**IN THE HIGH COURT OF SOUTH AFRICA**
(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

5/07/2023 .....
DATE SIGNATURE

**Case No: 34095/21**

In the matter between:

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|---|---|
| **INTERWASTE (PTY) LTD** | FIRST APPLICANT |
| **PLATINUM WASTE RESOURCES (PTY) LTD** | SECOND APPLICANT |
| **WILLIAM ALAN HARDY WILLCOCKS** | THIRD APPLICANT |

and

| | |
|---|---|
| **BROAD-BASED BLACK ECONOMIC EMPOWERMENT COMMISSION** | FIRST RESPONDENT |
| **JURIS RONNY MEKGWE** | SECOND RESPONDENT |
| **RAMMAT INVESTMENTS (PTY) LTD** | THIRD RESPONDENT |

**Delivered:** This judgment was handed down electronically by circulation to the parties' attorneys of record by e-mail. The date for the handing down of the judgment shall be deemed to be 5 July 2023.

## JUDGMENT

**DE JAGER AJ:**

1. On 3 February 2021, the First Respondent, the Broad-Based Black Economic Empowerment Commission ("*the Commission*") issued its final findings following an investigation pursuant to a complaint by the Second Respondent, Mr Juris Ronny Mekgwe ("*Mekgwe*"), which he lodged against the Applicants on 17 August 2016, some four and half years before.

2. In its final findings, the Commission found that the Applicants, Interwaste (Pty) Limited ("*Interwaste*"), Platinum Waste Resources (Pty) Limited ("*PWR*") and Mr William Willcocks ("*Willcocks*"), had committed the offence of fronting and had undermined the objectives of the Broad-Based Black Economic Empowerment Act, 33 of 2003 *("the Act")*.

3. This is an application for the review and setting aside of the Commission's final findings in accordance with Rule 53 of the Uniform Rules of Court. The application is brought in terms of the Promotion of Administrative Justice Act, 3 of 2000 ("*PAJA*") and, in as far as it might be relevant or required, the principle of legality.

4. The Applicant's grounds of review are the following:

    4.1. Firstly, it is alleged that the Commission failed to comply with Regulation 15(4) of the Broad-Based Black Economic Empowerment Regulations, 2016 (*"the Regulations*"), which requires a compliant to be investigated

and findings to be made and issued, within a year from the time the compliant was laid.

4.2. Secondly, the Applicants contend that the Commission failed to comply with the Regulation 16 of the Regulations. Regulation 16 allows for the continuation of the investigation after the complaint is withdrawn, *inter alia*, if it is justifiable to do so.

4.3. Thirdly, the Commission ignored material documents and information submitted by the Applicants.

4.4. Fourthly, the Commission acted in a procedurally unfair and irrational manner.

4.5. Fifthly, the Commission committed material errors of fact.

4.6. In the sixth regard, the Commission drew irrational conclusions and made errors of law.

4.7. The Commission applied an inadmissible and irregular onus on the side of the Applicants.

4.8. In the Applicants' Supplementary Founding Affidavit filed in terms of Uniform Rule 53(4), the Applicants added an eighth ground of review, i.e. that following the merit assessment of the complaint by the Commission, there was no basis for an investigation to take place or to continue, as it

was not justifiable to do so, as contemplated in Regulation 15(4) of the Regulations.

5. At the onset of this judgment, I wish to emphasise what this application is about, and what it is not about. I have been impelled to do so because of the fact that the Respondents' arguments are undoubtedly infused with the underlying contention that it is this Court's duty or obligation to seek and identify all and any possible transgressions of the Act in the present factual matrix of the case, and if found, to find in favour of the Commission.

6. This Court is acutely aware of the constitutional imperative of Black Economic Empowerment in South Africa. The Commission, established in terms of section 13 B of the Act, is mandated and obliged to exercise the functions assigned to it in terms of the Act in the most cost effective and efficient manner, and in accordance with the values and principles mentioned in section 195 of the Constitution, precisely to facilitate the said constitutional imperative.

7. This application is therefore not about the disgruntlement or even the guilt or innocence of any of the parties. It is also not aimed at scrutinizing compliance with the Act in general, but is indeed about scrutinizing the powers and functions executed by the Commission in conducting its investigation pursuant to the complaint lodged by Mekgwe. This judgment is therefore concerned with the rationality and lawfulness of the findings of the Commission in the context of the facts and evidence at the disposal of the Commission. Arguments aimed at indicating the Applicants' compliance or non-compliance with the objectives of the Act in broad and general terms, are irrelevant for purposes of this application.

What needs to be determined is whether or not the Commission went about its investigation in a lawful manner resulting in rational and lawful findings, based on the contents of the complaint and the prevailing facts.

**BACKGROUND GIVING RISE TO THE PRESENT APPLICATION**

8. This part of the judgment is aimed at providing a background and chronology of events which are relevant to the findings made in this judgment. Where the specific events or facts require evaluation for purposes of my findings, I will do so when dealing with the relevant facts.

9. In 2003, a Shareholders Agreement was concluded between entities known as Enviro-Fill (Pty) Limited, Itireleng Waste Recovery Project and Rampete Metal Process (Pty) Limited, regulating their relationship as shareholders in the Second Applicant, Platinum Waste Resources (Pty) Ltd ("*PWR*").

10. The Third Respondent, Rammat Investments (Pty) Limted *("Rammat")*, is a company owned and controlled by Mekgwe and one Mr Matalane Thomas Tau ("*Tau*"). Rammat became a shareholder of PWR on 28 December 2012 when it acquired 35% of the shares from the existing shareholder, Itireleng Waste Resources. At that time the First Applicant, Interwaste (Pty) Ltd ("*Interwaste*"), held the other 65% in PWR. Interwaste loaned Rammat an amount of R1 565 000,00 to finance and purchase its 35% shareholding in PWR. A few days later on 31 December 2012, Interwaste acquired 9% of Rammat's shares in PWR, reducing Rammat's to 26% and increasing that of Interwaste to 74%. The purchase price for the additional 9% was R402 428,57, which was set off against

the amount of R 1 565 000,00 which had been loaned to Rammat for its initial acquisition of the 35% in PWR, leaving an outstanding amount owing to Interwaste by Rammat of R1 162 571,43. This arrangement was expressly recorded in the Sale of Shares Agreement.[1]

11. This arrangement clearly constituted a transaction aimed at empowering Rammat in becoming a shareholder in PWR and retaining Mekgwe and Tau as directors in PWR, as they had been since PWR's early years.

12. Of course by the time Rammat became a shareholder of PWR, the only Shareholders Agreement in existence was the original one concluded in February 2003 amongst the shareholders of PWR at the time, referred to above. However, both Interwaste and Rammat signed undertakings respectively on 1 June 2010 and 28 December 2012 to be bound by the original Shareholders Agreement.[2] The undertaking was signed by Tau in his capacity as one of Rammat's directors. There can be no doubt whatsoever that both Interwaste and Rammat expressly agreed to be bound by the terms of the Shareholders Agreement dated 18 February 2003. It is also noteworthy that both Mekgwe and Tau were pre-existing members of the board of PWR having served in the capacity as representatives of one of the shareholders, Itireleng Waste Recovery Project. It is therefore reasonable to assume that Mekgwe and Tau had been aware of the existence and contents of the Shareholders Agreement entered into between PWR's initial shareholders.

