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|  | **DEPARTMENT : ENVIRONMENTAL AFFAIRS** |
| In re: | **THE LEGAL NATURE OF THE WASTE MANAGEMENT BUREAU, ITS RELATIONSHIP WITH THE DEPARTMENT AND THE DIRECTOR-GENERAL’S ROLE AND RELATIONSHIP WITH THE WASTE MANAGEMENT BUREAU** |

**EXPLANATORY MEMORANDUM**

**Introduction**

Various interactions between the Portfolio Committee on Environmental Affairs (the Portfolio Committee) and the Department of Environmental Affairs (the Department), in the above matter, refer. It may be of some benefit to the Portfolio Committee, to provide a detailed analysis and explanation of the origins and history of the establishment of the Waste Management Bureau (Bureau), in 2014, in terms of Part 7A of the National Environmental Management: Waste Amendment Act, 2014, (Act No. 26 of 2014) (NEMWAA) and the rationale underlying its formation.

**Background**

South Africa uniquely provided for an environmental right, section 24, in the Bill of Rights in our Constitution of 1996. It provides that everyone has the constitutional right to have an environment that is not harmful to their health or well-being and to have the environment protected for the benefit of present and future generations through reasonable legislative and other measures that – (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. To this end, the National Environmental Management: Waste Act, 2008 (Act No. 59 of 2008) (NEMWA), was passed to reform the old order apartheid laws regulating waste management in accordance with our new constitutional dispensation, in order to protect the health and well-being of our citizens and to protect our environment, by providing reasonable measures for the prevention of pollution and ecological degradation, and for securing ecologically sustainable development. NEMWA provides for institutional arrangements and planning matters; the establishment of a national waste information system; national norms and standards for the management of waste by all spheres of government; licensing and control of waste management activities; specific waste management measures; compliance and enforcement measures and for the remediation of contaminated land. On 4 May 2012, South Africa further published the Waste Management Strategy, which is now under implementation.

The South African legal framework regulating the waste management sector is influenced and informed by and based on the key components of the **waste management hierarchy**, which dictates the overall strategic approach for waste management, based on the principles of **reduce, reuse, recycle and recovery of waste**. The management of waste through the hierarchal approach is a recognised international model for the prioritization of waste management options. It offers a holistic approach to the management of waste materials and provides a systematic method for waste management during the waste lifecycle, addressing in turn waste avoidance, reduction, re-use, recycling, recovery, treatment, and safe disposal only as a last resort. This approach aims to eventually reduce the reliance of South Africa’s waste disposal into unsightly and unhealthy landfill sites, where currently up to 90% of our waste ends up.

Unfortunately, since the adoption of the waste hierarchy policy, in 2009, and our best efforts, increasing quantities of waste, poor waste management and lack of access to waste services, have increasingly led to increased pollution, with associated negative environmental impacts and degradation. This unacceptable situation is exacerbated by the fact that levels of recycling and re-use are very low and waste is not necessarily seen or considered as a resource with socio-economic potential. The waste sector has been identified as having significant potential for job creation and contributing to our macro economy, with the waste management sector having an **estimated potential turnover of approximately R50 billion per annum.**

To unlock this potential the Minister of Environmental Affairs in September 2013 tabled the National Environmental Management: Waste Amendment Bill, B32-2013 (attached), which included provisions for the establishment of a Waste Management Agency, which amongst others would have facilitated the development and coordination of the implementation of industry waste management plans and would have also managed disbursements to the industry waste management plans. The idea at the time was to establish a full-fledged public entity. However, these provisions were later changed by the then Portfolio Committee on Water and Environmental Affairs for reasons more fully explained later in the document. As the Minister of Environmental Affairs (Minister) said in 2014 during the adoption of National Environmental Management: Waste Amendment Bill [B32B-2013]: **“After 20 years of democracy the time has come for a transformation of the waste sector to offer our people a more dignified living by drawing them into the main stream economy and formalising the waste recycling and re-use economy as a viable and decent way to accelerate job creation in this sector for tens of thousands of people across South Africa.”**

**National Waste Statistics**

The **National Waste Information Baseline study**, which was commissioned by the Department, in 2011, showed that **108 million** tons of waste was generated in South Africa, of which **98 million tons** was disposed of in landfill sites. Of this: 59 million tons was general waste; 48 million tons was unclassified waste and the remaining 1 million tons was hazardous waste. Approximately **10%** of all waste generated in South Africa was **recycled**, in 2011, and **90%** was disposed of in **landfill sites**. A further study of the Department, in 2012 to 2013, also showed that **waste collection service delivery** is at only **65%**. It is also worth noting that in South Africa the composition of **household waste** alone, excluding paper, is currently composed of the following: plastics (14%); glass (3%); cans (4%); garden refuse (29%); non compostable food waste (12%); compostable food waste (25%); and unrecyclable general waste (13%).

The main drivers of waste generation are essentially expanding economies, increased goods production and an increase in population and production. South Africa does not compare favourably to other countries as far as the **recycling of waste and waste-to-energy processes** are concerned. **In South Africa, only 10% of waste is recycled; 2% of waste is processed in waste-to-energy processes; and 88% of waste ends up in landfill sites.** In comparison, a few countries from developed nations provide insight on what potential, economically and otherwise, there is to government implementing appropriate and large scale waste stream management. In **Germany**, 65% of waste is recycled, 33% of waste is processed in waste-to-energy processes and **2%** ends up in landfill sites. In the **Netherlands**, 59% of waste is recycled, 38% is processed in waste-to-energy processes and **3%** ends up in landfill sites. In **Belgium**, 63% of waste is recycled, 33,5% is processed in waste-to-energy processes and **3,5%** ends up in landfill sites. In **Sweden**, 49% of its waste is recycled, 47,5% is processed in waste-to-energy processes and **3,5%** ends up in landfill sites. In **Denmark**, 42% of waste is recycled, 52% is processed in waste-to-energy processes and **4%** ends up in landfill sites.

