BEFORE THE PORTS REGULATOR TRIBUNAL

In the matter between:

ASTRON ENERGY (PTY) LTD.	**APPELLANT**
BIDFREIGHT PORT OPERATIONS (PTY) LTD	**APPELLANT**
ISLAND VIEW STORAGE (PTY) LTD t/a BIDVEST TANK TERMINALS	**APPELLANT**
DURBAN COAL TERMINAL COMPANY (PTY) LTD	**APPELLANT**
SOUTH AFRICAN BULK TERMINAL (PTY) LTD	**APPELLANT**
RICHARDS BAY COAL TERMINAL (PTY) LTD	**APPELLANT**
FPT PORT LEASING (PTY) LTD	**COMPLAINANT/ APPELLANT**

and

TRANSNET NATIONAL PORTS AUTHORITY ("TNPA")	**RESPONDENT**

TRIBUNAL ORDER WITH REASONS

RULING ON WEGO CASCADE POLICY MODEL (CPM) IN TERMS OF SECTION 30(3)(a)- (f) READ WITH SECTIONS 46 AND 47 OF THE NATIONAL PORTS ACT NO 12 OF 2005 FOLLOWING THE HEARING HELD VIRTUALLY VIA TEAMS ON 25 NOVEMBER 2024, 29 JANUARY 2025, 19 FEBRUARY 2025, 13 MAY 2025, 17, 19, 25, 26 SEPTEMBER 2025 AND 03 DECEMBER 2025

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1 INTRODUCTION

1.1 This is a ruling in a consolidated appeal against a 'decision' made by the Respondent as contemplated in terms of section 46 of the National Ports Act, 2005, read with directives 8 and 9 of the Ports Directives, 2009, issued in terms of Section 30(3) of the National Ports Act [Act 12 of 2005] (hereinafter referred to as "the Act" and "Directives", respectively).

1.2 Section 46 of the Act reads as follows:

"46. (1) Any port user or licensed operator whose rights are adversely affected by a decision of the Authority may appeal against that decision to the Regulator in the manner directed under section 30(3)."

(2) After considering the appeal the Regulator must-

(a) confirm, set aside or vary the decision; or

(b) substitute the decision of the Authority for its own.

1.3 The grounds of appeal as set out in the founding affidavits by the Appellants in terms of Ports Regulator Directive 8(3)(b)(i), is in respect of the Respondent's decision on 3 May 2024, i.e. to charge the Appellants for WEGO CPM penalties and notifying the Appellants of that 'decision' by way of an email dated 3 May 2024 to which was attached a tax

invoice and Annexure A, hereinafter referred to as "the Decision". The Appellants consequently aver that the Respondent's Decision adversely affects the Appellants' rights.

1.4 The preliminary hearing was set down on 25 November 2024 whereto the parties sought a ruling on the question of whether the appeals are a narrow or wide appeal, the need for leading oral evidence to resolve factual disputes on the papers, as well as the question of onus, the duty to begin, the failure to disclose information and the separation of issues.

1.5 Furthermore, the Appellants as recorded in paragraph 1 in the Respondent's proposed agenda for the pre-trial conference records that the Respondent provides the information over which it claims confidentiality to the Hearing Panel, to be dealt with by the Hearing Panel in terms of Practice Directive 25, specifically sub-paragraphs (5), (6) and (8) of the Practice Directives issued in terms of section 30(3) of the National Ports Act, 12 of 2005, and whereto the Appellants disagreed with the proposal made by the Respondent and undertook to revert by 8 November 2024 with their alternative proposal.