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1 Annexure FA3 to the Founding Affidavit.
2 Annexure FA16 to the Founding Affidavit.

13. Mekgwe and Tau were then accordingly appointed as directors to the board of PWR, representing Rammat, as provided for in Clause 6.2 of the Shareholders Agreement.

14. The other salient terms of the Shareholders Agreement, to which Interwaste and Rammat agreed to abide, are the following:

14.1. Each of PWR's shareholders was entitled to vote on resolutions at shareholders meetings, with each shareholder having as many votes as the respective number of shares, and save for special resolutions (which require the approval of all the shareholders), were required to be approved by the majority of votes.

14.2. To vote on shareholders resolutions, which, if signed by all the shareholders, were valid and binding as if passed by a duly convened meeting of shareholders.

14.3. To vote on special resolutions, which required the approval of all shareholders on a number of specified matters, including:

14.3.1. disposal by the company of fixed assets or current assets, other than a transaction entered into in the ordinary and regular course of business of the company and on normal terms and conditions; and

14.3.2. the making of loans and advances to any person other than a subsidiary of the company, but which specifically exclude the making of loans or advances to employees of the company the quantum of which is more than the monthly remuneration paid by the company to such employee.

14.4. The shareholders are entitled to the payment of dividends as determined by the company from time to time.

15. The Shareholders Agreement also set out the roles and functions of the board of directors, which included:

15.1. The day-to-day management of the company vested in the board of directors.

15.2. The board of directors was required to procure the auditing of annual financial statements, delivery of management accounts, approval of the annual business plan budget, related matters and resolutions of the board of directors, which, in order to be in force and in effect, were to be approved by a majority of the votes present.

16. It is therefore clear that Rammat, in its capacity as minority shareholder had the right to:

16.1. Participate in shareholder resolutions made on shareholders meetings;

16.2. Representation on the board of directors and participation by its representatives in board activities;

16.3. The proportionate share of the dividends paid by PWR to its shareholders.

17. I interpose to point out that it was an ever present feature of the Respondents' argument and the Commission's findings, that Rammat, as minority shareholder, had been deprived of participation and control of PWR. Even though it was conceded by counsel on behalf of the Respondents, that the Companies Act and general principles of corporate law would be applicable to the shareholders of PWR, it was contended that corporate principles should somehow not apply in the present instance because of the paramount objective, i.e. the empowerment of Rammat. The argument was that Rammat should have had the same powers or control that a majority shareholder would have had. This view is of course without merit and frankly immature. It is in any event clear from the body of evidence that Rammat was indeed empowered to the extent of its shareholding and participated fully in the decision-making process, both as shareholder and on board level. I now return to the sequence of events.

18. Mekgwe was in charge of the Sun City Waste Management Contract which had been awarded to PWR. This was one of the most substantial contracts in PWR's portfolio. Sun City however terminated the contract on 24 June 2014, resulting in the loss of an important revenue stream, apparently necessitating the retrenchment of staff members who worked on the contract.

19. In the premises Mekgwe was also retrenched by PWR on 30 September 2014 on the basis of operational requirements arising from the termination of the Sun City contract.

20. Mekgwe unsuccessfully challenged the retrenchment in the Labour Court, who dismissed the claim on 23 December 2016 with costs. In its judgment the Labour Court (per Molahlehi J. ) *inter alia* held that:

20.1. PWR's attempts to find a solution that would have avoided Mekgwe's retrenchment were frustrated and snubbed by Mekgwe; and

20.2. Mekgwe acted unreasonably in that his one sided and selfish manner intended to address his needs and not the needs of the business and others; and

20.3. Mekgwe failed to make out a case for the unfair dismissal for operational reasons.

21. On 17 August 2016, and pending the judgment of Labour Court, Mekgwe filed the present complaint of fronting against Interwaste at the Commission. Mekgwe's written compliant was for the first time produced to the Applicants by the Commission as part of the Rule 53 Record in these proceedings. The complaint submitted to the Commission was not accompanied by any supporting documentation whatsoever.

22. It is relevant to note that it was suggested on behalf of the Applicants that it was clear that the complaint had been lodged by Mekgwe in retaliation for his dismissal and the ensuing labour dispute. This is denied by Mekgwe, who emphasised that his complaint was brought about as a result of longstanding concerns regarding alleged fronting practices by Interwaste and the fact that Rammat was deprived of any real control over PWR. Even though the timing of events makes it believable that Mekgwe was out for revenge, I do not make any finding in this regard.

23. On 29 March 2017 the Commission issued a Form B-BBEE-8 in terms of Regulation 15(4)(b) of the Regulations, mostly inquiring when certain events, alleged in the complaint, took place. No questions were asked, or information sought to investigate the veracity of Mekgwe's allegations.

24. On 31 March 2017 Mekgwe responded to the Commission's inquiries. Mekgwe's responses were vague and did not bolster his compliant significantly.

25. In the meantime, and in the light of Mekgwe's complaint with the Commission and general accusations of fronting leveled against Interwaste, the Third Applicant, in his capacity as CEO of Interwaste, Mr Willian Alan Hardy Willcocks ("*Willcocks*") addressed a letter to the board of directors of PWR on 9 November 2016. In this letter Willcocks objected to the allegations of fronting. Willcocks consequently and in light of the strained relationship and apparent distrust, gave notice to PWR of Interwaste's intention to cancel the equipment rental agreements in existence between Interwaste and PWR.

26. As a result, and on 20 December 2016, the board of PWR adopted a resolution, *inter alia*, authorizing and instructing Tau to obtain quotes to replace the equipment leased from Interwaste from independent suppliers, and to apply to one of the major banks for finance in the form of an instalment sale facility of some R20 million so as to enable PWR to replace the previously rented equipment.

27. In response to the application for the instalment sale facility, ABSA Bank indicated that if Interwaste was willing to provide a guarantee for the facility and Rammat provided its financial statements as well as the personal assets and liabilities of its shareholders, it would consider such an application. Apparently Mekgwe and Tau never provided the required financial information.

28. On 31 January 2017 the board of PWR considered its other options and resolved that the rental of equipment from third parties would be the most practical option. Tau was mandated to find possible beneficial rental agreements with third parties. He was however unable to find equipment at rates that PWR could afford and which compared to the rates previously charged by Interwaste.

29. On PWR's board meeting of 20 March 2017, PWR's viability and future were considered, because it was unable to secure equipment rentals from third parties at affordable rates. Seeing that PWR had no future to continue with its business without the required equipment, the voluntary liquidation of PWR was discussed. It is the Respondents' contention that the discussion relating to the possible liquidation of PWR, was indeed a method employed by the Applicants to force

Rammat into some kind of settlement with Interwaste or exit as shareholder from PWR.

30. Eventually during September 2017, Interwaste and Rammat came to an agreement in solving the impasse brought about by the termination of the rental agreement of the equipment, and the non-viability of PWR going forward.

31. In particular on 28 September 2017, Interwaste and Rammat entered into a Sale of Shares Agreement in terms of which Rammat sold its 26% shareholding in PWR to Interwaste.