It is evident that in all these developed countries **less than 5% of waste ends up in landfill sites** and the balance is used or reused, contributing substantially to those countries economic development; whereas in South Africa the figure is **88%** disposed of in landfill sites**,** with minimal contribution to our economic development by the waste sector. **The potential is huge for South Africa to exploit job creation opportunities and economic activities and production in the waste sector, with the further beneficial advantages to our environment.**

**Challenges in the Waste Sector**

It is against this background that several challenges were identified by the Department, National Treasury and the then Portfolio Committee, from 2010-2014, which required urgent attention in order to enable the waste sector, to reach its full economic potential and at the same time to attain the maximum environmental protection and benefits. **In other words, how does the Department unlock an estimated R50 billion into the economy, by activating sustainable waste stream economic activities, whilst at the same time reducing the amount of waste going to landfill sites from 88% to, say, 5%, like the above developed countries?**

At the time, there were only **three** main waste stream recycling programmes/projects in South Africa, which contributed to the economic development of the country, namely packaging (plastic bags and collect-a-can), waste tyres and used oil.

**Challenges relating to two institutional models for Waste Stream management at national level**

A brief analysis of the challenges faced by the two institutional models at national level for waste stream management is provided below. These models were intended to address waste stream management in two waste streams, namely, plastic carrier bags and waste tyres.

**Buyisa-e-Bag**

In early 2000, the then Minister of Environmental Affairs and Tourism expressed his intention to impose **a levy on plastic carrier bags,** to promote the reuse and recycling of plastic carrier bags and to enforce a minimum thickness of a plastic carrier bag which would promote the recycling of the bag. This was the first time in South Africa that for environmental reasons a **levy** had been implemented on a product or that there was enforcement of a compulsory design specification on a product, to promote recyclability and to achieve environmental objectives.

Through a National Economic Development and Labour Council (NEDLAC) led process, a Memorandum of Agreement (MoA) was signed by Government and the industry and labour components in the plastic carrier bag sector, setting up a section 21 non-profit company in 2005 as Buyisa-e-Bag. Buyisa-e-Bag was established as a non-profit company in terms of the Companies Act, 1973 (Act No. 61 of 1973) (the Companies Act), and its activities were governed and subject to the strict and limiting provisions in the Companies Act, applicable to non-profit companies, read with the MoA and Articles of Association (the Articles), when exercising its powers or performing its functions. Additionally, the non-profit company was expected, in terms of the MoA and Articles, to comply with the legal requirements of the Public Finance Management Act, 1999 (Act No. 1 of 1999) (PFMA), in performing its functions, financial management and reporting and auditing processes. The non-profit company acted mainly through a **Board of Directors (Board)**, consisting mainly of representatives from industry and labour in the plastics carrier bag sector, appointed by the then Minister, in accordance with the MoA and the Articles, and a **Chief Executive Officer (CEO)**. As provided for in the legal framework of the PFMA, the Board was the accounting authority.

Buyisa-e-Bag was established to support the expansion of collector networks of plastic carrier bags, which included establishing rural collection SMMEs and creating additional capacity within NGOs, to reuse or recycle plastic carrier bags. It was envisaged that this non-profit company would create job opportunities, an estimation of between 1900 and 3800 new jobs, and also to work with Sector Education and Training Authorities to address and improve skills and re-skill workers in the plastic carrier bag waste stream.

The **imposition of an environmental levy**, by **National Treasury (Treasury)**, was done, in terms of sections 54A and 54B of the Customs and Excise Act, 1964 (Act No. 91 of 1964) (the Customs and Excise Act), usually imposed on imported goods and goods specified in any item of Part 3 of Schedule 1. Treasury provided that the plastic carrier bag levy will be collected from retailers directly by **SARS** and paid into the **National Revenue Fund**. In turn, Buyisa-e-Bag sourced funding for their activities solely from Government through the Department. Unfortunately, Buyisa-e-Bag was engulfed with challenges, since its inception and registration as a section 21 non-profit company, in 2005. Some of these challenges are dealt with here. These challenges related to;

1. The **composition of the Board of Directors**, as designed by the MoA, became the most fatal structural flaw in the conceptualization of this non-profit company. Members of the Board were mainly appointed from components of employers and employees within the plastic carrier bag sector, and they soon developed into factions strongly opposed to each other, leading to **decision-making becoming paralysed** in the Board, because each component voted en bloc and in a factionalised manner, on the basis of their perceived self-interest;
2. **The legal structure of the company was complicated**. This non-profit company was set up as a Section 21 non-profit company in terms of the Companies Act; however, both the MoA and the Articles indicate that the company should operate in compliance with the PFMA;
3. Non-compliance with the **PFMA legal requirements on expenditure, financial management and reporting** became too frequent and increasingly serious; and
4. The company was also faced with several **governance issues**. In summary, some of the Board challenges were: There were in some instances conflicts of interests between the Board members in respect of their own business interests and that of the company; Board members were not being paid adequately and for some the time spent on Board activities which impacted on their earning potential; Board tasks and meetings were spent on resolving operational issues rather than strategic matters; Reports to the Board being unsatisfactory and not in accordance with the strategic plan of the company; The hostile relationship between the CEO and the Board; and a lack of understanding of the requirements for compliance with the Companies Act and the PFMA.

