**REPORT ON LIQUIDATION APPLICATIONS AGAINST REDISA AND KUSAKA TAKA**

1. **Background**
2. The Recycling and Economic Development Initiative of South Africa NPC (*“REDISA”*)*,* is a non-profit company without any members or shareholders, duly registered in terms of the law of South Africa with registration number 2010/022733/08 and with its registered address and principal place of business at the 4th floor, South Wing, Sunclare Building, 21 Dreyer Street, Claremont, Cape Town. REDISA is currently placed under liquidation by order of the High Court of South Africa, Western Cape Division.
3. According to the REDISA Memorandum of Incorporation, REDISA was established with the main object to engage in the conservation, rehabilitation and/or protection of the natural environment, specifically by creating and procuring the implementation of an approved Waste Tyre Management Plan as contemplated in and pursuant to The Environmental Management: Waste Act, 2008 (Act No. 59 of 2008) read with The National Environmental Management: Waste Regulations, subject to the approval conditions.
4. REDISA submitted a proposed Integrated Industry Waste Tyre Management Plan to the Department for Ministerial approval in terms of the Waste Tyre Regulations (under Government Notice R.149 of 2009 published in Government Gazette No 31901 of 13 February 2009, as amended. That proposed Integrated Industry Waste Tyre Management Plan (“the REDISA Plan”) was approved on 29 November 2012, subject to the conditions of approval as set out in paragraph 2 on pages 2 and 3 of the Ministerial letter of approval. As required by regulation 11(4) of the Waste Tyre Regulations, a notice of the Ministerial approval together with the REDISA Plan was published in the Government Gazette by way of Government Notice 988 on 30 November 2012.
5. The REDISA Plan is an “integrated industry waste tyre management plan”, as contemplated in regulation 9 and 10 of the Waste Tyre Regulations, which was approved for a period of five years from the date of publication of the Ministerial approval and therefore the REDISA Plan, in its current form, would have expired by operation of law on 30 November 2017. In essence the REDISA Plan is a waste management measure for the purposes of the Waste Act and was the only waste management measure in place for the management of waste tyres. The REDISA plan has been recently withdrawn in terms of the relevant Notices published in the Government Gazette. The withdrawal plan was effective from 1 October 2017.
6. Originally the REDISA Plan provided for the compulsory subscription thereto by all “tyre producers” as defined in Part 3 of the Waste Tyre Regulations and as prescribed by regulation 9(1)(k) thereof (before its repeal with effect from 1 February 2017). In terms thereof, a Waste Tyre Management Fee, of R 2.30 plus value-added tax per kilogram of manufactured and/or of imported tyres and casings (“the REDISA contribution”), was levied and collected by REDISA from all those subscribers and/or members who were compelled to subscribe, which provided REDISA with an income stream from public funds intended to be used for the sole purpose of implementing and administering the REDISA Plan. The REDISA contribution collected by REDISA generated an annual income of approximately R 575 million.
7. The Chief Executive Officer (CEO) of REDISA is Mr Hermann Felix Erdmann, who is also an Executive Director. The other Executive Directors are Ms Stacey Davidson and Ms Charline Kirk. These Directors have all been suspended as a result of the provisional liquidation and the appointed provisional liquidator is Ms Darusha Moodliar of Sanek Recovery Services.
8. **Basis for the Liquidation**
9. REDISA appointed a “*management company*” known as Kusaga Taka Consulting (Pty) Ltd (“*Kusaga Taka*”) “*to handle all operational aspects of the Plan*”. Kusaga Taka is a private profit company with registration number 2010/017708/07 (and thus registered before the approval of the REDISA Plan) with its physical address situated at the 4th Floor, North Wing, Sunclare Building, 21 Dreyer Street, Claremont, Cape Town. The physical address of REDISA is on the same floor. Three of the executive directors of REDISA are also the shareholders in Kusaga Taka.
10. Since the beginning of 2014 various officials of the Department had several interactions and meetings with Mr Erdmann and/or various other representatives of REDISA to discuss the alignment of the REDISA Plan to the amended Waste Act, the Pricing Strategy and the amended Waste Tyre Regulations. Apart from the numerous complaints the Department received from the tyre industry, several serious accusations were also levelled against REDISA in respect of the implementation of the REDISA Plan.
11. The new regulation 9(1)(jA) of the Waste Tyre Regulations (as amended) provided, with effect from 2 December 2016, that an integrated industry waste tyre management plan (such as the REDISA Plan) must at least be aligned to the pricing strategy for waste management charges.
12. The “National Pricing Strategy for Waste Management” or Pricing Strategy was published under Government Notice 904 of 11 August 2016, in terms of a newly inserted section 13A(1) of the Waste Act. The Pricing Strategy also contemplated the new funding model involving the collection of the tyre tax by the National Treasury via SARS.
13. As a result, from 1 February 2017, SARS is now charged by law with the responsibility to collect this tyre tax, or an environmental levy on tyres, from the manufacturers, importers or producers of tyres and to pay these funds into the National Revenue Fund as contemplated in section 213(1) of the Constitution.
14. The Department appointed the firm of iSolveit Consulting (Pty) Ltd as a service provider with the instruction to conduct a performance review and to examine the existing operations, records, progress on the implementation of the REDISA Plan, financial risks, liabilities and other commitments of REDISA (“the REDISA performance audit”). The iSolveit performance review was finalised in February 2017 and was also verified by Ernst & Young. The overall conclusions of this performance review and verification included:

13.1 Governance: There were clear conflicts of interest and poor governance controls within REDISA;

13.2 Performance: REDISA failed to meet any of its estimated targets;

13.3 Deviations: There were serious deviations from the approved REDISA Plan including exporting of waste tyres and investment in the Product Testing Institute (“PTI”);

13.4 Misuse of public funds: Purchase of immovable property, provision of security at private homes and seemingly excessive expenditure; and

13.5 Non-alignment of the REDISA Plan to the new regulatory framework.

1. On 23 May 2017 REDISA made a presentation to the Waste Management Bureau (“WMB”) and the Department, which presentation alerted the Department to the fact that REDISA’s Board of Directors made the decision to –
   1. place REDISA’s Financial Year 2018 (“*FY2018*”) Growth Business Plan on hold until funding uncertainties are resolved;
   2. develop a steady state FY2018 Business Plan and operate against this until 31 May 2017; and
   3. commence industry wind-down to meet the directors’ *fiduciary* responsibilities, should insufficient funding be allocated from 1 June 2017.
2. They also indicated in the said presentation that, even if it should receive a “*cash injection*” of R 210 million in July 2017, that would only allow the REDISA to postpone wind-down commencement to 1 October 2017.
3. Of greater concern is the fact that REDISA indicated in their last presentation to the Department that their cash balance in May 2017 amounted to only R 150 million and that, since their revenue had stopped, REDISA was operating off its remediation reserve and incurring a monthly burn rate of R 36.6 million.
4. The claim by REDISA on 23 May 2017 that their cash balance during May 2017 amounted to only R 150 million, stands in stark contrast to the amount of R 426,339 million of public funds that REDISA, on their own version, had on 31 January 2017, and it does not include the further collection of the REDISA Levy, which was payable three months in arrears, from 1 February 2017 to 31 May 2017.
5. The highly suspicious disappearance of public funds, viewed together with the confirmation by REDISA in their last presentation that the Board of Directors had resolved to commence winding-up procedures on 1 June 2017, called for immediate action on the part of the Department to safeguard what may be left of those public funds and the assets derived therefrom.
6. ***Ex Parte* Applications**
7. The Minister was advised to bring an urgent application on an *ex parte* basis for the liquidation of REDISA. The purpose of the application was to safeguard the remaining funds and assets under the control of REDISA from further dissipation.
8. On 1 June 2017, the Minister brought an application to provisionally put REDISA under liquidation. The order was granted with a return date being 25 July 2017. The Notice and the Court Order were served on REDISA and its employees.
9. A provisional Liquidator was also appointed on 2 June 2017 who then took over the business of REDISA as a going concern. The Director and some employees of REDISA were barred from the premises of REDISA. REDISA then brought an application to anticipate the return date to 22 June 2017. Upon application by the Minister, it was however postponed to 5 July 2017.
10. On 8 June 2017, the Minister also brought an application to liquidate Kusaga Taka. The order was granted with a return date being 25 July 2017.
11. **Judgement**
12. REDISA anticipated the return dates in both matters, and they were fully argued in court on 5 and 6 July 2017. Mr. Justice Henney of the Western Cape Division of the High Court delivered judgment on 15 September 2017 in both the Minister’s applications for the winding up of REDISA and Kusaga Taka and ordered that both REDISA and Kusaga Taka be placed in final liquidation.
13. REDISA raised the following points *in limine*, which the court dealt with during the judgment. These points are:-
    1. That the Minister had no *locus standi* to bring these applications:

The Court agreed with the Minister that she was acting in the public interest when she brought the two applications. The Court also held that REDISA is without any doubt an organ of state and the Minister’s contention is correct that the money collected by REDISA, which ended up in the pockets of the directors of REDISA through Kusaga Taka, is public funds.

* 1. That the Minister could not have launched the application for a provisional liquidation order on *ex parte* basis:

In respect of both the applications against REDISA as well as Kusaga Taka, the Court found that the Minister made out a sufficient case as to why the applications should be brought *ex parte*. The Court took into consideration the secretive manner in which the directors, some of whom are also shareholders in Kusaga Taka and the associated companies had conducted themselves and agreed with the Minister that urgent and drastic action had to be taken after they had been made aware of the conduct of Mr. Erdmann and the other directors of REDISA and the manner in which funds had been spirited towards Kusaga Taka.

* 1. That the ground for urgency relied upon by the Minister denies that scrutiny and that the *ex parte* application should be struck from the roll with reasons:

The Court was in agreement with the Minister that the conduct of REDISA leading up to the Applications constituted an effective repudiation of the implementation and administration of a substantial and important component of the REDISA Plan. It was the Court’s view that the Minister had made out a sufficient case to launch the proceedings on an urgent basis. The Court came to this conclusion based on the following [*par193 – 197*]:-

1. The objection by REDISA to align with the new funding model wherein the fees will be collected in future by SARS in terms of the amendments;
2. No justifiable explanation had been given for the depletion and disappearance of REDISA’s reserves;
3. REDISA’s had informed all interested parties of their intention to no longer collect waste tyres from collection points and that REDISA’s depots will not accept any deliveries as from the 1 June 2017; and
4. Mr. Erdmann notified contracted transporters of REDISA’s intention to terminate their contracts.
   1. That the Minister failed to disclose highly relevant facts to the court when the ex parte application was moved:

REDISA and Kusaga Taka alleged that the Minister failed to disclose information and documents pertinent to the applications at hand. The Court held that REDISA and Kusaga Taka failed to show that any material facts were withheld from the Court when the *ex parte* applications were heard [*par 90 – 99*].

1. In addition to the points *in limine* above, the Application was opposed by REDISA and Kusaga Taka on the basis that it was not just and equitable for the final liquidation order to be granted. In order to determine if a final liquidation order is just and equitable, the Court has to balance the interests of the individuals affected with the interests of good governance and the administration of justice.
2. It was the Court’s view that the Minister has made out a case that it is indeed just and equitable to wind up REDISA. The Court based its conclusion on the following facts -
   1. The manner in which REDISA should be funded is disputed by the Minister and REDISA.
   2. The Minister and REDISA are deadlocked on the issues of the new funding model.
   3. The lack of adequate funding and the breach of trust between the parties would ultimately lead to a situation where REDISA would find itself in dire financial difficulties.
   4. REDISA, with the existing resources, may not be able to fulfil their obligations in terms of the REDISA Plan and might become insolvent. In addition, REDISA had already started with the suspension of its services on 31 May 2017.
   5. The gradual disappearance of the reserves which had been previously reported to the Minister.
   6. There has been an unlawful misappropriation of public funds by the directors of REDISA which constitutes a direct contravention of the Companies Act and REDISA’s MoI.
   7. Neither the true nature of the shareholdership of REDISA and Kusaga Taka nor the unlawful payments to the directors were disclosed to the Minister.
   8. It would therefore be difficult for the Minister or the Department as well as National Treasury to fund REDISA in future if such funding which is public money would unlawfully accrue to its directors. This will lead to a situation where no funding would be given to REDISA to comply with the REDISA Plan, which would have dire consequences for the company.
3. It was the Court’s view that the Minister has made out a case that it is indeed just and equitable to wind up Kusaga Taka. The Court based its conclusion on the following facts -
   1. Kusaga Taka cannot independently exist without REDISA and is completely dependent on REDISA for funding. There is no evidence that it will be able to exist without the funding it receives from REDISA.
   2. Kusaga Taka was utilised as a vehicle to misappropriate money in contravention of the Companies Act and the REDISA MoI.
4. During 2013 REDISA has, without the Department’s or any prior approval, made a substantial “*investment*” of almost **R 60 million** in 2015 and of **R 7.55 million** in 2014 in another non-profit company, namely “*The Product Testing Institute NPC*” which was established by Mr. Erdmann.
5. The Minister decided to also bring an application to liquidate the Product Testing Institute NPC (“PTI”). The matter was heard on 9 June 2017 at the North Gauteng High Court. A provisional Liquidator was also appointed on 9 June 2017 who then took over the business of the PTI as a going concern. The directors of the PTI are opposing the application and the matter has been allocated special dates by the Deputy Judge President for hearing on 27 and 28 November 2017.
6. **Leave to Appeal**

