

IN THE NORTH GAITING HIGH COURT, PRETORIA

REPUBLIC OF SOUTH AFRICA

CASE NO: 51148/2012

In the matter between:

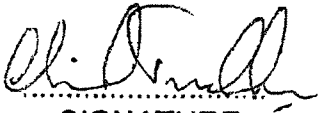
RETAIL MOTOR ORGANISATION

First Applicant

CIRCUIT FITMENT CC

Second Applicant

and

(1)	<u>REPORTABLE:</u>	<u>YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES:</u>	<u>YES / NO</u>
	12/11/12 DATE	 SIGNATURE

MINISTER OF WATER & ENVIRONMENTAL AFFAIRS First Respondent

RECYCLING & ECONOMIC DEVELOPMENT

INITIATIVE OF SOUTH AFRICA

Second Respondent

JUDGMENT

Tuchten J:

- 1 On 23 July 2012, the first respondent ("the Minister") published Government Notice 564 in the Schedule to Government Gazette 35534, promulgating an Integrated Industry Waste Management Plan ("the Redisa Plan") developed by the second respondent ("Redisa") in an attempt to deal with the problem of the disposal of waste motor

vehicle tyres. The evidence shows, although evidence is hardly necessary, that the disposal of such tyres is a significant ecological problem.

- 2 The applicants seek to interdict the implementation of the Redisa Plan pending the outcome of pending review proceedings to set aside the approval of the Redisa Plan by the Minister. The application for an interim interdict was held to be urgent in separate proceedings before Hiemstra AJ and the matter was adjourned for hearing on a date arranged in accordance with the practice of this Court and argued before me on 8 November 2012.
- 3 The first applicant ("RMI") is a voluntary organisation founded for the purpose of promoting, protecting and encouraging the interests of its members and the general motoring public. The second applicant played little part in the proceedings before me. Some point was made in argument in relation to the *locus standi* of the second applicant but as the first applicant manifestly has standing under s 38(e) of the Constitution, no more need be said in that regard.

- 4 Redisa was constituted as a non-profit company. It represents the interests of a number of significant participants in the tyre industry. It is a private industry initiative, not an organ of state and is funded by private industry financial institutions and participants in the industry.
- 5 The Redisa Plan contemplates substantial capital expenditure to deal with the environmental scourge of disposing of waste tyres. Redisa has already spent or committed R33 million toward this end. A large part of this was spent before the ministerial approval of the Redisa Plan.
- 6 The statutory framework and enabling legislation in terms of which the applicants' challenge to the lawfulness of the Redisa Plan must be evaluated is the National Environmental Management Waste Act, 59 of 2008 ("the Waste Act") and the Waste Tyre Regulations ("the Regulations") promulgated pursuant to the since repealed Environmental Conservation Act, 73 of 1989.¹

¹

Under s 80(2) of the Waste Act, any regulation made in terms of a provision of the ECA in force immediately before the date of the coming into effect of the Waste Act remains in force and is considered to have been made under the Waste Act until anything done under the Waste Act overrides it.

- 7 The Waste Act was enacted to promote the fundamental constitutional right to a clean, healthy, sustainable environment.² The long title and preamble reflect the purposes of the measure:

ACT

To reform the law regulating waste management in order to protect health and the environment by providing reasonable measures for the prevention of pollution and ecological degradation and for securing ecologically sustainable development; to provide for institutional arrangements and planning matters; to provide for national norms and standards for regulating the management of waste by all spheres of government; to provide for specific waste management measures; to provide for the licensing and control of waste management activities; to provide for the remediation of contaminated land; to provide for the national waste information system; to provide for compliance and enforcement; and to provide for matters connected therewith.