32. In addition PWR and Mekgwe concluded a settlement agreement in which Mekgwe withdrew its appeal of the Labour Court judgment to the Labour Appeal Court.

33. On the same date Mekgwe withdrew his compliant to the Commission. In his Notice of Withdrawal Mekgwe states, that he withdraws "*all allegations of fronting or the like that I may have levelled against Platinum Waste Resources and Interwaste including those submitted to Lonmin and the B-BBEE Commission*" and requesting "*that any investigations and/or with respect of to the above allegations be discontinued*".

34. On 29 September 2017 Interwaste notified the Commission that Mekgwe had withdrawn his complaint and requested that all investigations be discontinued. The Commission however replied that it reserved its right to continue to investigate the complaint.

35. I briefly return to the sequence of events in relation to the compliant itself made by Mekgwe.

36. After receiving the complaint, and on 21 April 2017 the Commission addressed a letter to Interwaste, informing Interwaste of Mekgwe's complaint.

37. In the summary the allegations as related by the Commission appear to be the following:[3]

37.1. Interwaste was the only shareholder of PWR participating and profiting from PWR's operations;

37.2. Interwaste was receiving funds from clients directly into its own bank account, to the exclusion of PWR, and ultimately Rammat;

37.3. Interwaste was profiting disproportionately to its share in PWR and the economic benefits derived by PWR were not flowing to the black directors and shareholders of PWR;

37.4. Interwaste controlled PWR and decisions were taken without Rammat's directors and the shareholders being consulted;

37.5. PWR's black directors were not actively participating in board decisions.

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3 Annexure FA18 to the Founding Affidavit.

37.6. Interwaste disposed of property of PWR and was paying loans from PWR without consulting Rammat;

37.7. PWR acquired a contract with Royal Bafokeng Platinum Mine without the knowledge or consultation with other shareholders of PWR, while the job was to be performed by Interwaste, and not PWR.

38. The Commission then requested certain documentation from Interwaste, setting a deadline of 3 May 2017 for Interwaste to respond.

39. After requesting an extension, Interwaste addressed a letter to the Commission on 9 May 2017 addressing each of the allegations in the Commission's letter.[4]

40. On 11 May 2017 Interwaste provided further documentation to the Commission.[5]

41. Both responses by Interwaste were delivered by hand on 11 May 2017 at the Commission. Receipt of Interwaste's Reponses were confirmed by e-mail from Mr Ramare of the Commission on 11 May 2017.

42. However on 8 June 2017, the Commission again forwarded its letter of 21 April 2017 to Interwaste, notifying Interwaste that the letter of 21 April 2017, is again enclosed and that it required Interwaste's immediate attention and response. It would appear that Interwaste's submissions up to that stage did not reach or were ignored by the Commission.

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4 Annexure FA20 to the Founding Affidavit.
5 Annexure FA21 to the Founding Affidavit.

43. On 12 June 2017, Interwaste again drew the Commission's attention to their previous responses which had been submitted more than a month prior.

44. Mekgwe eventually withdrew his complaint in September 2017 as explained above.

45. Pursuant to the Commission's apparent decision to continue to investigate the complaint, despite its withdrawal, the Commission sent a Form B-BBEE 10 to Interwaste on 2 October 2017, again informing Interwaste of the complaint filed by Mekgwe, and the Commission's intent to conduct an investigation in terms of section 13J of the Act.

46. Shortly thereafter, on 10 October 2017, the Commission requested further documentation from Interwaste, i.e. the Sales of Share Agreement, whereby Rammat sold its shareholding in PWR to Interwaste, and the resolution by the directors of Rammat indicating Rammat's resolve to sell its shares. Those were provided to the Commission.

47. No further reaction was received from the Commission until April 2019. On 11 April 2019 the Commission informed Interwaste that it had made preliminary findings against the Applicants.[6]

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6 Annexure FA31 to the Founding Affidavit.

48. In reaction to the preliminary findings, the Applicants addressed submissions to the Commission, delivered electronically and by hand.[7] I do deal with each of the submission separately. In summary:

48.1. The Commission was alerted to the fact that it was in breach of Regulation 15(4) of the Regulations; and

48.2. The fact that the compliant was not investigated of the Commission's own accord, but pursuant to a complaint by Mekgwe, the withdrawal of the complaint put an end to the investigation; and

48.3. the response then dealt with the errors, according to the Applicants, contained in the preliminary findings.

49. On 23 May 2019, the Applicants' attorneys addressed a letter to the Commission inquiring whether the Commission had any further queries in relation to the Applicants' submissions, and furthermore invited the Commission to a one on one meeting prior to any final findings being made. This meeting took place on 13 June 2019.

50. On 23 July 2019, more than a month later, having heard nothing from the Commission, the Applicants' attorneys addressed a letter to the Commission repeating their request that the Commission revert in respect of any outstanding issues before making any final findings.

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7 Annexure FA32 to the Founding Affidavit.

51. On 24 July 2019 the Commission responded by indicating that it was in the process of finalizing its investigation and that it would make contact if it required any further information.

52. At the end of that year, on 6 December 2019 the Applicants' attorneys addressed a letter to the Commission, enquiring as to the progress of their investigation.

53. On 13 December 2019 the Commission stated that it had not yet finalized its investigation.

54. During the year 2020, the Applicants heard nothing from the Commission.

55. It was only on 3 February 2021 that the Commission eventually issued its final findings.

**THE COMMISSION'S FINAL FINDINGS**

56. The final findings of the Commission, signed by Moipone Kgaboesele an Executive Manager of the Commission, were issued on 3 February 2021[8].

57. The findings may be summarized as follows:

57.1. The fact that Interwaste was renting machinery, and in turn leasing it to PWR, indicated that Interwaste was the only shareholder in PWR, profiting from PWR's operations.

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8 Annexure FA36 to the Founding Affidavit, p.3 to p.5 *et seq.*

57.2. The Commission found that PWR transferred substantial amounts of its revenue during 2015 to Interwase while Rammat received nothing, and the decision to transfer those funds was taken without Rammat having any knowledge or notification.

57.3. The fact that the directors appointed to and representing Interwaste on the PWR board, also held directorship in Interwaste was irregular. This would create some kind of conflict of interest and would influence the decisions taken by the PWR board in favour of Interwaste.

57.4. The Commission found that PWR advanced loans to Interwaste, including staff, without the involvement or knowledge of Rammat, signalling that PWR was controlled by Inerwaste.

57.5. PWR disposed of property belonging to PWR, without the involvement or consultation with Rammat, and without Rammat receiving its share of the proceeds from such disposals, indicating again Interwaste's control over PWR and the syphering away of PWR funds.

57.6. The Commission also found that PWR acquired a contract with Royal Bafokeng Platinum Mine to transport and dispose of hazardous waste, without prior consultation with Rammat. This contract would have been performed by Interwaste, to the exclusion of PWR, which signalled fronting, in the sense that PWR was merely an intermediary.

57.7. The Commission found that there was no evidence that Rammat received dividends as a shareholder in PWR. Furthermore certain dividends were paid out of the account of Interwaste, suggesting that it controlled PWR.

