



**IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE DIVISION, CAPE TOWN]**

**[REPORTABLE]
Case no. A251/22**

In the matter between:

TUBESTONE (PTY) LTD

Appellant

and

**THE RECYCLING & ECONOMIC DEVELOPMENT
INITIATIVE OF SOUTH AFRICA NPC**

Respondent

JUDGMENT DELIVERED (VIA EMAIL) ON 5 FEBRUARY 2024

SHER, J (FORTUIN J et MANTAME J concurring):

1. This is an appeal (with leave of the SCA) against a judgment of this Court,¹ in terms of which the appellant Tubestone (Pty) Ltd, a company which imports tyres, was held liable to pay the respondent, the Recycling & Economic Development Initiative of SA NPC ('Redisa'), the sum of R 2 479 335, together with interest and costs. The amount represented levies which were allegedly due in the period October 2016-February 2017 in terms of a so-called 'integrated industry waste tyre management plan' ('a WTM plan'), administered by Redisa, which was promulgated by the Minister of Water and Environmental Affairs on 30

¹ Reported *sub nom Recycling & Development Initiative of SA v Tubestone (Pty) Ltd* [2022] 1 ALL SA 774 (WCC).

November 2012 in terms of the National Environmental Management Waste Act ² ('the Waste Act') and the Waste Tyre Regulations of 2008.³

2. The Regulations sought to deal with the problem of the disposal of 'waste' tyres including used, retread or new tyres, which were not fit for use. They provided that tyre 'producers' (who were defined as including both manufacturers and importers) were not allowed to manufacture, import, or deal in tyres unless they subscribed to a WTM plan which contained measures for the recycling or disposal of waste tyres in a manner authorised by the plan. To this end, producers were required either to prepare and submit their own WTM plan to the Minister within 60 days of registering, or to subscribe to one which had already been approved by the Minister.

The background

3. Following its incorporation as a non-profit company in 2010, Redisa set about preparing what it envisaged could serve as a country-wide blueprint for a WTM plan. As the effective disposal of waste tyres was an environmentally sensitive issue which affected the entire country ⁴ it motivated for the adoption of a single, industry-wide plan on the grounds that it would be more cost-effective and efficient, given the economies of scale involved and given that it would allow for better financial control than a multiplicity of smaller, individual plans developed by various groupings within the thousands of tyre dealerships in the country. It contended that a national plan would be easier to implement and would allow for the maximisation of job creation and empowerment objectives, by including the informal sector, which deals with most scrap tyres.
4. The draft plan which Redisa prepared was submitted to the Minister in February 2011. In April and December that year competing plans were filed by the SA Tyre Process Corporation NPC ('SA Tyre') and the Retail Motor Industry Organisation. In November 2011 Redisa's plan was approved, but when an urgent application

² Act 59 of 2008- the 'Waste Act'.

³ The Regulations were promulgated in terms of s 24B of the Environment Conservation Act 73 of 1989, which (save for the Regulations made under it), was repealed by the Waste Act, with effect from 1 July 2009.

⁴ In terms of s 28(1) of the Waste Act a national waste management plan is required where waste affects more than one province.

was launched for an order suspending its implementation the Minister withdrew her approval. An amended plan was then submitted, which was published for public comment, and a public participation process followed. In July 2012 the Minister approved the amended plan but a further challenge was launched to it, which resulted in an interim interdict being granted, pending a review. Once again, the Minister withdrew her approval, but regranted it to a further amended version, which was promulgated on 30 November 2012.

5. Somewhat unusually, the plan was promulgated in the memorandum format in which it had been submitted to the Minister, rather than in the traditional, regulatory format which is commonly utilized when promulgating subordinate legislation.⁵ As a result it was an extensive and lengthy document, which served both as a promotional motivation for its acceptance and a loosely formulated regulatory framework for the disposal of waste tyres.
6. As for the regulatory framework it proposed, it envisaged establishing a network of producers, transporters and processors, who were to be registered with Redisa. Producers, who included both manufacturers and importers, would have to submit monthly returns in which they declared the number and mass of tyres manufactured and imported, which were to be verified by means of annual audit certificates. The information which was provided in these returns would serve as the basis for the levying of a 'waste tyre management fee'.
7. Waste tyres were to be collected from producers, dealers and public spaces and conveyed to storage depots and processors, by transporters, who were to be paid on a per kilogram/per kilometre basis pursuant to transportation contracts which would be awarded, on tender. The transporters and processors were similarly required to render returns as to the number, type and tonnage of tyres collected and transported to storage depots and disposal facilities, as were the managers of these facilities..⁶ The disposal of waste tyres (primarily by recycling) was to be carried out by the processors, who would tender for and be awarded a

⁵ As the plan was held to be in *Retail Industry Organization & Ano v Minister of Water & Environmental Affairs & Ano* 2014 (3) SA 251 (SCA) paras 29-30.

⁶ Clause 9.1.

- specified annual tonnage of waste tyres, which they would dispose of at a range of processing facilities which were to be established.
8. As far as funding the project was concerned, this was an aspect which was not conveniently dealt with in a single section of the memorandum, but in several clauses thereof and an annexure.⁷
 9. Essentially, it was envisaged that the plan would be funded from a 'waste tyre management fee' which was to be paid by subscribers (i.e. all tyre producers and importers), in the form of a levy which was to be imposed on all tyres produced in or imported to SA, on a Rand-per-kilogram weight cost basis.⁸ As tyre sizes varied from type to type and brand to brand, weights were to be standardised, by size and type of tyre. Included in the factors which would determine the Rand-per-kilogram cost were 1) collection and transportation costs 2) storage, handling and processing costs and 3) administration, management, advertising, and marketing costs. The bulk of these costs, some 38%, would be for transportation, with administration and depot/storage costs anticipated to each come in at half of that i.e. 20%.⁹
 10. The waste tyre management fee was 'estimated' on the basis of a 'steady state amount' (sic) needed to operate the plan, once the necessary systems and infrastructure was in place.¹⁰ It was expected that in the initial years there would be an over-recovery as the number of depots, transporters and processors would be less than the projected final numbers. This 'over-recovery' would be accumulated as a reserve which would be used to fund the initial establishment and set-up costs. Operational costs for the 1st year were estimated to be in the region of approximately R 624 million. Costs for succeeding years were to be based on the actual costs incurred in the 1st year and projected fluctuating variable costs, including inflation.¹¹
 11. The plan provided that the waste tyre management fee would be 'reviewed' annually, in consultation with relevant consumer bodies, based on 'operational

⁷ Annexure D.

⁸ Clause 17.1.

⁹ *Vide* the schematic above clause 25.1.

¹⁰ Clause 16.

¹¹ *Id.*

experience' and the number of tyres manufactured and imported.¹² Redisa's objective was to strive 'at all times' to minimise and contain the fee, 'in real terms', to an amount equal to or less than the initial levy charged. Annual reports would be published which would detail progress made in implementing the plan and would provide cost 'breakdowns' on a per kilogram basis.