Eventually, these challenges led to the liquidation of Buyisa-e-Bag, and the functions and activities of the company were incorporated into the Environmental Programme within the Department. The plastic carrier bag levy since the demise of Buyisa-e-Bag is still collected from retailers directly by SARS and paid into the National Revenue Fund. The Department and the Waste Management Bureau are still able to access the funds, for specific projects, through the submission of an acceptable business plan, to National Treasury.

**Recycling and Economic Development Initiative of South Africa NPC (REDISA)**

In November 2012, the Integrated Industry Waste Tyre Management Plan (IIWMP), submitted by the Recycling and Economic Development Initiative of South Africa NPC (REDISA), was approved by the Minister, after following a legal process in terms of the now repealed **Waste Tyre Regulations, 2009,** published in Government Notice No. 149, Government Gazette No. 3190 on 13 February 2009 (Waste Tyre Regulations). REDISA was registered as a non-profit company without members, in terms of the Companies Act, 2008 (Act No. 71 of 2008) and its activities are governed through a **Memorandum of Incorporation (MOI)**, which was compiled in accordance with the Companies Act. The MOI had contained provisions relating to the **Board of Directors** and its members and sought to ensure the independence of the REDISA Board. Provision is made for a Board consistent with provisions of the approved REDISA IIWMP, consisting of two executive directors, one legal expert, one financial expert, five captains of industry and higher learning, and one from the informal business sector. In accordance with REDISA being registered as a non-profit company, the **remuneration package** and any direct or indirect benefits, financial or otherwise, of or for directors, are strictly circumscribed and narrowly defined. To this end, article 4.2 of the MOI provides **“the Company, as a non-profit company, must not, directly or indirectly, pay any portion of its income or transfer any of its assets, regardless as to how the income or assets was derived, to any person who is or was an incorporator of the Company, or who is a Director, or person appointing a Director of the Company, except - as reasonable - remuneration for goods delivered or services rendered to, or at the direction of the Company…”** The MOI provides for a fair and reasonable compensation for Directors, but specifically in article 14.1 prohibits **“as contemplated in item 5(3) in schedule 1 of the Act, the Company may not provide a loan to, secure a debt or obligation of, or otherwise provide direct or indirect financial assistance to, a Director of the Company or of a related or inter-related company, or to a person related to any such Director.”** So, in very specific terms, the **MOI strictly limits Directors not being allowed to receive any benefit, financially or otherwise, directly or indirectly, other than by way of a fair and reasonable salary.**

The MOI empowered the Board, in terms of article 19, to appoint a management company, to perform very specific functions. The MOI then specifically provided **“…in order to preserve the independence of the Board….the following persons may not be appointed or serve as Directors of the Company – 11.6.2 any other person engaged in any capacity in any industry in respect of which the Company administers the Waste Tyre Management Plan; 11.6.3 where any Director is also a director of any other company or member of the governing or managing body of any other entity, whether established for commercial purposes or otherwise, any other person who is also a director of such company or member of the governing or managing body of such other entity; 11.6.4 any person who is a shareholder or director of any management company referred to in clause 19, where such appointment would result in more than 2 (two) such persons serving as Directors of the Company; 11.6.5 any person who is a related or inter-related person…to any person referred to in clauses 11.6.1 to 11.6.4,………such a person shall forthwith resign as Director of the Company.”**. There was thus very specific exclusions regarding which categories of persons were eligible to be appointed or remain as Directors of REDISA. Such exclusions were never adhered to.

The objective with the establishment of the non-profit company, in article 3 of the MOI, is stated as **“3.1 the main object ….is to engage in the conservation, rehabilitation and/or protection of the natural environment, specifically by creating and procuring the implementation of the Waste Tyre Management Plan…”** and **“3.2 (t)he ancillary objects are to….create employment and economic development...and...procure the provision of training for unemployed persons in...relevant…industries for the purpose…to obtain employment.”** The REDISA IIWMP was intended, amongst others, to divert waste tyres from disposal in landfill sites by administering and managing the value chain regarding waste tyres. Under the REDISA IIWMP, every producer and importer of tyres and casings had to **pay a contribution fee to REDISA,** the manager of the REDISA IIWMP, which was used to facilitate the collection, transport, distribution, storage and recycling of these waste tyres. In terms of this arrangement, **a waste tyre management fee of R2,30 plus VAT per kilogram** of manufactured and/or of imported tyres and casings was **levied and collected by REDISA** from **all** subscribers, and/or members who were **compelled to subscribe** to the REDISA IIWMP. The waste management fee provided REDISA with an income stream intended to be used for the sole purpose of implementing and administering the REDISA IIWMP. Up to **1 February 2017, approximately R 2, 2 billion was paid in tyre levies to REDISA.**

From the inception of REDISA, various role players in the tyre management waste stream, mostly unsuccessfully, challenged various aspects of the REDISA IIWMP project, in court. From 2014 onwards, the Department received numerous complaints on the implementation and operation of the REDISA IIWMP. The Department commissioned an **independent performance review** of the status of the implementation and administration of the REDISA IIWMP. The key findings of the performance review and further analysis by the Department, in summary, found that REDISA’s governance structures were inadequate to ensure good governance, particularly because of the serious conflicts of interest between the parties involved in the implementation of the REDISA IIWMP. REDISA failed to perform against its own key targets contained in the plan. Furthermore, the utilisation of funds for purposes that were not going to assist in furthering the interests and objectives of the plan seemed to be occurring frequently. REDISA was also engaged in activities and expenditure that was considered unauthorised deviations from the approved IIWMP and ultimately, REDISA was refusing to align to the new regulatory framework.