57.8. The Commission found that certain amounts were spent by PWR on a credit account without Rammat's knowledge.

57.9. In the final instance the Commission also referred to, and found that the signatures on the share certificates issued to Rammat as a shareholder were not those of Rammat's directors, Mekgwe and Tau, but was signed by an official of Interwaste, Broodryk. This would somehow indicate once again Interwaste's control over PWR to the exclusion of Rammat.

57.10. The fact that the annual financial statements were not signed by the directors of Rammat, again indicated that the black directors of PWR did not actively participate at decision making level in PWR.

57.11. The Commission found that the shareholders agreement concluded in February 2003, did not involve Rammat, wherefore Rammat was not bound by its terms.

57.12. The Commission also concluded that Rammat eventually sold its 26% shareholding to Interwaste, as a result of the alleged threats to liquidate PWR, because of the fact that it could not obtain finance to rent or purchase its own equipment, in the light of the termination of the rental agreement by Interwaste.

## GROUNDS OF REVIEW

### Non-compliance with Regulation 15(4) of the Regulation:

58. Regulation 15(4) reads as follows:

> *"(4) The Commission must within 1 (one) year of receipt of the compliant –*
>
> *(a) conduct an assessment of the merit of the complaint;*
>
> *(b) request any further information from the complainant by issuing Form B-BBEE 8;*
>
> *(c) investigate the complaint if it is justifiable to do so;*
>
> *(d) notify the respondent of the complaint;*
>
> *(e) issue summons in a prescribed FORM B-BBEE 20, in terms of section 13K of the Act, as may be necessary;*
>
> *(f) hold a formal hearing in terms of section 13J(2) of the Act, as may be necessary, in accordance with the procedures of the Commission; and*
>
> *(g) make a finding, with or without recommendations."*

59. It is common cause that Regulation 15(4)(g) requires the Commission to make a finding within one year of receipt of a complaint.

60. Mekgwe lodged his complaint with the Commission on 17 August 2016. The Commission was therefore required to complete its investigation by 17 August

2017. As set out earlier in this judgment, the final findings were however only issued on 3 February 2021, four years and six months after the complaint had been lodged.

61. The Regulations however provide for an extension of the one year period in the following terms of Regulation 15(15):

> *"(15) If the Commission is of the view that more time is warranted to conclude its process in respect of an investigation as contemplated in sub-Regulation (8), the Commission must inform the complainant of the need to extend the time, the circumstances warranting a longer period, and the exact period required as an extension."*

62. It is a matter of logic that Regulation 15(15) should be implemented before the investigation period expires. Regulation 15(4) would be of no consequence if an extension could be granted any time after the expiry of the one year period. According to the evidence by the Commission, while conceding that it is required to issue its findings within one year of receiving the complaint, the Commission ostensibly applied for and received permission to extend the investigation from Mekgwe on 21 December 2017, four months after the expiry of the one year period. It should be noted that the request sent to Mekgwe by the Commission in this regard, in any event did not comply with the requirements of Regulation 15(15), in that it did not refer to or mention any circumstances warranting a longer period.

63. All the Commission did comply with, was to indicate the exact extension period, i.e. four months.

64. By 4 May 2018, once again after the expiry of the required four months extension period, the Commission was once again compelled to request an extension from Mekgwe, again requesting a further four months to finalise the investigation. Mekgwe granted the request on 6 May 2018. Once again the request was devoid of any explanation warranting a further extension.

65. On 13 September 2018, the Commission again wrote to Mekgwe to request a further extension of six months this time, which Mekgwe graciously granted once again. In the Answering Affidavit the Commission arrives at the conclusion, that having regard to the aforesaid extensions, it did not fail to comply with Regulation 15(4). The Commission also makes the submission that despite the provisions of Regulation 15(4), there is nothing in the Act that precludes the Commission from investigating any matter under the Act, hence the time bar set in the Regulations cannot be interpreted to prevent the Commission from exercising its mandate under the Act.

66. After having received the further extension from Mekgwe for six months on 13 September 2018, the Commission in any event failed to finalise its investigation within that six month period as requested. It only brought out its findings on 3 February 2021. It therefore took almost two years beyond the last extension for it to file the final findings. It is common cause that there was no further extension granted beyond March 2019.

67. In an attempt to explain the extraordinary delay, the Commission alleges that it was caused as a result of capacity constraints. To this end the Commission explained in the Answering Affidavit that the official who dealt with the report

resigned from the service of the Commission at the end of June 2020. The name of the official was not mentioned in the Respondents' papers.

68. I requested Counsel for the Respondents during argument to obtain the identity of the official who allegedly dealt with the report and who resigned at the end of June 2020. When the identity of the official was divulged to me, I pointed out to Counsel that the particular person was not involved and did not sign any of the reports compiled by the Commission, i.e. the merit assessment report of 30 August 2017, the preliminary internal report of 9 April 2019, the preliminary findings of 11 April 2019, the final internal investigation report of 26 January 2021 and the final findings of 3 February 2021. I therefore reject the evidence that the delay was caused by the "*official who dealt with the report*" having resigned in June 2020.

69. In the matter of **SASOL Oil Limited v The Broad Based Black Economic Empowerment Commission and Others**, a judgment of this division by Baqwa J (Case Number: 21415/2020), by which judgment I am bound, the Court found as follows in respect of the non-compliance with Regulation 15(4):

> *"[62] In the circumstances, I find that the Commission's findings are reviewable in terms of section 6(2) of PAJA in that a mandatory and material condition prescribed by the empowering provision was not complied with within the meaning of section 6(2)(b) and that the findings themselves contravened Regulation 15(4) of the BEE Regulations within the meaning of section 6(2)(f)(i)."*

70. The exercise of the Commission's function must also be seen against the imperatives set out in section 13B of the Act.

71. Counsel on behalf of the Respondents submitted that the judgment in the SASOL matter referred to above was wrong, specifically in respect of the mandatory nature of the time bar set out in Regulation 15(4).

72. The Respondents relied in this regard on the matter of **Competition Commission of South Africa v Pickfords Removals (Pty) Limited** 2021 (3) SA (1) (CC). In this matter the Constitutional Court considered the time bar contained in section 67(1) of the Competition Act where a complaint in respect of a prohibited practice may not be initiated more than three years after the practice has ceased. In other words the complainant is barred from submitting a complaint more than three years after the practice has ceased.

73. In my view the **Pickfords** matter is distinguishable in at least the following respects:

73.1. In the **Pickfords** matter it is the complainant that is barred from submitting a complaint after three years. In the present matter it is the functionary of the particular state power that is compelled to execute its functions within one year from the complaint being lodged. The Commission is enjoined in terms of section 13B of the Act to exercise the functions assigned to it in the most cost effective and efficient manner and in accordance with the values and principles mentioned in section 195 of the Constitution. By delaying the finalisation of the investigation, those imperatives are contravened to the detriment of the accused party.

73.2. The Constitutional Court in the **Pickfords** matter considered that the time bar in the Competition Act, if found to be an inflexible and absolute time bar, might deprive complainants of access to courts. This is of course not the position in the present matter where the Commission is obliged to finalise and execute its powers within a specified time. No considerations of access to courts come into play.

73.3. Furthermore, it is conceivable that a complainant in respect of a prohibited practice may not have knowledge or sufficient knowledge of the facts giving rise to such a complaint, but may only become aware of the existence thereof after the three year period had lapsed. In the present instance, however, the Commission is expressly supplied with allegations and facts contained in the complaint which in turn need to be investigated. The Commission therefore knows exactly what to investigate from the very beginning.