12. As for the initial Rand-per kilogram levy which was to be imposed, it was explained¹³ that this had been arrived at on the basis of an average cost per ton of transporting waste tyres to kilns, at a rate of R 8/per (passenger) tyre, which equated to a cost of approximately R 800/per ton of rubber; plus a handling fee of R 200/per ton i.e. R 2 per tyre for services at depots and disposal facilities, and a disposal cost of R 900 per ton/R 9 per tyre, plus 20% for administration and other costs. In total this averaged out to a cost of approximately R 2280 per ton, which reduced to a Rand-per-kilogram figure came to R 2.30 per kilogram, excluding VAT. This was accordingly the initial levy which was imposed. Subsequent to its promulgation it was never increased or decreased and remained the same for the 4½ years relevant to this matter, from the gazetting of the plan at the end of November 2012 until May 2017.
13. It is common cause that the appellant subscribed to the plan. Although it only signed a deed of adherence in respect of the 2011 first draft thereof and did not sign another deed in respect of the final draft that was approved a year later, it was listed as a confirmed subscriber in the gazetted plan.
14. The appellant rendered returns and paid its levies for 4 years, from the time when the plan was promulgated in November 2012 until October 2016. Between October 2016 and January 2017 it continued to render returns but failed to make payment of any of the amounts due in respect of the invoices which were raised by Redisa, for those 4 months. The invoices reflected that, cumulatively, the appellant owed the amount which was claimed in the application.
15. At no time during the period November 2012 to May 2017 did the appellant ever contend that the plan, or any provision thereof, was invalid, unlawful, or

¹² Clauses 17.1 and 25.1.

¹³ In annexure D.

unenforceable, for any reason. In fact, the appellant did not contest the plan until it was called upon to respond to the application which Redisa launched in September 2019, in which it sought to extract payment from the appellant.

16. The appellant's failure to make any payments that were due after October 2016 occurred against the following background.¹⁴ Towards the end of 2013 the government indicated that it intended changing the funding model for waste management plans adopted in terms of the Waste Act. For this purpose in June 2014 an amendment¹⁵ to the Waste Act was passed, which provided that the Minister of Environmental Affairs, in concurrence with the Minister of Finance, was to publish a 'National Pricing Strategy' which would deal with the funding of the management and disposal of waste. The Strategy was published on 11 August 2016. It proposed that waste plan fees/levies were to be collected directly by the State, rather than by the entities established to administer waste plans, who would be funded by grants from the State.
17. On 1 November 2016, following an audit which was carried out on Redisa the Minister called upon it to provide written reasons, within 15 days, why its plan should not be withdrawn. Although it was given until 30 November 2016 to respond, on which date it duly filed a comprehensive response, the Minister issued a directive the preceding day, 29 November 2016, in which she gave notice that she had assumed control over Redisa and its operations.
18. Redisa then launched an urgent application in this Court for an order interdicting the Minister from implementing her directive, pending a review of it. An interim interdict was duly granted on 28 December 2016. This caused the Minister to withdraw her directive.
19. On 2 December 2016 amendments to the Waste Tyre Regulations were promulgated which sought to give effect to the Strategy, and on 1 February 2017 an amendment to the Customs and Excise Act.¹⁶ was passed. The cumulative effect of the legislative changes which were made was that as from 1 February

¹⁴ As set out in *Recycling & Development Initiative of SA v Minister of Environmental Affairs (Pty) Ltd* 2019 (3) SA 251 (SCA) paras 16-44.

¹⁵ The National Environmental Management: Waste Amendment Act 26 of 2014.

¹⁶ Act 91 of 1964.

2017 Redisa was no longer to be funded directly by the waste tyre levies which were due from producers and importers and was to be funded by way of grant allocations from National Treasury, and the function of collecting waste tyre levies was transferred to the SA Revenue Service. As the Redisa plan provided that levy payments were due within 90 days from date of invoice,¹⁷ the last levies that Redisa was therefore entitled to claim and receive payment for, after February 2017, were those which were due for payment by no later than May 2017.

20. Although Redisa was supposed to be allocated R 210 million in funding, pursuant to the publication of an appropriation bill in February 2017, no funds were forthcoming. In May 2017 it indicated that unless its funding was resolved it would have to scale back its operations. The Minister then launched an *ex parte* application for its winding-up, as well as for its management company, and provisional orders were granted against both entities on 1 and 8 June 2017, which were made final on 15 September 2017. However in a subsequent appeal the SCA set aside both windings-up, on 24 January 2019.
21. As a result, seemingly, of the events which took place between August 2016 and January 2019 a formal demand for payment of the arrear levies which fell due in the period October 2016-May 2017 was only sent to the appellant in August 2019. During the time that Redisa was under liquidation the liquidators did not seek to recover the arrears from the appellant.

The application a quo

22. In response to the application which was brought for an order directing it to make payment of the waste tyre management fees for the period October 2016-January 2017 the appellant raised several so-called 'collateral' or 'reactive' challenges. A collateral or reactive challenge is commonly understood as a challenge to the validity and enforcement of an administrative act or decision, which is raised in proceedings that are not designed or aimed at impeaching,

¹⁷ Clause 17.1 of the plan.

directly, the validity of such act or decision.¹⁸ The challenge is one raised incidentally, in response to an attempt to enforce the act or decision.

23. The appellant raised, in the first place, several alleged irregularities which had occurred during the time that Redisa had been in control of the WTM plan, which it claimed vitiated it. These included 1) the alleged payment of a management fee to the company which managed the plan, in excess of what was provided for in the management contract, from which proceeds the management company in turn paid large dividends to its shareholders and 2) alleged irregular payments by Redisa for the benefit of its directors (for lease rentals and security upgrades at their residences in Cape Town and the costs of private security), and for a residential property for staff members in Bryanston. As Redisa pointed out in its answering affidavit these allegations were sourced from the contents of the affidavits which were filed by the Minister in the winding-up applications and were rejected by the SCA, which held that they were materially devoid of any factual foundation and were unsustainable, as they had been comprehensively refuted by Redisa in its answering papers. As these allegations were not pressed in argument before the Court *a quo* and have not been resurrected as part of the grounds of appeal before us, there is no need to canvass them any further.
24. In the second place, the appellant contended that it was only liable to pay waste tyre management fees that were lawfully due, and those that were claimed were not. It pointed out that the plan provided that the initial R2.30 per kilogram levy which was imposed in 2012 was only an 'estimated' fee which was to be reviewed and amended annually, after consultation with stakeholders, having due regard for the actual costs which had been incurred in previous years. Contrary to this Redisa had sought payment of waste tyre management fees for the period between October 2016 and January/February 2017, which were levied on the basis of the original, unamended 2012 tariff. It had therefore either failed to review the plan annually, or if it had done so, had improperly resolved to maintain the waste tyre management fee at its original level, thereby failing to take into account the considerations it was supposed to. If Redisa had reviewed

¹⁸ *Oudekraal Estates (Pty) Ltd v City of Cape Town & Ors* 2004 (6) SA 222 (SCA) para 32, footnote 22.

the plan annually without input from stakeholders, it had also acted in a manner that was procedurally unfair, contrary to the provisions of the Promotion of Administrative Justice Act ('PAJA'),¹⁹ which, according to the appellant, required it to have held a public enquiry and to have obtained public comment before doing so. As Redisa had apparently managed to build up a 'remediation reserve' of approximately R 665 million the levy was clearly excessive and Redisa was over-charging its subscribers. In the circumstances it had also failed to comply with its obligation, in terms of the plan, to ensure that the waste tyre management fee was minimized, and the levy contained in 'real terms'. Thus, the appellant contended, Redisa had breached the plan in several ways, and in doing so had violated the legislation and made itself guilty of a criminal offence, and the fees claimed were unlawful.