Suspicions grew in the Department that the project was not being implemented in terms of the MOI or the approved REDISA IIWMP and that Directors were illegally and unlawfully financially benefitting from this non-profit company. This was based on various interactions with REDISA representatives, which grew increasingly acrimonious, together with REDISA’s avoidance in providing relevant and complete information to the Department.

National Treasury and the the The Environment Conservation Act, 1989, (Act No. 73 of 1989), since 2003, provided in **section 23B** for the making of Regulations relating to **“products that may have a substantial detrimental effect on the environment or human health.”** The Waste Tyre Regulations, 2009, passed in terms of the above section 23B, provides in **regulation 9(1)(k)**, in broad terms, that **“An integrated industry waste tyre management plan must at least - … (k) 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.”** Then, in July 2012, an Integrated Industry Waste Tyre Management Plan from REDISA was gazetted for implementation, providing in clauses 17 and 25, which the details of the **compulsory waste tyre management fees levied on plan subscribers**, must be provided, as required in terms of the above Regulation. A direct reference to the imposition and collection of the fees was included in **article 19(1) of the MOI,** dated 18 October 2012, which read: **“The Company shall, as determined by the Board and/or the terms of the Waste Tyre Management Plan from time to time and subject always to the provisions of relevant legislation, levy such fees (*“Waste Tyre Management Fees”*) on the Plan subscribers in respect of Waste Tyre Management Plan administered by the Company for the effective operation of such plan.”** and is expanded upon in article 19(2) of the MOI. In other words, a **non-profit company,** through **subordinate legislation** was authorised to **impose** payment of a **compulsory fee** and then to **directly collect** such fee from other waste tyres generators. As the REDISA Integrated Industry Waste Management Plan was the only approved plan and subscribing to the plan was made compulsory for tyre producers through the Waste Tyre Regulations, 2009, it was argued by National Treasury that the waste tyre management fee constituted a tax/levy. (Regulation 6(7) read with regulation17). The view that the waste tyre management fee constituted a tax/ levy was shared by the then Portfolio Committee.

Section 77(1)(b) and (3) of the Constitution states that **“a Bill is a money bill, if it imposes national taxes, levies, duties and surcharges”** and **“must be considered in accordance with the procedure established by section 75.”** Additionally, Chapter 13 of the Constitution, the PFMA, Treasury Regulations, the Customs and Excise Act and other Treasury legislation **provide the legal framework through and within which taxes, levies, duties, surcharges or similar monies are imposed by the three spheres of government on the South African citizenry.** And in respect of **ALL** money collected at the national government level, section 213(1) of the Constitution (and similarly section 12 of the PFMA) provides that **“(T)here is a National Revenue Fund into which all money received by the national government must be paid, except money reasonably excluded by an Act of Parliament.”** (my emphasis). It is trite that in our constitutional dispensation, at a national level , **taxes, levies, duties, surcharges or similar monies, are raised or imposed through a money Bill introduced by the Minister of Finance, in Parliament, for approval.** Such monies are then **collected by SARS** and **paid into a National Revenue Fund,** and section 12(2)(a) provides that SARS may **“withdraw money from the National Revenue Fund – (a) to refund any tax, levy, or duty credits or any other charges in connection with taxes, levies or duties;”**.

Considering the disappointment with the key findings of the independent performance review; the fact that the anticipated public services of waste tyre recycling or disposal not being satisfactorily provided; the seemingly illegal and unlawful implementation and undermining of the REDISA IIWMP; the irregular use of public funds by a non-profit company; the possible illegal and unlawful receipt of monies from the non-profit company by its directors; the ***ex parte* applications for the liquidation of REDISA and Kusaga Taka were initiated**, in June 2017, to safeguard what remained of the REDISA public funds and the assets derived therefrom. On 15 September 2017, the Western Cape Division of the High Court, delivered judgment in both the applications for the liquidation of REDISA and Kusaga Taka (the REDISA judgment) and ordered that both REDISA and Kusaga Taka be placed in **final liquidation.** During the litigation and liquidation processes surrounding REDISA and Kusaga Taka it emerged that the affairs and operations of REDISA (the non-profit company) and Kusaga Taka (the profit-making company) were **inextricably intertwined and interlinked,** inter alia, in that they shared premises with the same physical address, personnel and accounting and information systems. Also, **three of the executive directors of REDISA** were found, through legal obfuscation and by direct and indirect means, **to be the main shareholders of Kusaga Taka.**  As transpired in court cases and as was expanded on above, **a scheme was devised and established attempting to circumvent all the checks and balances established for a non-profit company in the Companies Act and in the MOI, including the ones referred to above, culminating in possibly hundreds of millions of Rands, collected by REDISA, illegally and unlawfully becoming the property of the Directors of REDISA, through its profit-making management company (Kusaga Taka) and other related entities.** This  **scheme/enterprise** was hidden behind a complex legal web of intertwined companies and entities and, in a nutshell, meant that **REDISA as a non-profit company and the collector of this tyre levy merely became the legal conduit for funneling hundreds of millions of Rands, illegally and unlawfully, to its Directors.** As, Judge Henney, succinctly captured it, in paragraph 152-153, of the REDISA judgment: **“…152. …..there was clear misuse or abuse of the distinction between the corporate identity of Kusaga Taka, NYI and Avranet and those who control it … which resulted in an unfair advantage to them. This unfair advantage was that as directors of REDISA…..they indirectly received income which they were not entitled to in terms of the provisions of the MOI and Schedule 1, Item1(3) of the Companies Act. This was unlawful. 153. It is for that reason that they failed to disclose the exact and true nature of their shareholdership in these companies. By doing so they abused and misused the distinction between the corporate identity of these entities and themselves. They were not entitled to any benefits or income of the non-profit organization in the manner in which they did, and tried to conceal the exact nature of such income or benefits.”** The directors of REDISA have appealed against the final liquidation orders of the High Court, to the Supreme Court of Appeal. The Department waits for the appeal to be heard.