73.4. Section 58(1)(c) of the Competition Act grants the Competition Tribunal the power to condone, on good cause shown, any non-compliance with the rules of the Commission or the Tribunal and of any time limit set out in the Competition Act. No such condonation procedure is contained in the Act or the Regulations in the present matter. The only possible extension of time to finalise the investigation, would be in terms of Regulation 15(15) dealt with above. Even though an explanation for the extension is required, the Regulation clearly does not require the complainant or any other parties' permission or condonation to extend the time to finalise the investigation. If the legislator intended that the

non-compliance with Regulation 15(4) (read together with Regulation 15(15)) should be condonable by the Court, it would have expressly provided for it in the Act or Regulations. In the premises the **Pickfords** matter does not support the arguments forwarded by the Respondents.

74. It is the Commission's submission that it should be held that the time bar in Regulation 15(4) is merely procedural and not a substantive one, as it would defeat the purpose of the Act and would undermine the Commission's work. What the Commission does not keep in mind however, is the devastating consequences a pending investigation by the Commission might have on the accused party in conducting its business while under investigation for an indeterminate period of time. Even if I am wrong in finding that the time bar in Regulation 15(4) is an absolute one, and that it should instead be condonable by the Court, there is no application or any reliable or credible evidence before me that would constitute an application for condonation or that would constitute good cause for condoning the Commission's reckless delay in finalizing its investigation.

75. I therefore find that the Commission acted beyond its powers when it issued its findings in breach of the empowering provisions of Regulation 15(4).

76. In the result the Commission's final findings fall to be reviewed and set aside in terms of section 6(2)(a), 6(2)(b), 6(2)(d), 6(2)(e)(i) and 6(2)(f)(i) of PAJA.

**Non-compliance of Regulation 16(2):**

77. Regulation 16(2) of the Regulations reads as follows:

> *"(2) The Commission may continue to investigate a complaint after it has been withdrawn, as if the Commissioner had initiated it in terms of section 13J if it is justifiable to do so."*

78. In terms of section 13J of the Act the Commission has the power to, on its own initiative or on receipt of the complaint, investigate any matter arising from the application of the Act.

79. The Applicants contend that after Mekgwe had withdrawn the complaint, the Commission could not continue investigating the compliant for three reasons:

79.1. Firstly, the Commission apparently did not "*resolve*" to continue with the investigation. This conclusion is based on the fact that no formal resolution was presented as part of the Rule 53 record by the Commission. Even though one would expect some kind of formal evidence that would indicate the formalization of the decision by the Commission to continue with the investigation, I do not find the absence of a formal resolution to be conclusive evidence that no such decision was taken. Regulation 16(2) itself empowers the Commission to continue with the investigation. The Commission also reserved its right to do so when the complaint was withdrawn.

79.2. Secondly, it submitted on behalf of the Applicants that the Commission did not investigate the matter as if it had initiated the complaint itself, because it continued its investigation pursuant to the complaint by Mekgwe. I do not agree this to be the proper interpretation of Regulation 16(2). The Regulation simply foresees that the investigation may proceed as if there had not been a prior complaint at all, in other words, as if the Commissioner had initiated it himself/herself. The very wording of Regulation 16(2) supports this in that it is determined that the Commission may continue to investigate the complaint after it has been withdrawn. It presupposes a continuance of the investigation which had started pursuant to the complaint. It certainly does not require an independent initiation of an investigation. In my view it simply means that the Commissioner can decide to continue with the investigation irrespective what the status of the earlier complaint is.

79.3. Thirdly, the Applicants contend that such an investigation may only continue if it is justifiable to do so. The Applicants go on to argue that this means that the investigation could only continue where the Commissioner had *"independent"* evidence known to him/her "*apart from that in the complaint*" which justifies reasonable suspicion that the Act had been breached. This interpretation, in my view, nullifies the intended purpose of Regulation 16(2). It ignores the point of departure of Regulation 16(2), i.e. that the Commission may continue with an investigation which had been withdrawn. It is obvious that the Commission would have taken due cognizance of the allegations

(whether they be meritorious or not) made by the complaint, whilst the investigation was still pending pursuant to the complaint. To suggest that the allegations in the complaint which came to the knowledge of the Commission whilst the complaint was being investigated, should now be erased as if the Commission had no knowledge thereof, thereby also removing the justifiability to continue with the investigation, is not persuasive. I therefore do not agree that it would only be justifiable to continue with the investigation if the Commission had in some way or another gained other evidence than that contained in the complaint, which could be labelled as "*independent*". I find it to be reasonable that the withdrawn allegations in a complaint, might very well move the Commission to continue with the investigation. Whether those allegations eventually prove to be meritorious or not, is a different question to be asked at a different juncture of the enquiry.

80. This ground of review is therefore not sustained.

**Failure to consider documents and information**:

Section 6(2)(e)(iii) of PAJA provides for the review of decisions and action taken based on irrelevant considerations, where relevant considerations were not considered. This basis for review is similarly grounds of review under the principle of legality.[9]

9 **Democratic Alliance v The President of South Africa** 2013 (1) SA 24 (CC).

81. It appears that the Commission ignored or discarded the following crucial documentation for purposes of its investigation:

81.1. The shareholders agreement:

81.1.1. Even though acknowledging receipt of the shareholders agreement dated 18 February 2003 concluded between the initial shareholders of PWR, the Commission steadfastly refused to acknowledge that the shareholders agreement also constituted a shareholders agreement between Rammat and Interwaste, despite Rammat and Interwaste having signed undertakings to be bound by the original shareholders agreement. These undertakings are indeed admitted by the Commission.

81.1.2. The original shareholders agreement expressly defines shareholders to include any party which may at any time become a shareholder of the company.[10]

81.1.3. The relevance of the contents of the shareholders agreement is of course *inter alia* the fact that it expressly allowed for the disposal of the property in the ordinary course of business without shareholder or board approval, which would negate the complaint that assets of PWR were disposed of without

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10 Clause 1.1.12 of Annexure FA4

Rammat's approval. It also determined the participation of shareholders in the management of PWR.

81.1.4. The Respondents submitted that there was in fact no shareholders agreement between Rammat, PWR and Interwaste. This submission was motivated by the fact that there is no proper explanation as to which party obtained which percentage of shareholding in PWR since 2003. This proposition is unconvincing and has no bearing on the question whether the shareholders agreement existed and whether, as already demonstrated, both Rammat and Interwaste subscribed to it.

81.1.5. It is furthermore submitted on behalf of the Respondents that Mekgwe and Tau were not appointed by Rammat as directors of PWR as they had been directors of PWR since December 2002. This line of thought is evenly inaccurate. During 2002 and later on, Mekgwe and Tau were directors of PWR but presented another shareholder, not Rammat.

81.1.6. The Respondents furthermore submit that the shareholders agreement provides that each of the shareholders was entitled to appoint only one director to the board of PWR per 20% of the issued share capital held. Seeing that Rammat held 26%, it could not have appointed two directors, indicating that the shareholders agreement relied upon by the Applicants was not adhered to, in turn indicating its non-existence. This argument is

of course based on an incorrect reading of clause 6.2.1 of the shareholders agreement, which expressly provides that "*fractions of percentages shall be taken into account*". This means that every fraction of 20% shares held will warrant the appointment of a further director. In the premises Rammat was indeed entitled to appoint two directors, which it did, being a 26% shareholder.