25. The Court *a quo* considered that the collateral challenges should not be entertained, on the grounds of the lengthy delay concerned.

An assessment

(i) The law

26. The parties' cases rest on opposing interpretations of the judgment of the Constitutional Court, per Cameron J, in *Merafong*.²⁰ The appellant contends that the judgment held that delay plays no role in a 'classical' collateral challenge which is raised by a 'non-state' actor, and it therefore cannot be taken into account. Thus, in its reading of the judgment, when the validity of an administrative act or decision is challenged collaterally the Court cannot refuse to entertain it and has no discretion to disallow it. It is only in the case of the 'extended' form of such a challenge i.e one involving an organ of state, that delay may be relevant.
27. On the other hand, Redisa contends that the appellant's interpretation is based on a selective misreading of the judgment, and the remarks which were made by Cameron J therein are limited to instances where the subject or entity which seeks to raise a collateral challenge was unaware of the existence of the

¹⁹ Act 3 of 2000.

²⁰ *Merafong City Local Municipality v AngloGold Ashanti Ltd* 2017 (2) SA 211 (CC).

administrative decision or ruling it later seeks to resist, because it was one that was of general application and not specific to, or directed at, it. In its reading of the judgment, in instances where a decision or ruling is specific to, or directed at an applicant, or to a class or group to which it belongs, delay may well be a consideration which can result in a court refusing to entertain a collateral challenge. This is no more than the necessary result and corollary of the well-established principle that, in the interests of finality and certainty, and as an incident of the rule of law, administrative decisions are considered to be binding and to have consequences and effect, unless and until they are set aside, and collateral challenges are an exception to this principle. Thus, where citizens or entities affected by an administrative decision or ruling seek to avoid it, they are required to bring review proceedings timeously to set it aside and cannot sit back and wait to resist the enforcement of such decision or ruling.

28. In *Merafong* the issue for determination by the CC was whether the SCA had been correct in holding that, for so long as an administrative decision or ruling had not been set aside an organ of state could not raise its alleged invalidity as a defence to proceedings in which that decision or ruling was sought to be enforced against it. Consequently, the SCA had held that the Merafong municipality could not raise a collateral challenge to the validity of a decision by the Minister of Water Affairs and Forestry which 'overruled' a surcharge the municipality sought to impose on water which it supplied to AngloGold Ashanti, for use in its mining operations. The municipality had contended that the Minister's decision was *ultra vires* and invalid as it intruded on the exclusive constitutional competence which had been conferred on the municipality to provide the supply of water, and the attempt to enforce the ruling could consequently be resisted.
29. In his judgment for the majority Cameron J set out the state of the law in relation to so-called 'reactive' or 'collateral' challenges, with reference to the most important pre- and post-constitutional decisions. In doing so he contrasted the approach which has been followed by courts which have dealt with reviews (both at common law pre-the Constitution and in terms of PAJA thereafter), with that

adopted in cases involving collateral challenges, which differ distinctively in their object, application, and scope from review matters.²¹ He pointed out that since the grant of a review is a discretionary remedy, courts have regularly refused to entertain reviews on the basis that the applicants had delayed unreasonably before launching them. This was however not the case in collateral challenge matters, where the state sought to coerce citizens 'into payment or prison'. In such matters the courts were frequently prepared to uphold a so-called 'collateral' or 'reactive' challenge to an administrative decision or ruling no matter how 'ancient' it was,²² on the grounds that it would offend the rule of law for a citizen to be subjected to punitive measures or sanctions based on administrative acts or decisions which were unlawful. Thus, it was said that courts in collateral challenge matters did not have a 'discretion' to allow or disallow the raising of such a challenge, as a litigant's right to do so arose from the fact that the validity of the administrative act or decision in question constituted the basis and legal prerequisite for the validity and legal force of the enforcement action that followed,²³ and even if the original decision may have been unlawful or formally invalid it could still produce, or result in, 'legally effective' consequences.

30. Much has been said and written, in academic works²⁴ and subsequent cases about the meaning and scope of the foregoing dicta pertaining to the consequences of legally invalid administrative decisions. For the purposes of this judgment it is not necessary or relevant to traverse the debate that has ensued in this regard. This is because it was accepted by the parties that unless and until a Court declared that the Redisa plan, or the relevant components thereof which were in issue (i.e. those which dealt with the levying of the waste tyre management fee), were unlawful, the promulgation of the plan had certain

²¹ Para 32.

²² Para 31.

²³ Para 36.

²⁴ Vide DM Pretorius '*Oudekraal After Fifteen Years; The Second Act (Or, a Reassessment of the Status and Force of Defective Administrative Decisions Pending Judicial Review)*' 2020 Stell LR 3; Angus McKenzie *The development of collateral review and the status of unlawful acts in South African law* (2017) unpublished LLM dissertation, University of the Witwatersrand; OT Van Dyk '*The Influence of the Oudekraal and Kirland Decisions on the Legal Status of an Invalid Administrative Act*' doctoral dissertation University of Pretoria 2021.

consequences in fact, if not in law, one of which being that it gave rise to a right on the part of Redisa to claim payment of the amounts levied on the appellant.