1.6 The Appellants are Astron Energy (Pty) Ltd, registration number: 1911/001154/07, a company duly registered and incorporated in accordance with the Company Laws of the Republic of South Africa, having its business address situated 5 Century Boulevard, Century City, Cape Town, 7441,FPT Port Leasing (Proprietary) Limited and FPT (Proprietary) Limited situated at O/P Berth, T-Jetty, Dock Road, Port of Durban, Richards Bay Coal Terminal (Pty) Ltd. a company registered and incorporated in accordance with the company laws of the Republic of South Africa, having its principal place of business at South Dunes, Richards Bay Harbour, Bidfreight Port Operations (Pty) Ltd. a private company registered and incorporated in accordance with the company laws of the Republic of South Africa, having its principal place of business at Millweed House 169-175 Maydon Road, Maydon Wharf,

Durban KwaZulu-Natal (BPO),Durban Coal Terminal Company (Pty) Ltd. trading as Bulk Connections, a private company registered and incorporated in accordance with the company laws of the Republic of South Africa, having its principal place of business at Java Road, Island View, Bluff, Durban, Kwazulu-Natal, Kwazulu-Natal and South African Bulk Terminal (Pty) Ltd. situated at 101 Maydon Road, Maydon Wharf, Durban, Kwazulu- Natal (hereinafter referred to as "the Appellants") and Island View Storage (Pty) Ltd, trading as Bidvest Tank Terminals with its principal offices situated at 309 Umhlanga Rocks Drive, Durban, Kwazulu-Natal, (Bidfreight, Durban Coal Terminal, South African Bulk Terminal and Island View Storage hereinafter also referred to as "the Bidvest Appellants").

1.7 The Bidvest Appellants were represented by Adv Paul Wallis, duly instructed by Ms J Finnigan and Ms J Woker of Shepstone and Wylie Attorneys.

1.8 Astron Energy (Pty) Ltd and Durban Coal Terminal Company (Pty) Ltd were represented by Adv. S Mullins SC & Adv. S Pudifin-Jones, duly instructed by Ms J Finnigan and Ms J Woker of Shepstone and Wylie Attorneys.

1.9 FPT Port Leasing (Pty) Ltd. was represented by Adv Louis Olivier, duly instructed by Willem Le Roux of Le Roux Attorneys.

1.10 The Respondent is Transnet National Ports Authority, a division of Transnet SOC Limited, a public company incorporated in terms of the Legal Succession to the South African Transport Services Act, 1989 read with the Companies Act, 2008. The Respondent has its head office situated at Emendi Admin Building, Neptune Road, Port Elizabeth, 6065, and was herein represented by Adv. C.J Pammenter SC & Adv. C Prinsloo duly instructed by Mr T Malatji, Ms B Masia and Ms N Mokoka of Malatji and Co. Attorneys.

2 THE TRIBUNAL'S RULING: WIDE OR NARROW APPEAL

Oder: the tribunal ordered as follows:

2.1 The appeal is a wide appeal, and therefore that the parties may lead oral evidence therein which the Appellants accepted, however, citing that the Tribunal be best placed to determine and exercise its discretion about the admissibility of such evidence;

2.2 That the party on whom the onus lies, i.e. the Appellants, in order to be successful, satisfy the Tribunal that it is entitled to succeed on their grounds of appeal;

2.3 The Respondent's refusal to provide the Appellants' legal cascading method and any formulae used in its calculation be dealt with and canvassed in one hearing so that the Tribunal, at the conclusion of the case, may dispose of the matter in its entirety; and

2.4 That the parties will abide by the provisions of Directive 16(2) of the Port Directives, 2009, in so far as it relates to the leading of evidence.

2.5 Costs: No costs were reserved.

3 CONFIDENTIAL CLAIM BY THE RESPONDENT

3.1 The hearing was set down for 19 February 2025 to consider oral evidence on the "confidential" nature of the information which the Appellants sought discovery of and to the Respondent's argument that said information required was confidential in nature, with access thereto possibly resulting in the contravention of competition principles, should the Appellants succeed in their application.