81.1.7. Nowhere in the Respondents argument do they attempt to explain the effect of annexure FA6 to the Founding Affidavit, being Rammat's undertaking to abide to the said shareholders agreement. None of the Respondents' arguments in respect of the shareholders agreement could detract from the unequivocal intention of both Interwaste and Rammat to be bound by the said shareholders agreement.

81.2. Minutes of Board and Shareholders meetings:

81.2.1. The final findings contained numerous references to the allegation that Interwaste had failed to provide copies of minutes of the board and shareholder meetings, which would reflect or not reflect Rammat's participation, the granting of loans and disposal of assets.

81.2.2. The Applicants however provided the minutes after the Commission had complained about their absence in the

preliminary findings provided to the Applicants. In response the Applicants provided a comprehensive set of the required minutes to the Commission.

81.2.3. However in the final findings of the Commission, it persisted that minutes were not provided.

81.2.4. The relevance of the minutes are that they would prove or disprove that Mekgwe and Tau were always in attendance and participated in discussions, voted on resolutions and were active members of the board of PWR.

81.2.5. It is therefore fair to conclude that the Commission simply disregarded this evidence. This conclusion is finally substantiated when the Commission admitted in the Answering Affidavit that its finding that Interwaste had failed to provide the Board minutes, was an oversight.

81.2.6. The Respondents contend that the contents of the minutes did not demonstrate participation by Mekgwe and Tau. I am of the view they did. But this is of course not the essence of the attack by the Applicants under this ground of review. It is indeed the fact that the minutes were ignored and not taken into account whatsoever for interpretation by the Commission, that makes their findings reviewable.

81.2.7. It is any event clear that Mekgwe and Tau's participation were in accordance with their position as minority shareholders in terms of the shareholders agreement and directors on the board of PWR[11].The Commission ought to have been aware of the position had they taken cognizance of the minutes.

81.3. The centralized treasury function:

81.3.1. The Applicants went to great lengths to explain and demonstrate the so-called centralized treasury function implemented between PWR and Interwaste. It worked as follows:

81.3.1.1. PWR had its own bank account into which customers deposited payment of services rendered.

81.3.1.2. The funds from this bank account were then transferred into a centralized master bank account held by Interwaste. These funds are deposited into the master account and are credited as a loan by PWR to Interwaste. Interwaste uses these funds to pay PWR's overheads and taxes.

81.3.1.3. The overhead payments made on behalf of and to the credit of PWR, are then deducted from PWR's loan

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11 See, **Sammel & Others v President Brand Gold Mining Ltd** 1969 (3) SA 629 (A) at 678.

account. Both Mekgwe and Tau's salaries were for instance paid from the master bank account and not from the bank account of PWR.

81.3.1.4. The reason for this system, was to achieve cost savings for PWR and improve its financial position by enabling it to secure funding to acquire assets without making use of its own costly overdraft facility.

81.3.2. The Applicants filed an expert report compiled by one Terrence Hatzkilson of Crowe Forensics. The said expert confirmed that the centralized treasury function was nothing out of the ordinary and confirmed that it gave PWR the advantage of centralized goods and services.

81.3.3. The Respondents elected not to file any expert evidence of their own in this regard, with the result that the expert evidence is uncontested.

81.3.4. It is also undisputed that the payments made by Interwaste on behalf of PWR, towards its overheads and taxes, indeed exceeded the amounts transferred from PWR's account pursuant to the centralized treasury function in the amount of R5 890 207,00. PWR therefore clearly received greater value from Interwaste than it provided for or paid over to Interwaste.

81.3.5. Despite having explained this system to the Commission, the Commission took the stance and found that transfer of funds from PWR to Interwaste diminished PWR's profits, thereby depriving Rammat of the economic benefit. The contrary was however shown by the fact that Interwaste expended more money to the credit of PWR than what PWR had earned and paid over to Interwaste. The Commission even went so far in its findings to state that their understanding or not of the centralized treasury function was neither here nor there because the only thing that the law really required was the empowerment of Rammat. If the Commission did understand the centralized treasury function, it ought to have concluded that it was implemented precisely to favour PWR and its minority shareholder. The Commission however fragrantly ignored these facts.

81.3.6. In the matter of **Afri Grain Marketing (Pty) Limited v Trustees for the time being of Copenship Bulkers AS (in liquidation), 2019 JDR 0966 (SCA)**, the Supreme Court of Appeal also recognized the centralized treasury function as common place in structuring the financial affairs of a group of companies. The Commission's dismissal of the centralized treasury function is therefore unlawful and reviewable.

81.4. Payment of dividends:

81.4.1. The Commission found that there was no proof that Rammat received payment of its share of the divided of a R1 million, during July 2016, as well as its share of the R4,5 million dividend in June 2013. The Applicants however provided the Commission with documentary proof of payment of the 2016 dividend. It also explained that Rammat's share of the 2013 dividend had been set off against the amount owed to Interwaste for the initial purchase of shares in PWR, referred to earlier.

81.4.2. Despite this the Commission found that there was no proof that Rammat received the payment of the dividends in its final findings, which is clearly unfounded. Only in the Answering Affidavit the Commission eventually conceded the proof of payment of the dividends, rendering the final findings flawed in this regard.

82. In the premises I find that the Commission's disregard of the aforesaid documentation and facts render the final findings reviewable in terms of section 6(2)(e)(iii) and 6(2)(f)(ii) of PAJA.

**Procedural unfairness:**

83. The Applicants raised a fourth ground for review is that the Commission did not conduct its investigation in a procedurally fair manner.

84. In terms of Regulation 15(13) of the Regulations, the Commission is required, before it makes its final findings, to notify the Respondent of the details of any adverse findings and provide the Respondent thirty days to respond thereto before issuing the findings.

85. See, in general the matter of **Joseph and Others v City of Johannesburg and Others** 2010 (4) SA 55 (CC) at paragraph 42:

> *"Procedural fairness . . . is concerned with giving people an opportunity to participate in the decisions that will affect them, and – crucially – a chance of influencing the outcome of those decisions."*

86. This is precisely what Regulation 15(13) envisages. The Commission failed to inform the Applicants of specific issues it had with for instance the shareholders agreement, referred to above, the centralized treasury function, and further information it might have required to overcome any doubt or any misunderstanding[12]. In form Regulation 15(3) requires the opportunity to be given to the Applicants to explain themselves, but even more important, in substance those explanations need to be considered with an open mind by the Commission that needs to apply its mind thereto.[13]

87. What makes the Commission's apparent determination to "convict" even more concerning is the fact that it took more than four years to conclude its

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12 See, **Gavric v Refugee Status Determination Officers, Capetown & Others** 2019 (1) SA 21 (CC), para 79.

13 See **Sasol** case at pars 45-50.

investigation, which one would have expected to be ample opportunity to go about its investigation fairly and thoroughly.