31. The issue that requires determination in this matter is whether the appellant's *delay* (in challenging the levies that were imposed and Redisa's right to claim payment thereof), should have non-suited it, as the Court *a quo* held. This is an important distinction to remember when considering what was said in *Merafong*, because that matter was not decided on the basis of the delay which had occurred between the time when the municipality had been overruled by the Minister in July 2015 and when the collateral challenge by it was raised, in proceedings in the High Court, some 6 years later, when AngloGold sought an order compelling the municipality to comply with the Minister's ruling. (In this regard it should be noted that until the application was brought by AngloGold it had continued to pay the surcharges imposed on it as the municipality had indicated that if it failed to do so it would discontinue the supply of water to it).
32. In his discussion of the legal position Cameron J referred to the decisions in *Panasonic*,²⁵ *Photocircuit*²⁶ and *Oudekraal*²⁷ all of which originated from, or were decided by, this Court. To properly understand and contextualize the remarks he made, on which the parties both rely for their competing contentions, it is necessary to briefly detail what occurred in these matters.
33. In *Panasonic*, which was decided in 1991, a trade union sought a declarator that the continued lock-out of its workers by the respondent company was unlawful, on the grounds that the preceding notification which it had given of a deadlock in negotiations and its referral of a dispute to conciliation by the then Industrial Council for the sector, was invalid. Conradie J considered the challenge to be a

²⁵ *Metal & Electrical Workers Union of South Africa v National Panasonic Co (Parow Factory)* 1991 (2) SA 527 (C).

²⁶ *National Industrial Council for the Iron, Steel, Engineering & Metallurgical Industry v Photocircuit SA (Pty) Ltd* 1993 (2) SA 245 (C).

²⁷ There are three reported '*Oudekraal*' matters relevant to this matter: the decision of Davis J (Veldhuizen J concurring) in *Oudekraal Estates (Pty) Ltd v City of Cape Town & Ors* 2002 (6) SA 573 (C) which was upheld on appeal to the SCA (albeit for different reasons) in *Oudekraal Estates (Pty) Ltd v City of Cape Town & Ors* 2004 (6) SA 222 (SCA), commonly referred to as '*Oudekraal 1*', which dealt with delay in the context of the collateral challenges raised by the City of Cape Town and *Oudekraal Estates (Pty) Ltd v City of Cape Town & Ors* 2010 (1) SA 333 (SCA), or '*Oudekraal 2*', which dealt with delay in the context of the review which was subsequently brought.

collateral one which (in the words of the English author Wade²⁸) had not been brought by the 'right person at the right time'. In his view the challenge had been brought too late²⁹ as the lock-out had been underway for several weeks and the applicant was getting ready to go on strike, on the understanding that the actions which had been taken by the respondent had been validly carried out. In the circumstances and having regard for the undesirability of interfering in labour relations and the collective bargaining process, he held that the collateral challenge should not be entertained. Thus, it is evident that the delay which attended on the matter in *Panasonic* was an important factor which featured in non-suiting the applicant.

34. Some two years later this Court had occasion, in *Photocircuit*, to pronounce on a collateral challenge which was contested on the grounds of undue delay. The applicant had sought an order compelling the respondent to render returns so that it could compute the respondent's levy contributions in terms of industrial agreements which applied to employers in the industry concerned. The application was resisted on the grounds that the Minister's approval of the registration of the applicant as an industrial council was *ultra vires* and the applicant accordingly lacked the necessary jurisdiction to require the respondent to submit returns. One of the aspects which the Court was required to determine in *limine* was whether, by reason of the lapse of time, the applicant should be precluded from doing so, as had previously occurred in *Panasonic*.
35. Scott J (as he then was) contrasted review matters which sought to set aside an administrative action or decision, in which it was accepted that a court had a discretion to decline to assist, as a result of undue delay, even though a substantive case for relief may have been made out; with collateral challenge matters, which were not in themselves aimed at impeaching the validity of the decision or action but to resist its enforcement. He held that in such matters a party could not be precluded from raising the invalidity of an underlying administrative action or decision 'merely' on the grounds of delay, for this might

²⁸ *Administrative Law* 6th ed, 331.

²⁹ *Id*, 530F-H.

be 'akin' to holding that a defence to a claim had become prescribed before the claim itself.³⁰ Consequently, in some cases administrative acts and subordinate legislation had been indirectly challenged in criminal and enforcement proceedings many years after they were performed or promulgated. In this regard he referred to the decision in the UK in 1961 in *Cure*³¹ where a purchase tax regulation which had been passed in 1945 was held to be *ultra vires* in a collateral challenge, when it was sought to be enforced some 16 years after its passing. In the circumstances, he concluded that the delay rule which was applicable in review matters³² where the alleged invalidity of an administrative act or decision, or of subordinate legislation, was challenged, could not serve as a defence to an action or application in which it was challenged collaterally.

36. Properly read in the context of the relevant facts which were before the Court at the time and the earlier remarks which were made by it, this decision also goes no further than to state that a defendant/respondent cannot be precluded *per se* from raising a collateral challenge, on the grounds of delay. On my reading of it the decision did not purport to lay down a general rule that in collateral challenge matters delay will *never* play a role and if it did purport to do so, this is contrary to the position which has subsequently been adopted by our highest Courts.
37. That brings us to the decision in *Oudekraal*, which also originated in this Court,³³ and then made its way to the SCA, on two occasions. The relevant facts were briefly as follows. In 1957 the then Administrator of the Cape Province granted approval for the laying out of a township on the site of the *Oudekraal* farm, in an area along the so-called 'Twelve Apostle' mountain range on the Atlantic coast, between Bakoven and Llandudno. The legislation required that a general plan for the township was to be submitted to the Surveyor-General within 12 months from the date of the Administrator's approval, and once it was approved it was in turn to be lodged with the Registrar of Deeds within 3 months thereof, for his approval. This did not happen, even though the Administrator had granted

³⁰ *Photocircuit* n 26, 253C-D.

³¹ *Cure v Deeley Ltd* [1961] 3 All ER 641 (QB).

³² As set out in *Wolgroeiens Afslalers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A), 39C-D.

³³ *Oudekraal Estates (Pty) Ltd v City of Cape Town & Ors* 2002 (6) SA 573 (C).

extensions for the lodging of the documents referred to, in June 1960 and October 1961. Despite these extensions the submissions and approvals occurred out of time, in or about 1961-1962. In 1965 the land was acquired from the original owner's deceased estate, but no attempt was made to develop it until 1996 i.e. some 30 years later, when the succeeding owner submitted an engineering services plan for the proposed township to the then Cape Metropolitan Council ('the City') for approval. The application was rejected on the grounds that the approval for the township had lapsed in 1961, as the general plan for the development had not been submitted and approved within the requisite time periods. In response, the owner made application for an order declaring that the township and development rights had not lapsed and were of full force and effect. The City (together with a range of other parties) resisted the application by way of a collateral challenge, on the basis that the authorisation on which the applicant relied had lapsed in 1961. In response, the applicant in turn countered that the City could not rely on such a defence as it had delayed excessively before challenging the authorisation.

38. Davis J noted that from the documents which had been submitted for approval of the general plan in 1961 it was apparent that the existence of several graves of Muslim slaves and kramats (burial shrines) which were of great religious, cultural and historical significance to the Muslim community, had not been depicted and had accordingly not been considered and taken into account when approval for the township was granted. In addition, the area had in the intervening years been incorporated into a national park and was of great environmental importance. This aspect too had also clearly not been considered at the time when the approval had been granted in 1961. Consequently, given the potential for a serious breach of now constitutionally enshrined religious, cultural and environmental rights, were the property to be developed, he was of the view that it would be an improper exercise of the Court's 'discretion' to refuse to allow the City's collateral challenge 'solely' on the grounds of delay. In this regard he pointed out that not only had the City not sought to challenge the authorisations and approvals which had been granted in the 60's but the applicant himself had

not done so for some 30 years after acquiring the property. Consequently, he held that as the approval for the township had lapsed before the general plan could be submitted and approved, it was a nullity, and the City was entitled to raise this as a defence.