After the passing of NEMWAA, in 2014, as discussed below, transitional arrangements for existing Industry Waste Management Plans in the Act and the amendment of the Waste tyre Regulations, 2009 made the management of waste tyres through the newly established Bureau, in the absence of an approved IIWMP, possible. This enabled the Minister, after duly following a consultation process, to withdraw the REDISA IIWMP, with effect from 01 October 2017. This removed any authority for REDISA to engage in any activities related to the former Waste Tyre Management Plan. From 1 February 2017, the waste tyre levy is being collected by SARS from the manufacturers/ producers or importers of tyres and paid into the National Revenue Fund. This is being done by imposition of an environmental levy in terms of sections 54A and 54B of the Customs and Excise Act, on imported goods and goods specified in any item of Part 3 of Schedule 1. The Department and the Bureau are able to access these funds through the submission of an acceptable business plan, to Treasury.

**Addressing the challenges faced by waste stream management, particularly identifying the optimum institutional model**

In 2014, against this background and cognisant of the above mentioned challenges and failures of the Buyisa-e-Bag and REDISA waste stream management models, the then Portfolio Committee, as explained above, took cognisance of the fact that the overall strategic approach to waste management in South Africa, and the consequent waste legislation flowing from it, is influenced and informed by the key elements of the **waste hierarchy**, which is based on the **principles of reduce, reuse, recycle and recover waste**. However, although **the waste hierarchy approach has been policy in South Africa for some time now, unfortunately waste stream recycling has been limited.**

The then Portfolio Committee, in terms of the above investigation and analysis of the challenges facing both existing waste stream management models, **identified the similarities and differences of the challenges** relating to and emanating from the legal structure, governance matters, funding requirements and model, financial management and reporting and accountability requirements of both entities and **the nature and manner of the imposition and collection of the two environmental levies,** as follows:

The most important **similarities in challenges** between the two models, were:

(a) both entities were registered as **non-profit companies** in terms of the Companies Act, established and governed in terms of legal instruments, like a MOI (and Waste Management Plan) or MoA (and Articles);

(b) both entities were established as **organs of state for the sole purpose of performing a public function for the benefit of the public** (effective and efficient waste tyre and plastic carrier bag recycling or disposal) in terms of the waste management legislation;

(c) both entities were **funded by public monies** raised from the public by way of two different environmental levies;

(d) in respect of both entities, the usual **tools and mechanisms for good governance and accountability applicable to state organs**, like the legal regime of the PFMA and parliamentary oversight, were not applicable or insufficiently implemented or made applicable; and

(e) in both entities, the Minister and Director-General did **not have efficient, effective and meaningful interventionist and supervisory powers** over the entities in terms of the empowering waste management legal framework.

And the most important **differences in challenges** between the two models, were:

(a) Buyisa-e-Bag was established in in terms of an MOA by the Department; whereas REDISA was created through a legal process in terms of the Waste Tyre Regulations initiated by the Department;

(b) The Board of Directors of Buyisa-e-Bag was appointed by Minister in terms of the political agreement reached at NEDLAC that they should be from employer and employee groupings in the plastic carrier bag sector; whereas the Board of Directors of REDISA was appointed in terms of the MOI without the involvement of the Minister or the tyre industry;

(c) The funding requirements of Buyisa-e-Bag were met through a grant from Treasury from the monies levied through the plastic carrier bag levy; whereas the funding requirements of REDISA were met from the waste tyre fee/levy which was paid directly to REDISA;

(d) All services anticipated to be provided or delivered by Buyisa-e-Bag for the public benefit were performed by Buyisa-e-Bag itself; whereas all services anticipated to be provided or delivered by REDISA for the public benefit were performed by a managing company (Kusaga Taka), set up by REDISA;

(e) the plastic bag levy from inception was authorized in terms of the Customs and Excise Act; whereas the waste tyre management fee was imposed through the through the gazetted REDISA Integrated Industry Waste Tyre Management Plan;

(f) the plastic bag levy from inception was imposed by Treasury; whereas the waste tyre management fee was levied and imposed by REDISA;

(g) the plastic bag levy was collected by SARS; whereas the waste tyre management fee was collected directly by REDISA;

(h) the plastic bag levy was paid into the National Revenue Fund; whereas the waste tyre management fee was paid directly to REDISA and not paid into the National Revenue Fund;

(i) the plastic bag levy is a levy imposed on producers and importers of plastic bags, which is the passed on to consumers who wish to make use of and purchase a plastic carrier bag at the time of making a purchase; whereas the waste tyre management fee was a compulsory fee levied on persons in the tyre industry who were compelled to subscribe to the REDISA Integrated Industry Waste Tyre Management Plan;

(j) the plastic bag levy was introduced through legislation of Treasury, the Customs and Excise Act; whereas the waste tyre fee/levy was introduced through subordinate legislation of the Department and not by way of a money Bill passed in terms of section 75 of the Constitution.

