134 of the majority judgment, have been met. The Minister, in her capacity as the Executive responsible for ensuring compliance with the REDISA Plan, was entitled to take all the steps she took in the public interest, instead of reporting the various non-compliances to the Commission or Panel, as per the appellants' proposition. Courts are the guardians of the Constitution and should not be seen to be ivory towers that are oblivious to the realities of how the slow pace of litigation may have a negative impact on the recovery of public funds.

[258] In my view, it would truly amount to putting substance over form if the appeal was to succeed purely because this court opines that the court a quo should have resorted to the 'less drastic' remedy of an interdict, institution of a claim, an order declaring the implicated executive directors as delinquent, or any other remedy proposed by the appellants, notwithstanding that the court a quo in fact had a discretion in that regard. That court carefully considered a number of authorities, including a judgment that had granted a winding-up order under analogous

circumstances.[96] The exercise of its discretion is evident from the tenor of its evaluation of evidence and arguments, viewed against the backdrop of apposite authorities. Under such circumstances, it cannot be seriously contended that the court a quo did not exercise its discretion at all, or that it did not exercise it judicially. In my view, the court a quo's discretion was judicially exercised. There is therefore no basis for this court to tamper with it.[97]

[259] For all the reasons set out above, I would dismiss the appeal with costs.

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M B Molemela

Judge of Appeal

[96] *Pienaar v Thusano Foundation & another* 1992 (2) SA 552 (BG).
[97] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Limited & another* 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC); [2015] ZACC 22.

Appearances:

(Case no: 1260/17 and 188/18)

For Appellant:	G Budlender SC (With him L Kelly) Instructed by: Cliffe Dekker Hofmeyr Inc, Cape Town Claude Reid Attorneys, Bloemfontein
For Respondent:	G Woodland SC (with him J Rust) Instructed by: The State Attorney, Cape Town The State Attorney, Bloemfontein

(Case no: 1279/17 and 187/18)

For Appellant:	J G Dickerson SC (with him K Reynolds) Instructed by: Bradley Conradie Halton Cheadle, Cape Town Claude Reid Attorneys, Bloemfontein
For Respondent:	J Muller SC (with him B Swart SC and J Myburgh) Instructed by: The State Attorney, Cape Town The State Attorney, Bloemfontein