39. From the foregoing it is evident that the issue of delay was considered, *a la Photocircuit*, to be a factor that should be taken into account in determining whether the collateral challenge should be sustained.
40. On appeal, the SCA confirmed and restated³⁴ with reference to the decision of the House of Lords in *Boddington*,³⁵ that collateral challenges were commonly raised in proceedings that were not designed directly to impeach the validity of an administrative act or decision, but to resist its enforcement. They occurred in instances where an administrative act or decision was sought to be applied coercively by the state or a public authority against a person or entity. As the coercive action derived its force from the prior administrative action or decision, the right to challenge the validity thereof indirectly or 'collaterally' arose because the validity of the action or decision was an essential prerequisite for the validity of the coercive action.³⁶
41. In the circumstances, a person or entity which was subject to the coercive action could not be precluded from challenging the validity of the administrative action or decision from which it derived its force. Thus, in those cases in which the validity of an administrative act or decision could be challenged collaterally a court had no 'discretion' to allow or disallow the raising of such a defence,³⁷ unlike in review matters, where the court had such a discretion, which served as a 'moderating tool' for avoiding or minimising injustice in instances where 'legality and certainty collide'.³⁸ But the SCA warned that the two remedies were not to be conflated: each one had its own, separate application to its appropriate circumstances, and they ought not to be seen as 'interchangeable

³⁴ *Oudekraal Estates (Pty) Ltd v City of Cape Town & Ors* 2004 (6) SA 222 (SCA) para 36.

³⁵ *Boddington v British Transport Police* [1998] 2 All ER 203.

³⁶ *Id.*, para 36.

³⁷ *Id.*

³⁸ *Id.*

manifestations' of a single remedy that arose whenever an administrative act was challenged on the grounds of invalidity.³⁹

42. Thus, contrary to the Court *a quo* the SCA held that in matters involving collateral challenges, which are properly raised, the court concerned does not have a 'discretion' to refuse to entertain the challenge, unlike in reviews. But the SCA did not hold that in appropriate circumstances a delay in raising a collateral challenge may not count as one of the factors which must be taken into account, in order to determine whether the challenge should be permitted.
43. Contrary to the Court *a quo* the SCA also held that the City's purported reliance on a collateral challenge was 'misplaced', for two reasons. In the first place, it was of the view that the approval of the Oudekraal township by the Administrator, constituted no more than permission to develop land in a particular way, which took effect once various steps that were prescribed had been complied with, and on a proper construction of the relevant legislation the validity of the subsequent steps i.e. those taken afterwards was not dependent on the legal validity of the Administrator's approval, but merely on the fact that it was given.⁴⁰ There was no obligation on the Surveyor-General and Registrar of Deeds to satisfy themselves that the Administrator's approval was valid in order for them to carry out their functions, and the validity and legal force and effect of their actions did not depend upon the validity of the Administrator's actions or decisions.
44. In the second place, in the form in which the matter had come before the Court *a quo* the invalid administrative act of the Administrator had not been sought to be applied coercively against the City by a public authority or the state, nor did it serve to provide a foundation for any coercive action against the City. Thus, the requirements for a collateral challenge had not been present.
45. However, despite these findings the SCA nonetheless concluded that the relief which had been sought had been correctly refused and, in its view, the applicant had not been entitled to obtain a declaratory order to the effect that the steps

³⁹ Id.

⁴⁰ Para 39.

which had been taken by the various officials involved were regular or lawful, as this would pre-empt the review which had been launched.

46. In this regard, it noted, as per the findings of the Court a *quo*, that the graves and kramats had not been referred to or shown on the application for approval of the township, and it agreed that their presence was a significant factor that should have been taken into account when the decision of whether to permit the establishment of a township on the land, had been taken. The failure to consider this potentially rendered the approval which was granted by the Administrator invalid and *ultra vires* and liable to be set aside on review. However, for so long as the Administrator's approval was in place the owners of the land were allowed to develop a township on it, as the approval was an act which had consequences, and the City was not entitled to ignore it.⁴¹
47. Subsequent to the decision by the SCA the review application which was launched by the City succeeded in this Court, notwithstanding the delay involved, which was condoned on the grounds of the unique circumstances which were present. The decision was upheld on appeal to the SCA in *Oudekraal 2* ⁴² which emphasised the constitutional changes which had been brought about by the recognition of religious and cultural rights and the right to have the environment protected. The SCA held that the principle of legality and the interests of justice would be advanced by ensuring that the invalid decision of the Administrator did not stand.
48. From the foregoing discussion of the *Oudekraal* decisions it will be apparent that the issue of delay in relation to collateral challenges, which was touched upon in the first decision of Davis J, was not revisited and did not feature in the ratio of the subsequent decisions on appeal.
49. The next time the issue of delay arose in a collateral challenge matter which went all the way to the SCA, was in 2010, in *3M SA*⁴³ where in response to an attempt by the Commissioner of the SA Revenue Service to extract payment of arrear import duties, the defendant sought to assail the validity of the underlying

⁴¹ Para 40.

⁴² *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2010 (1) SA 333 (SCA).

⁴³ *3M SA (Pty) Ltd v Commissioner, South African Revenue Service* [2010] 3 All SA 361 (SCA).

administrative decision on which it was based, in an application for a declarator. In response, the Commissioner objected on the basis that the applicant should have instituted a review within 180 days in terms of PAJA but had failed to do so. After citing the extract in *Photocircuit* previously referred to, about a defendant in proceedings involving a collateral challenge not being precluded from raising the defence ‘merely’ on the grounds of delay (for to do so would otherwise be akin to holding that the defence had become prescribed before the claim itself), the SCA held that Commissioner’s attempt to raise the delay as a defence, in the circumstances before it, was ‘simply not available’.⁴⁴

50. That brings us back to the decision of the CC in *Merafong*, in 2017. As was previously pointed out at the commencement of this discussion, the issue the CC was required to determine was whether a collateral challenge could be raised by an organ of state, and not whether the *delay* which was attendant thereon, should non-suit it.
51. On this aspect the Court held that even though collateral challenges were aimed, in the first instance, at protecting citizens from the undue exercise of state power⁴⁵ there was no practical or conceptual reason to restrict their use only to such circumstances and Merafong’s status as an organ of state did not categorically exclude it from raising a collateral challenge.⁴⁶
52. But Cameron J was of the view that Merafong’s challenge had distinctive attributes which rendered it different from the so-called ‘classical’ collateral challenge, where delay ‘played no role’ and the subject of coercive action was entitled to have the lawfulness thereof scrutinised because the rule of law required that official power should not be exercised against someone unless it was lawfully sourced.⁴⁷ In this regard the ‘virtue’ of ‘classical’ reactive challenges lay in the fact that they provided a defence to parties who faced the enforcement of the law but never ‘previously confronted it’.⁴⁸ For this reason, such challenges were sometimes disallowed, in instances where the challenging party had an

⁴⁴ Id para 33.