Preamble

WHEREAS everyone has the constitutional right to have an environment that is not harmful to his or her health and to have the environment protected for the benefit of present and future generations through reasonable legislative and other measures that-

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Section 24 of the Constitution reads:

Everyone has the right-

- (a) to an environment that is not harmful to their health or well-being; and
- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that-
 - (i) prevent pollution and ecological degradation;
 - (ii) promote conservation; and
 - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

- (a) prevent pollution and ecological degradation;
- (b) promote conservation; and
- (c) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development;

AND WHEREAS waste management practices in many areas of the Republic are not conducive to a healthy environment and the impact of improper waste management practices are often borne disproportionately by the poor;

AND WHEREAS poor waste management practices can have an adverse impact both locally and globally;

AND WHEREAS sustainable development requires that the generation of waste is avoided, or where it cannot be avoided, that it is reduced, re-used, recycled or recovered and only as a last resort treated and safely disposed of;

AND WHEREAS the minimisation of pollution and the use of natural resources through vigorous control, cleaner technologies, cleaner production and consumption practices, and waste minimisation are key to ensuring that the environment is protected from the impact of waste;

AND WHEREAS waste under certain circumstances is a resource and offers economic opportunities;

AND WHEREAS waste and management practices relating to waste are matters that-

- require national legislation to maintain essential national standards;
- in order to be dealt with effectively, require uniform norms and standards that apply throughout the Republic; and
- in order to promote and give effect to the right to an environment that is not harmful to health and well-being, have to apply uniformly throughout the Republic; and
- require strategies, norms and standards which seek to ensure best waste practices within a system of co-operative governance ...

- 8 To this end, a clear legislative policy is articulated. The criminal law, directed as it is toward identifying and punishing offenders after the event is inadequate to deal with the great challenges of giving effect to the constitutional environmental imperatives; so it is necessary to involve and engage the public and industry participants in initiatives contemplated by the measure.
- 9 To this end, the Waste Act gives Minister wide powers. For example, she must in due manner set national norms and standards to deal with waste;³ she must designate a national waste management officer responsible for coordinating waste management in the national government;⁴ she may declare priority wastes;⁵ she may extend producer responsibility;⁶ she may by due process list waste management activities,⁷ upon which no one may conduct such an activity except in the way determined by the Minister or under license.⁸

3 Section 7

4 Section 10

5 Section 14

6 Section 18

7 Section 19

8 Section 20

- 10 The Waste Act lays emphasis on planning. Central to this policy decision is the concept of an industry waste management plan ("IWMP") as described in Chapter 7 of the Act and the homely principle, accepted, I believe, by all responsible adults that he or she who makes a mess should bear the prime responsibility for cleaning it up. To this end, the Minister may, by due process, require categories of persons or industry participants and organs of state to develop an IWMP for her approval,⁹ in which case she is given certain coercive powers to ensure compliance with her requirements. In addition, where she exercises her power to require the development of an IWMP, she must specify the information that must be included in it.¹⁰ Although guide lines for such specified information are laid down, under s 30(2)(l), the specification may include any matter that may be necessary to give effect to the objects of the Act.
- 11 Consistent with the policy of collaboration between the executive, government and the private sector in relation to waste management, any person, category of persons or industry may elect at their own initiative to prepare an IWMP for the Minister's approval.¹¹

⁹ Sections 28 and 29

¹⁰ Section 30

¹¹ Section 28(7)

12 Where an IWMP is developed in accordance with a direction from the Minister, the person responsible for developing it (whom I shall describe in this judgement as the plan developer) must take appropriate steps to bring its contents to the attention of interested parties, who include organs of state, interested persons and the public and must follow any directions given by the Minister in regard to the consultation process that must be followed.¹²

13 Section 32(1) prescribes what happens when the Minister receives an IWMP:

The Minister, acting in terms of section 28 (1) or 29 (1), or the MEC acting in terms of section 28 (2) or 29 (2), may on receipt of an industry waste management plan-

- (a) approve the plan in writing, with any amendments or conditions, and give directions for the implementation of the plan;
- (b) require additional information to be furnished and a revised plan to be submitted within timeframes specified by the Minister or MEC for approval;
- (c) require amendments to be made to the plan within timeframes specified by the Minister or MEC; or
- (d) reject the plan with reasons if it does not comply with the requirements of a notice in terms of section 28 (1) or (2) or 29 (1) or (2), as the case may be, or if a consultation process in accordance with section 31 was not followed.