88. Astoundingly enough it was submitted on behalf of the Respondents that despite the detailed representations made by the Applicants amounting to some 186 pages, the Commission did not look at the detail but rather at the crux or the nub of the issue. The Commission goes on to submit that it is not the impact of the substantial volume of documents provided that might sway the Commission's findings, but of paramount importance is whether the B-BBEE Act was complied with or not. These submissions simply do not make sense and indeed smack of the Respondents' general proposition i.e. that empowerment principles must be pursued, irrespective of the facts or even the law. The Commission cannot function or conduct a proper investigation or determine whether there was a transgression of the Act or not, without applying their minds properly to each and every piece of evidence presented to them. These submissions are indeed telling and disturbing, in that they probably represent precisely the attitude adopted by the Commission throughout this investigation.

89. Wherefore the final findings also fall to be reviewed in terms of section 6(2)(c) of PAJA.

**Material errors of fact:**

90. The Applicants base this ground of review on the provisions of section 6 (2)(e)(iii) of PAJA i.e. the taking into account of irrelevant considerations and ignoring of relevant considerations.[14]

91. The Applicants identified and submitted that the following errors of fact led the Commission to its final findings:

91.1. The Commission found that Interwaste rented equipment and leased it to PWR, but then Interwaste used the equipment itself to the exclusion of PWR. The equipment was however rented out to PWR by Interwaste for the reason that it benefited PWR financially. PWR would not have been able to obtain the same equipment at more competitive prices, nor could it afford to buy its own. The fact that the equipment was rented to PWR, was solely for the benefit of PWR and its shareholders, including Rammat.

91.2. It was however minuted in the minutes of the general meeting of PWR on 11 August 2016 that a TLB was removed from the Lonmin site and was working at another Interwaste site while being rented by PWR.[15] This was mentioned by Mekgwe during the meeting. If true, it was in all probability a once off occurrence. No further evidence of similar incidences was recorded or tendered in this application. The allegation is therefore

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14 **Chairman of the State Tender Board v Digital Voice Processing (Pty) Limited, Chairman of State Tender Board v Sneller Digital (Pty) Limited** [2012] 2 All SA 111 (SCA) at par 34.

15 Annexure FA9.14, p.001-202

unsubstantiated or at least an isolated incident which does not amount to a transgression of the Act.

91.3. The Commission also found that intercompany loans were advanced without the knowledge or involvement of Rammat and concluded that 90% of the revenue of PWR was transferred to Interwaste, to the exclusion of Rammat.

91.4. It is clear that Rammat knew about these transfers of funds, in that its directors had been part of the special resolutions on a year on year basis that were passed to this effect. In any event, these transferred funds were in line with the centralized treasury function referred to above, and was therefore not unauthorized or suspicious in any way. The Commission's finding in this regard is therefore factually incorrect.

91.5. The Commission further found that Rammat was unaware of the disposal of certain of PWR's property. This conclusion is of course the consequence of the Commission's refusal to acknowledge the contents of the shareholders agreement referred to above, being the source of PWR's right to dispose of its property in the ordinary course of its business without involving the directors. The finding is therefore factually incorrect.

91.6. Furthermore the Commission made the finding that PWR acquired a waste management contract with Royal Bafokeng Platinum Mine without the knowledge of Rammat. This appears to be an incorrect finding having

regard to the minutes of the board meeting attended by Tau and Mekgwe wherein Tau recorded that the Royal Bafokeng contract had been retained.[16]

91.7. The most glaring factual error made by the Commission for reasons not explained by them, was its initial finding that there was no proof of dividends having been declared and paid to Rammat. The Commission only eventually admitted the payment of dividends in the Answering Affidavit without dealing with its initial findings in this regard, which denied such payments.[17] The Commission's final findings in this regard are also therefore factually flawed.

92. In the premises the findings in their totality also stand to be reviewed and set aside in terms of section 6(2)(e)(iii) and 6(2)(i) of PAJA.

**Irrationality and errors of law:**

93. In terms of section 6(2)(d) of PAJA as well as under the principle of legality a court may judicially review an administrative action if the action was materially influenced by an error of law. An error of law occurs whenever a decision maker disregards provisions of the empowering statute or is guilty of gross irregularity or simply fails to understand the statute or its requirements.[18]

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16 See Founding Affidavit, Annexure FA9.10, p.001-191
17 Answering Affidavit, para 45, p.001-736
18 **Hira and Others v Booysen & Another** [1992] 2 All SA 344 (A) at p. 357.

94. In the present case the Commission found that the Applicants are guilty of undermining the objectives of the Act and of fronting practices. Fronting practices are defined in section 1 of the Act. I do not repeat the entire section here. The question that needs to be answered is whether the Commission established any of the jurisdictional facts defined in the Act for finding the Applicants guilty of fronting.[19]

95. The facts relied upon by the Commission to come to this finding simply did not point to the offence of fronting as defined by the Act:

95.1. The Commission found that the fact that Interwaste rented equipment from PWR was a "*concession*" on the side of Interwaste that it committed fronting practices. The detailed explanation of the leasing arrangement signals the opposite. Without this arrangement PWR would simply not have been able to operate, to the detriment of its B BBEE-shareholder, Rammat.

95.2. The Commission also concluded that cross directorship, i.e. that Interwaste directors also served on the board of PWR, was indicative of a fronting practice. This conclusion is simply irrational and does not fall within any conceivable definition of fronting.

95.3. The Commission concluded that fronting took place because of the fact that assets of PWR were sold, without sharing the proceeds thereof with

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19 See also, **Cargo Carriers Proprietary Limited v Broad Based Black Economic Empower Commission and Others** (7600/2019) [2022] ZAGPPHC 38 (28 January 2022), para 45.

Rammat. The Commission's reasoning is based on the misapprehension that all proceeds, whether it be from a sale of assets or other, are automatically to be shared and distributed amongst the shareholders. This interpretation is of course incorrect. The proceeds belong to the company and if so resolved, may be distributed as part of a dividend in future. It certainly does not signal fronting. In any event the disposal of assets in the normal course of business, does not require the approval of the board or shareholders, as determined by the shareholders agreement.

95.4. The Commission, in disregarding or discarding the centralized treasury function, found that the Applicants were guilty of fronting because Interwaste paid the dividends to the shareholders of PWR, and not PWR itself. The true facts however are that the dividends were paid from the master bank account from funds of PWR held in the master bank account. It is in any event not enough to show financial control of PWR by Interwaste, to constitute fronting. It is required to show that Rammat has been deprived of economic benefits or participation. The contrary appears from the facts.

95.5. The Commission also found that fronting occurred because of the fact that the black directors of PWR were excluded from its management because they did not sign the financial statements from 2013 to 2015 financial years. The fact that they did not add their signatures to the financial statements cannot conceivably amount to fronting as defined by

the Act. The financial statements were in any event approved by the board of PWR, on which Mekgwe and Tau served.

95.6. A further concern of the Commission was that the Royal Bafokeng contract was a clear example of fronting because even though the contract was awarded to PWR, it was Interwaste that performed it and retained a majority of the revenue. This, in my view would indeed be a classic example of fronting, in that it would appear that PWR was merely used as an intermediary to obtain the contract. In the present instance however it is clear that this was an isolated instance, brought about by the fact that PWR, at that stage, did not have the necessary equipment to its disposal any longer to perform the contract. This state of affairs was certainly not the norm or common practice during the relationship between Rammat and Interwaste. No other evidence or instances of such conduct or nature were presented in these proceedings.