⁴⁵ Para 55.

⁴⁶ Para 68.

⁴⁷ Para 69.

⁴⁸ Para 70.

appeal or other remedy available and the administrative action or decision which was in dispute was 'specifically directed' at and known to it, in contrast with instances where the administrative action or decision was directed at the 'world at large' i.e. was of general application and as such was possibly unknown to it, in which case delay could not be a disqualifying factor.⁴⁹

53. By way of examples of matters where collateral challenges had been refused he referred, in passing, ⁵⁰ to the decisions of the English Courts in *Quietlynn* ⁵¹ (which concerned an injunction for failure to operate a 'sex shop' in accordance with a licence) and *Wicks* ⁵² (which concerned a prosecution for failure to comply with a stop building enforcement notice), and the decision of our Courts in *Khabisi* ⁵³ (which concerned an interdict for failure to comply with compliance notices issued in terms of environmental legislation).
54. In each of these matters the administrative decisions were specifically directed at the applicants and thus known to them and, as was said in *Quietlynn* ⁵⁴ they had 'clear and ample opportunity'⁵⁵ to challenge their legality directly,⁵⁶ prior to attempting to resist their enforcement collaterally. In *Tasima* ⁵⁷ the Constitutional Court spoke of a 'sufficient' opportunity.
55. In contrast to these matters, the 'classical' collateral challenge, where it was sought to resist an administrative act of general application, is the decision in *Boddington*,⁵⁸ which was referred to by the SCA in *Oudekraal* 1. It concerned a bylaw which allowed for the regulation of the conduct of persons on trains by the British railway authorities. The bylaw became operative sometime after it was

⁴⁹ Paras 70-71.

⁵⁰ In footnote 86.

⁵¹ *Plymouth City Council v Quietlynn* [1987] 2 All ER 1040.

⁵² *R v Wicks* {1997} 2 All ER 801.

⁵³ *Khabisi v Aquarella Investments 83 (Pty) Ltd & Ors* 2008 (4) SA 195 (T).

⁵⁴ Note 51.

⁵⁵ *Id*, per Lord Irving in *Quietlynn* n 51, as endorsed in the recent decision of *R v Cooper* [2022] EWCA Crim 922, which concerned a failure to comply with a stop works notice in terms of environmental regulations, and the court refused to entertain a collateral challenge as the defendant could have availed himself of an internal appeal to an administrative body but failed to do so.

⁵⁶ In both *Quietlynn* and *Wicks* the relevant statutory schemes provided for internal, administrative remedies of appeal.

⁵⁷ *Department of Transport v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC), footnote 63.

⁵⁸ Note 35.

brought into law, as subordinate legislation, when notices were posted in trains, prohibiting smoking in all carriages. When he was charged with contravening the bylaw the accused sought to raise a collateral challenge that the decision to post the notices was *ultra vires* the authorities' powers, but he was convicted by the district court on the basis of existing precedent, which held that unless a bylaw was substantively, as opposed to procedurally, invalid it could not be called into question in criminal proceedings. The House of Lords was of the view that collateral challenges could be raised in criminal proceedings on the grounds of both procedural and substantive invalidity and accordingly held that the existing precedent should be overruled. It was further of the view that the collateral challenges in *Quietlynn* and *Wicks* were distinguishable as they were concerned with administrative acts which were specifically directed at defendants who had clear and ample opportunity to challenge the legality thereof, before being charged. In contrast with those matters the bylaw was of a 'general' character in the sense that it was directed at the 'world at large', and the first time when the accused was affected by it, was when he was charged with smoking in breach of it. Before then, the accused had no 'sensible opportunity' to challenge the validity of the posting of the notices.

56. Cameron J was of the view that as the Merafong municipality was well aware of the Minister's decision against it, which was specifically addressed to it, and knew that it could be contested, its reactive challenge was of the category that necessitated scrutiny in regard to the delay.⁵⁹
57. As an organ of state it had a constitutional obligation to uphold and support the rule of law *inter alia* by seeking redress for the unlawful actions of the state,⁶⁰ and was accordingly obliged to institute proceedings to review the Minister's decision without unreasonable delay. By remitting the matter to the High Court for consideration afresh Merafong would have the opportunity to provide an explanation for why it had not challenged the Minister's decision directly and the 'hurdles' of lateness and potential prejudice could be considered.

⁵⁹ Para 72.

⁶⁰ Para 61.

58. From the exposition of the decision in *Merafong* it should be clear that the issue of delay is not irrelevant to proceedings in which collateral challenges are raised by so-called non-state actors and it is a factor which must be considered when determining whether a collateral challenge should be entertained, in all matters involving such challenges. Aside from the passages of the judgment that have already been referred to this is made clear in other paragraphs in Cameron J's judgment where he commented that delay, though 'relevant', may not be 'conclusive' in a collateral challenge matter ⁶¹ and there is a range in such matters: in some of them delay will be 'axiomatically irrelevant' whilst in others it 'counts'.⁶²
59. Following on its decision in *Merafong* in 2017 the Constitutional Court again had occasion, in several matters which it heard between 2018 and 2019, to consider the issue and effect of delay in the bringing of collateral challenges, and extended the range and ambit thereof by holding that not all such challenges need to be made or employed defensively but may be done so offensively.
60. Thus, in *Tasima* ⁶³ the Department of Transport was permitted to raise a collateral challenge in the form of a counter-application for review, as a defence to contempt proceedings which were brought, when it sought to resist compliance with an order which had been granted against it, improperly extending a service contract after it had already expired. There had been a 6-year delay between the time when the contract was improperly extended and when the challenge was lodged. The CC confirmed that reactive challenges may be brought by organs of state, provided that the delay in doing so was not 'unwarrantably undue'.⁶⁴ It held that, whilst a court should be slow to allow procedural hurdles to prevent it from looking into a challenge to the lawfulness of the exercise of public power it was equally a feature of the rule of law that 'undue' delay should not be tolerated, as it could prejudice the respondent and undermine the public interest in bringing certainty and finality to administrative

⁶¹ Para 77.

⁶² Para 81.

⁶³ Note 57.