- 14 The prescriptions in s 32(1) are clearly not definitive of the Minister's powers. I give two examples:
- 14.1 Her power expressly conferred in s 32(1)(d) to reject an IWMP extends only to those submitted to her pursuant to a direction under s 28 or s 29. The purposes of the measure however demand that she has the implicit power to reject an IWMP submitted otherwise than in accordance with a ministerial direction; and
- 14.2 Under s 32(1)(c), the Minister is expressly given the power to "require amendments to be made to the plan ...". The purposes of the measure require too that the Minister be given the power to effect amendments at her own initiative.
- 15 Under ss 32(6) and (7), once an IWMP has been approved, notice to that effect must be given in the Government or other relevant Gazette. Curiously, there does not appear to be any provision in the Waste Act under which an IWMP duly so published is made binding on any persons or category of persons but in s 67(1)(d) read with s 68(2), it is an offence to contravene or fail to comply with an IWMP punishable by a fine of up to R5 million or imprisonment for up to five years, or

both. This point was not addressed in argument and I shall therefore say no more about it.¹³

- 16 The Waste Act expressly lays down in ss 72 and 73 the procedures the Minister must follow in regard to consultation and public participation. Sections 72(1) provides:

Before exercising a power which, in terms of this Act, must be exercised in accordance with this section and section 73, the Minister ... must follow such consultative process as may be appropriate in the circumstances.

- 17 While the obligation to consult is limited to the consultative process which is *appropriate*, the Minister's obligations in relation to public participation are wide reaching. Section 73 requires that

- (1) Before exercising a power that, in terms of this Act, must be exercised in accordance with this section, the Minister or MEC, as the case may be, must give notice of the proposed exercise of the relevant power-
- (a) in the Gazette; and
 - (b) in at least one newspaper distributed nationally or, if the exercise of power will only affect a specific area, in at least one newspaper distributed in that area.

¹³ Under reg 6, a tyre producer must either, within a prescribed time period, submit its own such plan to the Minister for approval or register and comply with an existing plan. I shall return to this point.

- (2) The notice must-
 - (a) invite members of the public to submit to the Minister or MEC, as the case may be, within no less than 30 days of publication of the notice in the Gazette, written representations on or objections to the proposed exercise of power; and
 - (b) contain sufficient information to enable members of the public to submit representations or objections.
- 18 The consultation and public participation procedures in the Waste Act seek to give effect to another fundamental right; that of just administrative action under s 33 of the Constitution which must be read with the statute enacted, pursuant to s 33(2), to give effect to that right, the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA").
- 19 The Regulations apply specifically to what I may describe loosely as the tyre industry and participants in that industry. Tyre producers, as defined in reg 1¹⁴ must under reg 6(3) either prepare and submit an "integrated industry waste tyre management plan" ("IIWTMP") to the Minister or register with an existing one and must in either event comply with the IIWTMP applicable to it. Reg 9 lays down that an IIWTMP must "at least" address certain specified issues. Among those are that it must provide an annual projection of the quantities

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"... any person or institution engaged in the commercial manufacture or import of tyres and retreadable casings, and the import of vehicles fitted with tyres for distribution in South Africa."

and types of tyres that are manufactured or imported that will become waste tyres¹⁵ and will be managed through the "integrated industry waste tyre management plan" (reg 9(1)(b)); provide details of the manner in which the contribution of each member of the plan will be determined and how the contribution will be collected and distributed (reg 9(1)(k)).

20 Regs 9(1)(i) and 9(1)(j) provide a clue to a policy consideration underlying the regulation of waste tyre management plans: reg 9(1)(i) appears to require that "all" waste tyres be managed in accordance with the plan within five years of the date of its approval while reg 9(1)(j) provides that the plan must provide estimates of the costs of implementing the activities of the plan "for the *first*¹⁶ five years". It therefore seems that the regulation contemplates that the plans in question be justified in terms of five year spans.

21 Reg 10(1) requires the plan developer to bring the contents of the proposed IIWTMP to the attention of relevant organs of state, interested persons and the public and call for comments to the plan. Reg 10(2) requires the plan developer to consider any comments

¹⁵ Defined in reg 1 as a new, used, retreaded or un-roadworthy tyre, not suitable to be retreaded, repaired or sold as a part worn tyre and not fit for its original intended use.

¹⁶ Own emphasis

received and transmit them, with any responses to such comments, and the plan itself to the Minister.

- 22 Reg 11 provides that on receipt of the plan, the Minister has a number of options and duties. Reg 11(1)(a) empowers the Minister to call for additional information and a revised plan; reg 11(1)(b) obliges the Minister to publish the IIWTMP in the Government Gazette for comment; reg 11(1)(c) obliges the Minister to send any comments received by the Minister to the plan developer for "consideration and incorporation where relevant".