**Minister of Environmental Affairs vs Kusaga Taka Consulting (Pty) Ltd, Minister of Environmental Affairs vs REDISA**

1. The directors of Kusaga Taka filed a Notice of their application on 18 September 2017 for leave to appeal against the whole of the judgement and the order of Mr Justice Henney. At a meeting requested by the counsel for Kusaga Taka and REDISA, on 22 September 2017 with Mr Justice Henney, the Honourable Judge allocated the hearing of the applications for leave to appeal to Tuesday 31 October 2017.
2. On 22 September 2017, after the meeting with Mr Justice Henney and the allocation of the hearing of the applications for leave to appeal, the suspended executive directors of REDISA filed a Notice of their application for leave to appeal to the Supreme Court of Appeal against the whole judgement and order of Mr Justice Henney.
3. **Grounds of Appeal**

**Minister of Environmental Affairs vs Kusaga Taka Consulting (Pty) Ltd**

1. The Respondent/ Appellants seek leave to appeal to the Supreme Court of Appeal based on the following grounds, as set out in their court papers:

*Locus standi*

28.1 That the Court erred in its findings in interpreting the Companies Act as having conferred standing on the Minister to bring an application for the winding-up of Kusaga Taka, a solvent company, and to do so urgently on an *ex parte* basis. Further that the Companies Act does not provide for extended standing to wind-up solvent private companies. Alternatively, that there are no grounds in this case to justify the Minister’s failure to give notice of the application to Kusaga Taka.

Non-disclosure

28.2 That the Court erred in not discharging the provisional order of liquidation obtained by the Minister *ex parte* on the grounds that the Minister failed to disclose materially relevant facts in her Founding Affidavit.

Just and equitable winding-up

28.3 That the Court erred in finding that the Minister had made out a case for the provisional and final winding-up of Kusaga Taka on a just and equitable basis on the following grounds :

1. REDISA and the REDISA Plan constitutes the substratum of Kusaga Taka;
2. Kusaga Taka is wholly dependent on fees earned under the management agreement and pursuant to the REDISA Plan;
3. The fees paid by REDISA to Kusaga Taka *“had been misappropriated to Erdmann, Davidson and Kirk”* in contravention of REDISA’s Memorandum of Incorporation;
4. Kusaga Taka *“was used as a vehicle to enrich REDISA’s Directors”.*
   1. Further, that the Court erred in reaching the aforesaid findings by:
5. Impermissibly relying on hearsay evidence;
6. Failing to properly apply the relevant test in motion proceedings in which final relief is sought;
7. Incorrectly rejecting and/or disregarding the versions contained in the answering affidavits deposed to by Mr Erdmann and Mr Crozier;
8. Relying on a report prepared by Accountants @ Law (Pty) Ltd, attached to the Minister’s replying affidavit.