⁶⁴ *Id.*, para 143.

action. Consequently, a court should exhibit ‘vigilance, consideration and propriety’ before overlooking a late review, ‘reactive or otherwise’.⁶⁵

61. In considering whether to condone the delay in *Tasima*, the CC adopted the ‘factual, multifactorial and context-sensitive’⁶⁶ test which was formulated in *Khumalo*⁶⁷ (which concerned a review) in which it was held that regard must be had to all the relevant circumstances including the nature of the disputed decision and the merits of the challenge to it,⁶⁸ and the explanation which has been tendered for the delay and why it should be overlooked, with reference to the consequences which may ensue if the impugned decision is set aside or not enforced, including any potential prejudice that may be occasioned to affected parties. It also reiterated that, as far as the explanation for the delay is concerned it must be a full and comprehensive one, which covers the entire period.⁶⁹
62. In similar vein, in *Gijima* ⁷⁰ where the CC held that organs of state who seek to review their own decisions must do so in terms of the principle of legality, and not by way of a review of administrative action in terms of PAJA (as it only applies to private persons and not to the state), it confirmed *en passant* that when doing so by way of a reactive challenge the question of ‘unwarranted delay’ may feature and may have to be accounted for. Finally, in *Buffalo City*, ⁷¹ where the municipality raised a collateral challenge in the form of the review of a tender (in defence to an application for provisional sentence claiming payment in terms of a contract which was concluded pursuant to the award thereof) the Court emphasised (per Cameron J) that if collateral review challenges were allowed in the face of utterly unreasonable delays, without even minimal explanations, the protections which had been afforded by various judgments would provide ‘leaky cover’.

(ii) An application and a summary

⁶⁵ Para 160.

⁶⁶ Per Khampepe J para 144.

⁶⁷ *Khumalo & Ano v MEC for Education, KwaZulu Natal & Ors* 2013 (4) SA 262 (CC).

⁶⁸ *Khumalo* para 57.

⁶⁹ *Tasima*, paras 152-170.

⁷⁰ *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC).

⁷¹ *Buffalo City Metropolitan University v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC) para 137.

63. It is time to apply the principles which have been elucidated, to the facts of the case which is before us. In doing so, and by way of a preliminary remark, it is in my view wholly unhelpful to make use of the formalistic distinction between a so-called ‘classical’ collateral challenge by a private person as it is commonly understood (as typified by and identified in *Boddington*), and a so-called ‘extended’ one by an organ of state or corporate entity (of the kind which features in *Oudekraal*, *Merafong*, *Tasima* and *Buffalo City*), and to attempt to force the facts of this matter into one or other of these categorizations. Whereas they may be useful when one is engaged in attempting to understand the historical origins and the evolution and development of the use of such challenges, in English law and our law, they should not be seen and understood as two different legal animals, which are subject to two wholly different legal regimes and treatments. Given the developments which have occurred in this area of the law and the extension of the availability of such challenges, from private persons to corporate entities and organs of state, and from purely reactive i.e. defensive applications to offensive ones it is, in my view, time to jettison the artificiality of these distinctions and to simply refer to collateral challenges as a genus, rather than in terms of separate species.
64. It is precisely because of the appellant’s attempt to straitjacket the facts of the matter into one or other of these categorizations, based on the remarks which were made in *Merafong*, that the parties arrive at diametrically opposite interpretations of the judgment, and the appellant has misread the judgment.
65. The appellant contends that in saying that in a ‘classical’ collateral challenge ‘delay plays no role’⁷² Cameron J was laying down a rule or principle. And because of this, as the appellant’s challenge, according to it, is a ‘classical’ one, its delay in raising it is consequently irrelevant and cannot be held against it.
66. I do not understand Cameron J’s comment that way. As is by now trite and well-established, when interpreting any document, including a judgment, one must consider the text i.e. the language used, in the context of the document as a whole, with due regard for the purpose intended by the author. The comment

⁷² Id, para 69.

must accordingly be read and interpreted in the context of the fact that it was made as part of an exposition of the origins and development of the use of collateral challenges in our law, and the further comment, a paragraph later, that a 'classical' collateral challenge provides a defence to a person who faces the enforcement of the law, but 'who never previously confronted it'.⁷³ (Perhaps, with respect, a better formulation would have been to say 'who never previously was confronted by it?').

67. In my view, properly considered in this context, what Cameron J was saying was that in the 'classical' collateral challenge delay *commonly cannot or does not* play a role, because it is concerned with cases where a person (or as it has subsequently been extended, a corporate entity or organ of state) has not previously been confronted with the coercive action concerned i.e. with the enforcement of an administrative action or decision which he now seeks to resist, when confronted by it. Obviously, in such circumstances there can be no issue or question about any delay on his part because he was not confronted with the action before. Delay does not feature because it is considered that, until the confrontation occurred, there was no legal obligation on the subject of the coercive action to challenge it, or in the words of the case law, because in the particular circumstances of the case it is considered that the subject did not have a 'sensible' (as per *Boddington*) or 'sufficient' (as per *Tasima*) opportunity to do so, until a later date or occasion, in response to which the collateral challenge was raised. Thus, in my view, when commenting that in the 'classical' collateral challenge 'delay plays no role' Cameron J was not seeking to lay down a rule or principle pertaining to a so-called 'classical' collateral challenge but was simply describing a primary feature of it.
68. In the circumstances, as I understand it a collateral challenge will not necessarily succeed, simply because it is described as a so-called 'classical' one i.e. one brought by a citizen in response to coercive action by the state, based on an administrative action or decision which was general in nature. There may well be instances where, notwithstanding the generality of the action or decision

⁷³ Id, para 70.

concerned, the citizen may not be able to resist its enforcement, for instance where the citizen was aware of the action or decision and that it may apply to him, but deliberately chose not to challenge it and to see if he could avoid it, because it applied to the population at large, and as a result, flouted the law or acted in deliberate and knowing contravention of it, and only chose to confront it later, in response to coercive action. A court in such circumstances might well decline to uphold a late collateral challenge.

69. Ultimately, the question which requires an answer is not whether the collateral challenge which is raised, be it by a private person or by an organ of state or corporate entity, is a 'classical' one or not, but whether, on the facts which are before the Court at the time, it is one which can and should be entertained. In answering this question the determining factors are 1) whether the object of the challenge i.e. the administrative act or decision, or the legislation on which it is based and from which it derives legal force and effect, is one that was specific to the challenger (in that it was directed at him/her, or it, in particular, or to a class or group to which he/she/they belongs), or is one that was general and unspecific or indeterminate (in that it was of application to the world at large) and 2) whether it was known to the challenger (or should have been known by him/her/it, with the exercise of reasonable care).
70. In the case of the former and a challenger who had actual knowledge (such as in this matter), the further factor that must be considered is whether the challenger had sufficient (or 'ample') opportunity to contest the administrative act or decision directly (by way of review or other legal remedy⁷⁴), but failed, or deliberately chose not, to do so. In such a case, delay will obviously be an aspect which the court must consider, in determining whether to entertain the challenge or to dismiss it. Unlike in review matters, the court will not have a 'discretion' to refuse to entertain the challenge without evaluating it, *simply* or *only* because it was brought late. It must have regard for all the circumstances, which will include the

⁷⁴ In the English cases of *Quietlynn* and *Wicks* (notes 51 and 52) collateral challenges were held to be impermissible where the challenger had recourse to an internal appeal but chose not to make use of it, and in Canada courts have declined to entertain collateral challenges for the same reason vide *R v Consolidated Maybrun Mines Ltd* [1998] 1 S.C.R. 706; 1998 CanLii 820 (SCC); as endorsed in *R v Al Klippert Ltd* [1998] 1 S.C.R. 737; 1998 CanLii 821 (SCC).

delay which was attendant on the bringing of the challenge and the explanation which was given in this regard, and the effect that upholding the challenge may have on vested rights, as well as the requirements of certainty and finality of administrative acts and decisions. Thus, in short, in our law delay is and has always been a factor in collateral challenge matters, which *may* have to be taken into account.