- 23 Under reg 11(1)(d) the Minister

... must, after incorporation of any comments, review the revised [IIWTMP], approve it with or without conditions, or reject the [IIWTMP] with reasons and with a timeframe for resubmission.

- 24 It is to be noted that the regulation, read alone, does not in terms give the Minister the power to initiate amendments to draft IIWTMPs received under reg 10 or prescribe the procedure to be followed if any amendment, whether effected by the Minister or the plan developer, is contemplated. These questions are at the heart of the dispute as it developed before me.

- 25 The Minister's approval must "at least specify the period for which the approval is issued, which period may be extended by the Minister".¹⁷ Once the Minister approves an IIWTMP, she must give notice of that fact in the relevant Gazette.¹⁸
- 26 Reg 12 requires that an IIWTMP
- ... must be revised and resubmitted for approval by the Minister at 5 year intervals¹⁹ or sooner if the Minister or the [plan developer] identifies that amendments are required.
- 27 A revised IIWTMP must be published in the Government Gazette for a period of 30 days, no doubt for the purpose of eliciting comment from interested parties.²⁰
- 28 Reg 17(1)(b) read with regs 12(3) and 17(2) render it an offence to contravene or fail to comply with an IIWTMP or a revised IIWTMP, punishable by a fine or by imprisonment or both.

¹⁷ Reg 11(3). No period for approval or extension is specified, which suggests that the plans are not legislatively restricted to lifespans of five years or less.

¹⁸ Reg 11(4)

¹⁹ Which suggests that the plans are indeed legislatively restricted to lifespans of five years or less, although under reg 12(4) the Minister may exempt the plan developer from submitting a revised plan if she, upon a request for exemption, is satisfied that the "plan continues to meet the objectives of the regulations and does not require amendments.

²⁰ Reg 12(2)

- 29 The Regulations were published on 13 February 2009 and made effective from 30 June 2009. The Waste Act commenced on the following day, 1 July 2009. Around this time, Redisa began to develop an IIWTMP, initially with the support of RMI. Some 18 months later, RMI withdrew its support for the Redisa Plan. The papers do not say why this happened.
- 30 An earlier version of the Redisa Plan was approved by the Minister and gazetted on 28 November 2011. RMI made no comment in relation to and took no action against that version of the Redisa Plan. However, on 21 December 2012, RMI submitted its own draft IIWTMP to the Minister.
- 31 It appeared that there had not been due publication of the Redisa Plan for a period of 30 days and the SA Tyre Recycling Process Company NPC moved the South GAUTENG High Court urgently under case no 1944/2012 to suspend the implementation of the Redisa Plan pending a review. On 26 January 2012, the Minister withdrew her approval of the Redisa Plan, thereby rendering review unnecessary.
- 32 Redisa duly readvertised its Plan and called for comment. Much comment was received and addressed although none was forthcoming from RMI. It must be remembered however that RMI is

an umbrella organisation and the papers do not show the extent, if any, to which RMI's members participated in the comment process.

- 33 Be that as it may, on 10 April 2012, the Minister's director general: waste management convened a meeting to discuss the three draft IIWTMPs that the Minister had received, from Redisa, RMI and SATRP, the applicant in the earlier urgent application to the South GAITING High Court. At this meeting, RMI raised no relevant concerns.
- 34 On 17 April 2012, the Redisa Plan was once again gazetted. On 20 April 2012, the Minister addressed correspondence to RMI requiring additional information under reg 11(1)(a). To date, RMI has not responded to the Minister. On 16 May 2012, RMI, through Mr Premlall, the deponent to RMI's main founding affidavit, amongst many others, commented on the draft Redisa Plan. On 23 July 2012, the Minister approved the Redisa Plan. Her notice of approval, together with the text of the version of the Redisa Plan which she approved, was gazetted.
- 35 By notice of motion dated 3 September 2012, the applicants moved the court for relief. The relief sought was in two parts; in Part A, which is presently before me, the applicants seek to interdict the

implementation of the Redisa Plan pending the review relief which is the subject of Part B.