So, in summary, the biggest challenges or shortcomings the then Portfolio Committee identified, through its analysis, with the two existing waste stream management institutional models at the time, were: **the constitutional and legal challenges faced by the REDISA model; the fatal structural flaws present in both models; the absence of the usual tools or mechanisms for good governance and accountability applicable to state organs, like the legal regime of the PFMA and parliamentary oversight, were not applicable or insufficiently implemented or made applicable in both models; and the existence of a Board of Directors in both models, mainly acting in their own self-interest and manipulating the flaws in both institutional models, to maximize directly or indirectly substantial financial benefits for the Board members.** The lessons learnt seemed obvious. The then Portfolio Committee was of the view that when government establishes institutional arrangements (usually in the form of an entity or agency or a non-profit company), which provides a service in the public interest or operates with public funding (paying of a fee by the public or by way of a grant from the fiscus), **in a sector like waste, were substantial amounts of monies are potentially able to be generated, whilst providing a public service, then**:

1. **Institutional models within the private sector,** like a non-profit company or other trading entity or corporation, does **not** appear to be a **suitable** fit when a **service** is being provided by it in the **public interest,** as the pursuance of the maximum profit margins do not square with the provision of services in the public interest;
2. **Boards of Directors**, who may act in their own self - interest or for their direct or indirect financial gain, must not form part of such an institutional model;
3. The **usual tools of accountability and oversight,** applicable to government institutions or organs of state, like the legal regime of the PFMA and parliamentary oversight, must be made applicable to any institutional model, created in the future, which provides **services for the benefit of the public or is funded by the public**, whether by way of a levy or a grant from the fiscus;
4. The provision of **services performed in the public interest or with funds from the public**, in the waste sector (probably in all sectors), must be done **within a policy framework** established by the **Minister** and must **operationally be accountable** to the **Director-General** of the Department (Director General) and must be performed **subject to the PFMA** with the **Director-General as accounting officer;**
5. The institutional model needed to regulate all aspects of waste stream disposal or reuse or recycling of all types of waste streams would require a **limited but highly skilled staff component**, which probably does not fit within the present civil servant legal framework and an **exception** will have to be provided for in the legislative/regulatory framework to allow an appropriately skilled staff component to be appointed for this new institutional model; and
6. The **imposition of any environmental tax/levy or similar charge** must take place through the introduction of a **money Bill by the Minister of Finance**, must be **collected by SARS** and **paid into the National Revenue Fund;** and the institutional model for which the levy was meant for must be able to access the funds collected through the levy **from Treasury** by way of a **grant**, conditional or otherwise, on production of a **business plan approved by the Treasury and the Department.**

**In other words, the then Portfolio Committee concluded that there was a need to develop a new institutional model to regulate waste stream management, without the existence of a Board of Directors and not being a non-profit company, where the Minister sets the policy framework within which it must operate and it operationally being accountable to the Director-General, whilst operating within the legal framework of the PFMA with the Director-General being the accounting officer, but it is not a line function unit of the Department because the whole regulatory framework of civil servants is not applicable to its staff component. So, for all intents and purposes it is part of the Department, as the Minister (policy) and Director-General (accounting officer) remain the main role players, but it is an entity outside the Department because of the regulatory framework of its staff component differing from the rest of the Department. Hence, the new entity being referred to as a Bureau, to distinguish it from a line function unit in the Department, on the one hand and on the other hand, the usual statutory agencies accountable to the Department, like the South African National Biodiversity Institute (SANBI), South African National Parks (SANPARKS) and so on. So the new institutional model for waste stream management had to be something between a line function unit of the Department and the usual statutory agencies accountable to the Department, like SANPARKS and others. And, as stated above, the imposition of any environmental tax/levy or similar charge must take place through the introduction of a money Bill by the Minister of Finance, must be collected by SARS and paid into the National Revenue Fund; and the institutional model (Bureau) for which the levy was meant for must be able to access the funds collected through the levy from Treasury by way of a grant, conditional or otherwise, on production of a business plan approved by the Treasury and the Department.**

**Legal Nature of the Waste Management Bureau established through the NEMWAA**

In 2014, the **Waste Management Bureau** was established in terms of the **NEMWAA**. Section 34A, provides that **“An implementation Bureau dealing with waste management to be known as the “Waste Management Bureau” is hereby established, within the Department, as a juristic person.”** (my emphasis).The Bureau was established as **a specialist implementing agent and as a juristic person**, **without a Board of Directors,** within but separate from the Department, with the objective of preparation, facilitation and implementation of industry waste management plans. The intention was to establish a separate legal persona within but separate from the Department. In other words, the Bureau exists as a separate legal persona, without a Board of Directors, headed and acting through a Chief Executive Officer of the Bureau (CEO), who is accountable to and reports to the Director-General, and the Director-General is appointed as the accounting authority of the Bureau for purposes of the PFMA. Importantly, the Bureau must comply with the PFMA legal framework relating to financial management, reporting and auditing. The Bureau must exercise its powers and perform its functions within the framework of a policy published by the Minister. The Minister is obliged to monitor the exercising of powers and performance of functions of the Bureau; set service-level standards and norms for the Bureau for the execution of its powers and functions; and can issue directives to the Bureau in the case of noncompliance with the policy determined to ensure the effective and efficient functioning of the Bureau.