71. In this matter delay is, in my view, a material and important feature which *must* be considered. The appellant knew about the Redisa plan well before it was promulgated in 2012 and subscribed to it. As an importer it was part of a group of persons to whom the provisions of the plan specifically applied. It knew that the plan made provision for the levying of a waste tyre management fee which was to be reviewed and adjusted annually i.e. increased or decreased, depending on the prior year's running and operational costs. It knew, already in the first year after its promulgation, that the fee was not reviewed and adjusted, and that it was not reviewed and adjusted in the years that followed. Despite this it continued voluntarily and without demur to make payment of the fee, as it was levied, for a period of 4 years between the promulgation of the plan on 30 November 2012 and October 2016, when it stopped doing so, without offering any explanation. During the 4 years that it paid the fee it did not seek to raise any illegality or invalidity in relation to it and only sought to do so when the application was launched by Redisa in September 2019, just short of 3 years after it stopped paying.
72. In seeking to challenge the enforcement of the plan collaterally the applicant made no attempt to provide any explanation for why it made payment of a fee it considered to be unlawful, at least from November 2013 until October 2016, and why it never sought to challenge the levying of the fee by way of a review, or otherwise. It failed to provide any explanation for its delay in doing anything until it raised its collateral challenge late in 2019. It was, by law, required to provide a full and cogent explanation which covered the entire period of delay, but it did not even provide a cursory one. In the absence of any of these explanations it is difficult not to conclude that its belated raising of a collateral challenge was

nothing more than an opportunistic attempt to avoid making payment, and that it stopped making payment of the levies in October 2016 because it took advantage of the fact that 1) the state had indicated in or about August 2016 that it was going to change the funding model for waste plans and by doing so Redisa would no longer be entitled to recover the levies from subscribers, and 2) in or about October-November 2016 the Minister sought to take control of Redisa.

73. Given the circumstances, can it be said that the delay should nonetheless have been overlooked by the Court *a quo*? I think not. In my view the interests of the finality and certainty of administrative decisions, are strongly against allowing this. Millions of rands were paid over in lieu of levies by tyre producers and importers from November 2012 to May 2017.
74. It should also be pointed out that the prospects of the appellant succeeding on the merits of its challenge were extremely tenuous, for two principal reasons, and this was a further factor which militated against allowing the challenge to be entertained.
75. In the first place the contention that Redisa's failure to review the plan and to amend the fee constituted a criminal offence and therefore the fees claimed by it were unlawful, could not succeed. In advancing its challenge on this basis the appellant pointed out that in terms of the Waste Act a person or entity which is party to a waste plan commits an offence if they contravene or fail to comply with the plan.⁷⁵ When considering the provision concerned, one must not stare blindly at the language and apply a literal interpretation only, and one must seek to provide a sensible and purposive interpretation, in the context of the Act, read as a whole. In this regard, aside from provisions which set out the extent of any financial contribution that may be required to support consumer-based waste reduction programs, the contents of a waste plan can, in terms of the Act,⁷⁶ be far-ranging and can include aspirational aspects such as 'targets' for waste minimisation, 'programs' and 'opportunities' to minimise and reduce the generation of waste, and mechanisms for informing the public of the impact of

⁷⁵ Section 67(1)(d).

⁷⁶ Sections 30(1)-(2).

waste-generating products on the environment. The waste plan provided by Redisa is extensive and detailed and contains a number of these aspirational 'targets', aims and objectives. Given what may be contained in a waste plan It could, in my view, therefore never have been intended or envisaged that a simple failure to comply with any single provision in a waste plan, would result in a punishable offence.

76. In the second place, those provisions of the plan which dealt with the waste tyre management fee, clearly stated that the initial levy which was proposed was simply an 'estimate', which was subject to change, and would be reviewed annually, after consultation with all stakeholders and consideration of the previous year's operational costs. As I read it, the plan did not compel Redisa to amend the fee annually, only to review it, and if justified pursuant thereto, to *then* amend it, after due consultation with all stakeholders, which would include government.
77. Redisa says that it duly commenced a process of review in September 2013, within a year after the plan was promulgated. On 16 September 2013 it held a meeting with the Department at which a proposed fee increase was discussed. The Department undertook to revert in this regard. At a further meeting which was held on 5 November 2013 Redisa was asked to submit its proposed amendments to the plan, which it did on 25 November 2013, when it submitted a proposal that there should be an annual adjustment to the fee, based on changes to the consumer price index. On 29 January 2014 the Department informed Redisa that in its view the plan did not need to be amended at that stage by being taken through a fee review process. By doing so the Department effectively communicated that the fee should be maintained as it was. Redisa says that, had the Department supported an increase it would then have commenced the necessary consultation and public participation process with interested parties.
78. Then, as previously pointed out, at the end of 2013 the Department proposed amendments to the funding model for waste management plans which were promulgated in June 2014, and pursuant to legislative amendments which were passed between December 2016 and February 2017 to give effect to this change

Redisa was no longer empowered to collect the waste tyre management fee directly from subscribers, and this function was subsequently transferred to the SA Revenue Service. In such circumstances it is ludicrous to suggest that Redisa committed an offence by not reviewing and amending the waste tyre management fees after September 2013, because, as a result of the legislative changes that were made it was, in my view, no longer empowered to do so.

79. In the circumstances, the fact that the waste tyre management fee was not adjusted after its initial promulgation, because it was not reviewed and amended, does not mean that it became unlawful. It was lawfully set and imposed as a levy when the plan was gazetted, and until it was reviewed and amended it surely remained a lawful fee that could be levied, as would any subsequent adjusted fee, until it was reviewed and amended.
80. For the foregoing reasons the decision of the Court *a quo* must be upheld. In the result, I would make the following order:

The appeal is dismissed with costs, including the costs of two counsel where so employed.

M SHER

Judge of the High Court

I agree, and it is so ordered.

C FORTUIN

Judge of the High Court

I agree.

B MANTAME

Judge of the High Court

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