- 36 Although a number of grounds of attack are contained in RMI's affidavits, I shall deal in this judgment only with those which were supported in oral argument. I have however considered all the grounds raised. My conclusion is that the grounds not mentioned in oral argument have at this stage not been substantiated. I say this, bearing in mind that the Minister has not yet provided the record of her decision under Rule 53 and that further evidence may yet be forthcoming to support those grounds.
- 37 The first ground of attack with which I shall deal relates to the fact that the version of the Redisa Plan as gazetted and approved differs from the version of the Plan put up for public comment. The approved version of the Redisa Plan contains an item 15.1 which had been entirely omitted from the version put up for comment. Item 15.1 reads:

Waste Reduction Targets

The following are the targets for waste reduction:

- Within 12 months processing 30 000 tons/year of waste tyres using existing waste tyre processors.
- Within 24 months, processing of 90 000 tons/year of waste tyres.
- Within 36 months, processing of 150 000 tons/year of waste tyres.

- Within 60 months. Processing of 400 000 tons/year waste tyres arising.

This will be subject to industry participants being compliant to the scorecard criteria and the timeous processing of EIA applications.

Note that the tonnages to be processed will include an increasing proportion of historical tyres to approximately 25% by year 5.

Refer to the section *Job Creation* below for job creation timeframes.

38 In his replying affidavit, Mr Premlall makes clear that he did not initially appreciate that the approved Plan differed from that put up for comment. The addition of item 15.1 was discovered through the industry of RMI's lawyers when they were finalising RMI's replying affidavit. Duly prompted by his lawyers, Mr Premlall took the point in reply and explained his failure to take it in the founding affidavit. The respondents were afforded an opportunity to deal with the new point. They did so. The reactions of the respondent were at both a procedural and a substantive level.

39 At the level of procedure, while it is true that an applicant must make her case in the founding affidavit, this is, as been said, not a law of the Medes and the Persians. The departure from recognised procedure has been explained. The point raised, at the level of substance, is not

frivolous. The respondents have been heard on the new material and are not prejudiced. In the exercise of my discretion, I shall entertain the point. I deal below with its merits.

- 40 The Redisa Plan is a substantial document, running to some 47 printed pages, with annexures, in the record. It was presented on the basis that it was

... structured around there being only one waste tyre management plan, on the basis that it is the only workable approach.

- 41 This prompted an attack on the basis that the Minister has misconceived her powers. It is suggested that because *Redisa* sees its Plan as the only one which will operate in the industry, the Minister did so as well. One only has to articulate the proposition to reject it. The proposition seeks to impose on the Minister the subjective viewpoint of *Redisa*. There is simply no basis in logic for doing so. The Minister has denied having any such perception of her powers. The reaction of the Minister in calling for additional information on the RMI Plan demonstrates that she had not closed her mind to the possibility of there being in operation within the tyre industry more than one IIWTMP. There is no substance in this attack.

42 The next ground of attack is that while the Redisa Plan requires those engaged by its terms to pay levies, there is no provision in the legislation under which an IIWTMP can legitimately provide for the payment of levies. I disagree. Reg 9(1)(k) provides in terms that a Plan must provide details of the manner in which the contribution of each member of the IIWTMP will be determined and how the contribution will be collected and distributed. Section 12 (1)(g) of the Waste Act requires that an IWMP, of which an IIWTMP is a species, must indicate the financial resources that are required to give effect to the plan.

43 It must be borne in mind that the legislative scheme contemplates a private sector solution to an environmental problem, for the creation and administration of which, broadly, the private sector tyre industry is responsible, to be devised and administered with the approval but ultimately independent of government. It is not contemplated that public purse is to be drawn upon in the implementation of the IIWTMP. As the legislative scheme demands that tyre producers as defined be members of one or other IIWTMP, it is inevitable that they bear the cost of the management of the waste so created. All the other participants in the industry and, of course, the consumers of their products, are downstream of tyre producers who are thus positioned to pass the cost of waste management on, ultimately to

consumers. Even if there had been no provision in the legislative scheme for levies, I would have found it necessarily implicit in the scheme as devised. I therefore conclude that an IIWTMP must provide for financial contributions by its members and may by necessary implication provide for levies, amongst other reasonable financing mechanisms, in so doing.

44 Then the applicants contend that, properly analysed, the Redisa Plan is so flawed that no reasonable decision maker could have approved it. In this regard, the applicants say that given the targets which are listed in item 15.1 of the Redisa Plan, quoted above, Redisa will not deal with the historical waste tyre stockpiles.