The objects of the Bureau are, amongst others, to promote and facilitate the minimisation, reuse, recycling and recovery of waste; to manage the disbursement of incentives and funds derived from waste management charges for the minimisation, reuse, recycling, recovery, transport, storage, treatment and disposal of waste and the implementation of industry waste management plans. The Bureau also has to monitor the implementation of industry waste management plans and the impact of incentives and disincentives; and very importantly to progressively build capacity within the Bureau to provide specialist support for the development and implementation of municipal waste management plans and capacity-building programmes. The Bureau must further provide support and advice on the development of waste management plans, tools, instruments, processes, systems, norms and standards, municipal waste management plans and capacity-building programmes.

Parliament realizing that a specialist implementing agent of the kind envisaged, needed to attract the kind of personnel with skill levels which do not fit into the framework and specifications of the present civil service legal framework, decided to adopt a model that will enable the Bureau to attract specialist skills.

Arguably, the most important change NEMWAA introduced into the waste stream management institutional arrangements, was the fundamental changes made to the funding model of the Bureau. As a result of the publication of the Pricing Strategy and the money Bill (amending the Customs and Excise Act), as well as the amendments to the Waste Tyre Regulations, 2009, from 1 February 2017, the waste tyre levy is now collected from the manufacturers, producers or importers of tyres, by SARS and paid into the National Revenue Fund. This is being done by the imposition of an environmental levy in terms of sections 54A and 54B of the Customs and Excise Act, on imported goods and goods specified in any item of Part 3 of Schedule 1. The Department and Bureau are able to access the funds raised by waste management tyre levy through the submission of and approval by, an acceptable business plan, to Treasury. In this regard, it is worth highlighting that the full implementation of the change in the funding model in the waste tyre waste stream was dependent on the development and publication of the Pricing Strategy for waste management charges, and most importantly the development and publication of a Money Bill giving effect to the Pricing strategy by Treasury. Section 13B of the NEMWAA specifically states that **“An Act of Parliament, to give effect to necessary elements of the pricing strategy contemplated in section 13A, is to be tabled in accordance with the provision of section 77 of the Constitution, within 3 months of the publication of the pricing strategy contemplated in section 13A(5)(b) in the Gazette,….”** The **National Pricing Strategy for Waste Management** was published, on 11 August 2016, in terms of section 13A of the NEMWAA. The Waste Tyre Regulations, 2009, were also amended to give effect to elements of the Pricing Strategy, on 2 December 2016. However, due to REDISA challenging the Pricing Strategy and the Money Bill parliamentary process, in court, the amendment to the Revenue Laws Act, 13 of 2016, only commenced on 19 January 2017, which further resulted in an amendment of the Customs and Excise Act, which was amended with effect from 1 February 2017. As a result, the environmental levy on tyres only came into operation on 1 February 2017, and SARS is now charged by law with the responsibility to collect this environmental levy on tyres, from the manufacturers, importers or producers of tyres and to pay these funds into the National Revenue Fund.

The deliberate emphasis by Parliament, which often does not seem to be understood, is that this entity, the Bureau, was established largely to be a **specialist IMPLEMENTATION entity** relating to all matters dealing with the **implementation of industry waste management plans**. It has a specific, very focused and narrow mandate relating to **IMPLEMENTATION** of specific aspects of waste management. The Bureau was designed in such a manner as to accommodate **private sector skill sets relating to IMPLEMENTATION efficiency and proficiency** in a government entity, to perform the kind of implementation functions which most governments perform very badly and very slowly.

**The intention of Parliament, was to create a specialist IMPLEMENTING entity, with a legal persona, without a Board of Directors, operationally independent from the Department in relation to the preparation, facilitation and implementation of industry waste plans, but with strong oversight over the policy direction, operations and finances of the Bureau, by both the Minister and the Director-General, within the PFMA legal framework and with parliamentary oversight; whilst removing the constitutional challenges faced by the REDISA model.** In this context, the 2014 amendments in the NEMWAA were intended, amongst others, to provide **policy and regulatory certainty** in the waste management sector, as well as creating an **innovative institutional mechanism** to supplement capacity in the waste management sector, which would promote and accelerate opportunities in the waste recycling economy, creating job opportunities and skills development.

Obviously, with the liquidation of REDISA and Kusaga Taka and the findings of illegal and unlawful activities of and by the Directors, and the constitutional challenges identified in respect of the REDISA funding model, NEMWAA provided for transitional arrangements, to allow for the REDISA model to be amended and realigned in accordance with the new model envisaged in NEMWAA, especially in relation with its funding model and bringing it in line with the public finance management system. Unfortunately, the directors of REDISA, pending the appeal against the final liquidation order to the Supreme Court of Appeal, have done everything they could not only to avoid the implementation of the transitional arrangements, but actively opposed every step of the way. Since the beginning of 2014, there were engagements with REDISA to discuss the alignment of the REDISA IIWMP to the amended NEMWAA, the Pricing Strategy and the Waste Tyre Regulations, by various officials of the Department. Despite numerous requests from the Department, to REDISA, to revise and align the REDISA IIWMP to the current legislation and the new funding model, REDISA deliberately refrained to revise, amend and resubmit the REDISA IIWMP, for consideration and approval by Minister. Had REDISA done so, we would have had a proper business plan and budget and the Department would have been in a position to obtain public funding for REDISA, to further implement and administer the REDISA IIWMP in line with the new funding model and the public finance management system. **This recalcitrance of the directors of REDISA has been the main reason for the delays with the establishment and implementation of the BUREAU and other provisions of NEMWAA.**

**The second reason for the delays is linked to the transitional arrangements in NEMWA and the listing of the Bureau as a public entity in terms of the PFMA legal framework.** In this regard, section 47(2) (read with sections 46-49) of the PFMA, read with Regulation 25.1 and 2 of the Treasury Regulations, sets out the legal framework for the listing of public entities in Schedule 3 of the PFMA. In light of the National Environmental Law Amendment Bill that is currently considered by Parliament, the Department is engaging with National Treasury to list the Waste Management Bureau in terms of the PFMA.