**Minister of Environmental Affairs vs REDISA**

1. The Respondent/ Appellants seek leave to appeal to the Supreme Court of Appeal based on the following grounds, as set out in their court papers:

*Locus standi*

29.1. That the Court erred in its findings in interpreting the Companies Act as having conferred standing on the Minister to bring an application for the winding-up of REDISA, a solvent company, and to do so urgently on an *ex parte* basis. Further that the Companies Act does not provide for extended standing to wind-up solvent private companies. Alternatively that there are no grounds in this case to justify the Minister’s failure to give notice of the application to REDISA.

Non-disclosure

29.2. That the Court erred in not discharging the provisional order of liquidation obtained by the Minister *ex parte* on the grounds that the Minister failed to disclose materially relevant facts in her Founding Affidavit. Further that the Court’s reasoning in concluding that the Minister was justified in launching an *ex parte* application and thus taking *“urgent and drastic action”* because of the alleged *“underhand and secretive manner in which the directors…had conducted themselves”* is misconceived, in particular having regard to the fact that the Court did not find that, if service of the application had in fact taken place, the directors would have hidden funds from REDISA and Kusaga Taka or, would have sought to dissipate assets.

Just and equitable winding-up

29.3. That the Court erred in finding that the Minister had made out a case for the provisional and final winding-up of REDISA on a just and equitable basis on the following grounds

1. That there were mismanagement and/or misappropriation of public funds by the directors justifying the application in the public interest;
2. The fees paid by the REDISA to Respondent “*had been misappropriated to Erdmann, Davidson and Kirk’*  (i.e. the directors) in contravention of REDISA’s Memorandum of Agreement;
3. REDISA was used as a vehicle to enrich its directors; and
4. REDISA was used in conjunction with Kusaga Taka, as a scheme to *“siphon off”* public funds for the benefit of its directors, or the shareholders of Kusaga Taka.
   1. . Further that the Court erred in reaching the aforesaid findings by:
5. Impermissibly relying on hearsay evidence;
6. Failing to properly apply the relevant test in motion proceedings in which final relief is sought;
7. Incorrectly rejecting and/or disregarding the versions contained in the answering affidavits deposed to by Mr Erdmann alternatively to make findings that were common cause facts that justified the relief sought;
8. Relying on a report prepared by Accountants @ Law (Pty) Ltd, attached to the Minister’s replying affidavit, which report was characterised by its authors as provisional, being a cursory one identifying transactions as issues *“which require detailed investigations”;*
9. Impermissibly permitting the Minister to make out a case for relief on reply;
10. Concluding that the directors had failed to disclose *“the true state and exact nature of the relationship”* between the individual shareholders and Kusaga Taka despite the regular disclosures made to Minister and Department.
11. **Implications of the Applications for Leave to Appeal**
12. Where an appeal is lodged against an order in civil matters, section 18 of the Superior Courts Act, 2013 (Act No. 10 of 2013) ordinarily suspends the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, pending the decision of the application or appeal.
13. However in respect to Sequestration Orders, section 150(3) of the Insolvency Act provides that when an appeal has been noted against a final order of sequestration, the provisions of the Insolvency Act nevertheless apply as if no appeal had been noted.
14. While applications for leave to appeal have been filed, neither the directors of Kusaga Taka nor the directors of REDISA have given an indication that they regard Kusaga Taka and/or REDISA to be back under their control. In the event that the directors of Kusaga Taka and/or REDISA attempt to take control of the respective companies pending the appeal, the Minister would at that point be at liberty to apply for a declaratory order that section 150(3) of the Insolvency Act is applicable, or, in the alternative, that the operation and execution of the final liquidation orders are not suspended pending the appeal, as contemplated in section 18(3) of the Superior Court’s Act.
15. **Conclusion**
16. The application for leave to appeal must be heard by the Western Cape Division of the High Court in Cape Town on 31 October 2017. Should the application succeed, the matter will proceed to the Supreme Court of Appeal (SCA). The directors of REDISA might petition the SCA directly should their application for leave to appeal not be granted by the High Court.
17. Minister in the Government Gazette dated 29 September 2017 withdrew her approval of the REDISA IIWTMP with effect from 1 October 2017.