45 In my view, this argument is founded on the *non sequitur* that because the Redisa Plan will not be able to dispose of the whole stockpile, it should not be allowed to dispose of any waste. The simple answer to the argument is that one has to begin somewhere. It is better to dispose, in an ecologically acceptable way, with some of the waste than to do nothing. RMI's argument, if correct, should form the basis for the proposition that Redisa's inability to dispose of all of the tyre waste demonstrates the need for additional Plans - such as that of RMI itself.

- 46 In addition, I have before me the opinion, on oath, of Mr Thomas Becker, the chief executive officer of Genan Business & Development A/S, a Danish company, which is the largest tyre recycler in the world. Mr Becker has impressive qualifications and credentials in the fields of environment, energy and climate change management and has through his association with Genan a thorough knowledge of most tyre recycling systems in different countries on different continents.
- 47 Genan and Mr Becker have followed the development and implementation of the Redisa Plan and commented publicly on it in a letter to the Director General of Environmental Affairs. While suggesting a series of minor amendments and improvements, Mr Becker is of the view that the Redisa plan is state of the art, as it will be efficient, transparent and environmentally beneficial.
- 48 The proper forum for the final ventilation of the issue whether the plan is so flawed as to be unacceptable to any reasonable decision maker is the court hearing the review. Further relevant evidence may, as I have said, be forthcoming. I shall therefore say no more than that nothing in the papers as they presently stand justifies a conclusion favourable in this regard to the applicants.

49 This leaves for consideration the issue revolving around item 15.1. In my view, the effect of ss 72 and 73 of the Waste Act, read together with s 33 of the Constitution and ss 3 and 4 of PAJA is to place it beyond dispute that the Minister must (leaving aside situations of urgency, on which I express no opinion) at the very least follow what is described in s 4 of PAJA as a notice and comment procedure in relation to draft IWMPs (and thus IIWTMPs) submitted to her for approval. This requires that each material provision of each such plan be published in the Government Gazette as provided for in s 73.

50 In this regard, it is no answer, in my view, to say that the *bulk* of the provisions of the Redisa Plan were so published. The interested person is entitled to notice of every material such provision. This conclusion disposes of the argument, made on behalf of the respondents before me, that the Regulations do not in terms require that prospective amendments effected after the conclusion of the notice and comment process must be put up for comment by interested persons. The short answer to that submission is that the Waste Act itself requires that they must.

51 I am quite unable to find, as contended for on behalf of the respondents, that the material in item 15.1 is not material. It bears upon the efficacy of the Plan as a whole. It bears upon the claim by Redisa that its Plan is the complete answer to the waste tyre disposal problem. Again, however, this is a matter to be determined by the reviewing court. It is sufficient for me to say at this stage that in my view the applicants have substantial prospects of success on this ground. In *Affordable Medicines Trust & Others v Minister of Health & Others*,²¹ the Constitutional Court summarised the legal position as follows at paras 48 and 49:

Our constitutional democracy is founded on, among other values, the "(s)upremacy of the Constitution and the rule of law." The very next provision of the Constitution dictates that the "Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid". And to give effect to the supremacy of the Constitution, courts "must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency". This commitment to the supremacy of the Constitution and the rule of law means that the exercise of all public power is now subject to constitutional control.

The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public

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2006 (3) SA 247 (CC)

power is regulated by the Constitution. It entails that both the Legislature and the Executive "are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law". In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power.
[footnotes omitted]

- 52 The requirements for an interim interdict are, as recently emphasised in *National Treasury and Others v Opposition to Urban Tolling Alliance* [2012] ZACC 18 para 41 ("OUTA"), a *prima facie* right even if open to some doubt; a reasonable apprehension of irreparable and imminent harm to the right if an interdict is not granted; the balance of convenience must favour the grant of the interdict; and the applicant must have no other remedy. It is also trite that although the four factors must be established, the more well established, and thus less open to doubt, the right, the less the need for the balance of convenience to favour the applicant.
- 53 This being a case in which the applicants seek a temporary restraint against the exercise of statutory power well ahead of the final adjudication of the applicants' case, I must bear in mind, as OUTA para 47 makes clear, that relief of this nature must be granted only in the clearest of cases and after (I would respectfully add, where appropriate) a careful consideration of separation of powers harm.