**Perceived Conflict of interest in dual roles of the Director-General**

Due to the numerous challenges faced with establishing and operationalising the Bureau, the Bureau still does not currently have a CEO. The Minister of Environmental Affairs of the view that until such time that the Bureau is listed as an entity in terms of the PFMA, it does not make sense to appoint a CEO. Section 34A(3) of the NEMWAA, in anticipation of the challenges to be faced with the implementation of the Bureau, specifically provides **“in the absence of a functional Bureau or a Chief Executive Officer, the powers and duties of the Bureau revert to the Director-General of the Department…..who …must exercise those powers and perform those duties until the Bureau is functional or a Chief Executive Officer is appointed’.** Currently, the Director-General is performing the powers and duties of the Bureau in terms of section 34A(3), while recruitment processes are being finalised. The Director-General has been performing these powers and duties since the establishment of the Bureau, on 2 June 2014, when NEMWAA commenced. The powers and duties of the Bureau are additional to her powers and duties as a Director-General of the Department. In light of the withdrawal of the REDISA Integrated Industry Waste Management Plan and the provisional winding up of REDISA, it was necessary for the Department to bring the Bureau in operation to step in to manage the waste tyres in order to prevent job losses and to prevent waste tyres from piling up. The letter to the Minister of Finance is attached hereto for reference purposes.

The roles which are the source of the concern are **statutory duties imposed on the Director-General by an Act of Parliament**. The Director-General is temporarily acting as a CEO of the Bureau in terms of section 34A(3) of the NEMWAA and as accounting officer in terms of section 34G(1) of NEMWAA, read with the exception in section 49(2) of the PFMA. In other words, it is an Act of Parliament that places a legal obligation on her to act temporarily as a CEO until a CEO is appointed, whilst continuing to perform her duties as accounting officer of the Bureau. If the Director-General does not temporarily act as the CEO of the Bureau in terms of section 34A(3) of the NEMWAA, then she will be in non-compliance with an Act of Parliament. Furthermore, section 34A(3) of the NEMWAA does not provide for a legal alternative to appoint another person either within the Department or the Bureau to act as a CEO of the Bureau.

Secondly, this is **temporary arrangement provided for by Parliament**, in anticipation of the challenges which were going to arise with the setting up of the new Bureau, whilst realigning REDISA to the new legal framework it had to comply with. It was provided for, clearly, to smooth over the transitional period, without too many personalities getting in the way. It will not or is highly unlikely to arise beyond the transitional period.

Legal precedent clearly demands that a conflict of interest only arises in a given scenario if the existing facts or circumstances show that a conflict of interest exists or that a person is in fact conflicted on the basis of the existing facts in the circumstances in which he/she find themselves. So, a **theoretical or potential conflict does not suffice to meet the legal standard** before a person can be regarded as conflicted.

So, for these reasons, legally there must be existing facts or circumstances that present a conflict of interest for the Director-General, to temporarily act as a CEO of the Bureau, in the absence of a functional Bureau or a CEO, as well as being the accounting officer of the Bureau, before the Director-General could be said to be conflicted. **As no such facts or circumstances exist or have been alleged or are forthcoming, the answer to the concern posed is positively, no.** In any case, in the unlikely event of such conflict arising, the Department will not be opposed to amend section 34A(3) of NEMWAA, to provide that if the scenario sketched in that section were to arise then the Director-General will appoint a person in the Department or Bureau as an acting CEO, and removing the possibility of the Director-General in that scenario acting as the acting CEO.

**Way Forward**

The National Environmental Management Laws Amendment Bill [B14-2017] currently before Parliament proposes changes to the current model of the Waste Management Bureau. Once the Bill is passed by Parliament, signed into law and promulgated, the challenges experienced and criticism against the current model will be addressed. The Waste Management Bureau will then be able to function as a fully-fledged public entity with a board. However, until such time that the Bill is passed by Parliament, the Department has to implement the current model.

In terms of the transitional arrangements provided for in the Waste Tyre Regulations, 2017 the Waste Management Bureau is currently ensuring/ facilitating the management, recycling and re-use of waste tyres in the absence of an industry waste tyre management plan.

The Minister of Environmental Affairs published the call for Industry Waste Tyre Management Plans on 30 October 2017 with a closing date of 31 December 2017.

Four submissions were received by the Department/Ministry within the specified timeframe in response to the call for tyre Industry Waste Management Plans:

- Evergreen Energy (Pty) Ltd : 16 November 2017;

- JPC Energy Systems : 11 December 2017;

- TWAMISA (Pty) Ltd : 30 December 2017; and

- SATRUCO NPC : 31 December 2017.

The process undertaken in handling the received submissions was as follows:

i) A preliminary Departmental evaluation was conducted and communicated to the plan proponents;

ii) Public consultation and hearings were conducted in seven provinces as per Government Notice No. 472 published in Government Gazette No. 41612 on 07 May 2018;

iii) Engagements with Government departments/entities were conducted on 06-07 June 2018;

iv) Written comments were received by the Department up to the closing date of 07 June 2018;

v) Plan proponents were given until the 31 August 2018 to consider the comments received, to amend their Industry Waste Management Plans and to submit them to the Minister for consideration; and

vi) Generators and producers of waste tyres were requested to indicate to which of the proposed industry waste tyre management plan they subscribed, if any.