95.7. Lastly, the Commission found that Rammat eventually sold its shareholding in PWR to Interwaste under pressure and as a result of threats to liquidate PWR. The circumstances surrounding the discussion of liquidation of PWR have been dealt with before in this judgment. The issue of liquidation was brought about by the fact that the PWR did not have any equipment to its disposal any longer as a result of the termination of the lease by Interwaste. Under those circumstances PWR could simply not proceed to operate, which would realistically have resulted in its liquidation. It is therefore inaccurate to allege that the possibility of liquidation was used to coerce Rammat into selling its

shares to Interwaste. But even if it were, it would not amount to fronting as defined by the Act.

95.8. The Respondents are of the view that had the funds of PWR not been transferred to the master bank account, PWR would have had enough revenue to purchase its own equipment and would not have had to rent it from Interwaste. This argument loses sight of the fact that all PWR's overheads had been paid from the master bank account on behalf of PWR, in fact exceeding the money received from the revenue generated by PWR. There would simply not have been enough funds available to purchase equipment for PWR. It does not amount to fronting nor does it undermine the objectives of the Act.

95.9. The Respondents furthermore made the submission that the issue of cross directorship undermined the objectives of the Act, i.e. to increase the number of black people who own and manage enterprises. This argument does not make sense for the simple reason that the complaint was that the directors of Interwaste also served on the board of PWR. This had no bearing on the appointment of Tau or Mekgwe as directors representing Rammat on the board of PWR.

96. In the light of the numerous errors of law committed by the Commission coming to its findings and having regarding the provisions of the Act, the final findings fall to be reviewed under section 16(2)(d) of PAJA.

**Imposition of an impermissible onus:**

97. It was submitted on behalf of the Applicants that the Commission bears the onus to show or prove fronting as the offence contemplated in section 13O of the Act. It is not for the accused to prove that it is not guilty of fronting.

98. In the present instance the Commission relied on the alleged absence of evidence provided by the Applicants, as a basis to find the Applicants guilty of fronting. This in fact imposed by implication, an onus on the Applicants to prove their innocence i.e. that they had not committed fronting practices and had not undermined the objectives of the Act.

99. It seems that the Respondents are of the view that no question of onus comes into play, but at least concedes that no such onus could be placed on the accused to indicate the accused's innocence.

100. n as far as the Commission indeed expected the Applicants to provide enough evidence to exonerate them from the accusation of fronting, the Commission would have been mistaken. It is for the Commission to obtain the necessary evidence that would objectively prove fronting on the part of the Applicants.

101. In the circumstances this ground of review is also sustained, rendering the final findings reviewable.

**No basis for investigation:**

102. In its Supplementary Affidavit the Applicants raised a further and final ground of review after having received the Rule 53 record of proceedings.

103. The gist of this ground of review is that having regard to the requirements of Regulation 15(4), it was not justifiable to investigate the complaint of Mekgwe. Regulation 15(4) requires the Commission to conduct an initial assessment of the merits, gather further information if required, and proceed with the investigation if justifiable to do so.

104. For the Commission to have had justifiable reasons to proceed with the investigation, it is submitted that there ought to be some objective factual basis on which a suspicion of a transgression should be based.

105. When considering the foundation of the investigation, i.e. Mekgwe's complaint, it in itself did not comply with the requirements of the relevant legislation. Instead of asking for proof of the bold allegations made in the complaint, it appears as if the Commission had accepted the allegations on face value, and merely inquired when certain alleged transgressions took place. It merely requested a copy of the shareholders agreement and loan agreement which Mekgwe did not have.

106. After having contacted Interwaste and informing Interwaste of the complaint, Interwaste reacted comprehensively and answered Mekgwe's complaint with supporting evidence. If the Commission had given due consideration to the evidence provided by the Applicants, the Commission ought to have concluded

that there was no reasonable basis upon which to investigate the complaint further.

107. Having regard to the contents of the merits assessment report compiled by the Commission, it found that:

107.1. Mekgwe had been appointed as a black non-executive of PWR since 2012. This is of course true, except perhaps for the fact that he was certainly acting in an executive capacity. The fact that he was so appointed could however not be *prima facie* evidence of fronting and could not justify further investigation.

107.2. The Commission misinterpreted the B-BBEE certification of PWR and concluded that the reflected scores in the certificates were not consistent with the company not being 100% black owned. The certificates in fact indicated that the company was 38,2% black owned. Even disregarding the Commission's apparent misinterpretation, it would however not signify fronting or the undermining of the Act *per se*.

107.3. It is the contention of behalf of the Respondents that Mekgwe's complaint was sufficient to alert the Commission and create enough suspicion to justify further investigation. I am of the view that the Respondents are setting the benchmark envisaged in Regulation 15(4), too low. Suspicion must be supported by substantiated evidence, which lacked in the present instance.

108. For these reasons the findings should be reviewed and set aside on this ground as well.

109. Finally, I wish to make mention of the extensive arguments advanced on behalf of the Respondents regarding the so-called B-BBEE strategy and constitutional imperative of black economic empowerment, in conjunction with the Codes of Good Practice.

110. As emphasised at the beginning of this judgement, the constitutional imperative of black economic empowerment is not in dispute in this application. What is in dispute is whether the Commission acted lawfully and rationally in compiling its final findings, or not.

111. The arguments raised in respect of the Codes of Good Practice are, in my view, irrelevant for purposes of this application, in that:

111.1. They did not form part of the complaint; and

111.2. They were not considered interpreted or included by the Commission during any stage of its investigation; and

111.3. They were not dealt with or referred to by the Commission in arriving at the Commission's final findings.

112. I therefore do not intend considering same for purposes of scrutinising the Commission's conduct.

## CONCLUSION

113. Having regard to all the facts and considerations applicable in this matter, it is clear that the decisions and final findings of the Commission are tainted to the extent that they are irregular and in violation of PAJA as well as the principle of legality.

114. Once a ground of review under PAJA has been established the Court is enjoined to declare the decision or finding unlawful.[20]

115. **In the result I make the following order:**

(i) The final findings made by the First Respondent in respect of the Applicants, issued on 3 February 2021 are declared unconstitutional, unlawful and invalid.

(ii) The final findings of the First Respondent are therefore reviewed and set aside.

(iii) The First Respondent is ordered to pay the First, Second and Third Applicants' costs of the application, including the costs of two counsel.

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20 **Allpay Consolidated Investments (Pty) Limited v Chief Executive Officer of the South African Social Security Agency & Others** 2014 (1) SA 604 (CC), para 25

**NF DE JAGER**
ACTING JUDGE OF THE HIGH COURT

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|---|---|
| **Dates of hearing:** | 19 April 2023 |
| **Date of judgment:** | 5 July 2023 |
| **For the Applicants:** | Adv Wim Trengove SC<br>together with Adv Michael Mbikiwa |
| **Instructed by:** | Cliffe Dekker Hofmeyr |
| **For the Respondents:** | Adv MD Mohlamonyane SC<br>together with Adv MM Ramabulana |
| **Instructed by:** | The State Attorney |