54 The harm contended for by the applicants is twofold: firstly, that the members of RMI who are tyre producers will have to submit to the injustice of having to subscribe against their wills to an IIWTMP which offends against the principle of legality; and, secondly, that they will have to pay levies.

55 I do not think the first consideration has any real weight in isolation. The right to be compelled only to do that which the law permits is not denied, merely deferred until the reviewing court has pronounced. There is no cogent evidence in the papers as to the monetary quantum the levies are likely to impose on the average tyre producer or on any specific tyre producer. I was told in argument that the figure is something between R8 and R12 per tyre. Whether this relates to all tyres or merely to passenger vehicle tyres is unknown. In mitigation of this harm, the aggrieved tyre producer has only to stipulate when paying the levy that it does so under protest and it will have, if the levy is found to be unlawful, an action for the return of its money founded on the *condictio indebiti*.²² I have considered whether it can be said that because the money may be recovered by legal proceedings, it can legitimately be said that there is no irreparable harm. In my view there will indeed be harm in the fact that the tyre producer is required to pay now that which it notionally does not lawfully owe. The

22Compare *OUTA*, para 54

monetary harm that will ensue from the fact that a tyre producer is required to pay a levy that might turn out to be unlawfully levied is thus slight, but not, in my view, so negligible as to fall within the scope of the maxim *de minimis non curat lex*.

56 I accept that the affected tyre producers have no alternative remedy in the short term. Unless and until an IIWTMP more acceptable to them is approved by the Minister, they are compelled by law to subscribe to the Redisa Plan. Their remedy in the medium to long term is to develop an alternative IIWTMP. That may become a factor in the review if RMI does not press ahead with its own Plan.

57 This brings me to the question of balance of convenience, which means the prejudice to the applicants if the interdict is refused, weighed against the prejudice to the respondents if it be granted. Subject to one factor with which I shall deal below, the balance of convenience would have been in my view tilted strongly in favour of the respondents. The first respondent has a constitutional and statutory duty to manage the disposal of waste tyres. It is manifest that the sanctions which the criminal law imposes, after the fact, are inadequate to deal with the problem. That both Redisa and RMI have sought to develop Plans demonstrates that both of them recognise a need for the organised industry to deal with the matter. Redisa, for its

part, has expended or committed R33 million towards its project. There is no reason to believe that the Department of Environmental Affairs and Redisa are anything but *bona fide* in their respective spheres in relation to the Redisa Plan and the RMI Plan. The failure by RMI to respond to the Minister's request for information indicates that RMI is not vigorously developing its Plan. Against that, the tyre producer members of RMI will have to pay, pending final determination of the review, modest sums toward their levy obligations which they will probably be able to recover if the review goes in their favour and which they in any event will probably pass on downstream to the ultimate consumers.

58 I do not see the case as raising any separation of powers issues. The issue on which I have found the applicants have prospects of success relates not to the polycentric evaluation of policy considerations, a power which has been entrusted to the Minister by legislation, but to whether the procedure followed by the Minister in relation to item 15.1 is in compliance with law.

59 As I have said, I must balance the various factors. There is one which I have not yet mentioned which tilts the scale against the respondents. Section 2 of the Constitution provides that conduct inconsistent with the Constitution is invalid. If the Minister accepts that the attempt to

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

60 This being a constitutional matter, I may under 172(1)(b) of the Constitution make any order which is just and equitable. I have anxiously considered whether there is any order other than an interdict which would, on the conclusions to which I have come, be just and equitable. Counsel for the respondents did not suggest one and I cannot think of one.

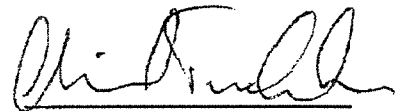
61 The order of this court must therefore be as follows:

1 Pending the final determination of the relief sought in Part B of the notice of motion, the first and second respondents are interdicted and restrained from proceeding with the

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implementation of the second respondent's integrated waste management plan as approved in Government Gazette notice 564 and as published in the Schedule to Government Gazette no. 35534 on 23 July 2012;

- 2 Costs will be costs in the review, ie the proceedings before the court hearing the case for relief in Part B of the notice of motion, provided that such costs should be taxed on the footing that the employment of senior counsel and, where applicable, senior and junior counsel was justified.



NB Tuchten
Judge of the High Court
12 November 2012