3.2 The matter was first set down for 29 - 31January 2025 in order for the Tribunal to hear argument against and in favour of the disclosure of the calculations and formulae used in the determination of the Cascade Policy 'penalty' by the Respondent. Following a preliminary issue raised by the Appellants on 29 January 2025, the Tribunal made an interlocutory order on 03 February 2025 wherein the Tribunal also remanded the hearing into the confidentiality claim to 19 February 2025 and then again to 13 & 14 May 2025 for the parties to conclude leading evidence, during which it was agreed that the parties would file their heads of argument on 06 June 2025 (for which extension was subsequently granted to 10 June 2025).

4. THE TRIBUNAL'S RULING: CONFIDENTIALITY CLAIM ON FORMULAE AND WORKING CALCULATIONS BY THE RESPONDENT

4.1 As stated in the Tribunal's ruling on the preliminary issues dated 04 December 2024, and to avoid repetition, the Uniform Rules of Court – Rule 35(1) and (3), allow the parties to an action to discover the documents that are or may be relevant to the issues in the matter and which the other party is or expected to be in possession thereof. It further provides for mechanisms to enforce compliance therewith should a party fail to do so. Moreover, it is every party's right to be given a fair trial as enshrined in the Bill of Rights in the Constitution of the Republic of South Africa.

3.3 It is not disputed that the Respondent failed to provide the underlying formulae and working calculations on how the figures in Annexure A to the 'Directive' are arrived at in respect of each of the six tables appearing in the annexures for each Appellant's penalty.

3.4 It is also trite that the Respondent at least on two occasions, i.e. when it

undertook to revert to Appellants with a copy of the calculations by close of business on 23 November 2023, which response had not been provided by 7 December 2023 and when during pre-appeal conference the Respondent agreed to provide the Appellants with the formulae used to calculate the results that appear in Annexure A to the penalties applicable to each Appellant by 8 November 2024, which strikingly, was not done, save for what the Respondent circulating to the Appellants on 11 November 2024 which it claims to address the method of calculation of the penalty imposed on a port-by-port basis.

3.5 However, the Appellants during the pre-appeal conference specifically recorded that they are looking to receive the underlying mathematical formulae which were used to calculate the WEGO penalties in accordance with Annexures A to the Appellants' respective penalty invoices, which the Respondent agreed to.

3.6 **ORDER**

3.6.1 In the circumstances, the claim of confidentiality by the Respondent falls to be dismissed, and the refusal by the Respondent to grant access to the Appellants to the records of the calculations, formulae and source documents in the determination of the penalty as specified per individual Appellant's "Directive", is dismissed.

3.6.2 The Respondent is accordingly ordered to:

3.6.2.1 Furnish to the Appellants' legal representatives, within 20 (twenty) days of the service of this order upon them, i.e. 18 July 2025, copies of the calculations and formula or source documents underpinning the individual calculation of the penalty applicable to the respective Appellants.

3.6.2.2 The legal representatives for the Appellants must have restricted

access to inspection of the documents (see Supervisors of Bethelsdorp Institute v Port Elizabeth Salt Pan Co 1918 EDL 261).

3.6.2.3 The legal representatives are also ordered not to reproduce the record they had inspected.

3.6.3 It is common cause that in the consolidated appeal of the Appellants, the objections raised by the Respondent are not merely confined to points of law but have shown to have traversed the merits as well.

3.6.4 The parties have raised a plethora of issues for consideration by this Tribunal. However, in our view, many of the arguments advanced by the parties relate to issues on the merits which ought to have been properly dealt with by the Tribunal during the hearing of the main consolidated appeal.

3.6.5 Whilst the Tribunal remained reluctant to accept the modular nature of the grounds of appeals when there was a considerable risk that the isolation of significant issues for early decision was unlikely to be truly dispositive of the proceedings as a whole, it was conscious that appeals of this nature resorted to a tribunal was to use it as a adjudication mechanism for its speed, informality, cheapness, accessibility and expertise which it can provide.

3.6.6 Here, it is also cardinally important to have regard to Guardian National Insurance Co Ltd v Searle NO 1999 (3) SA 296 (SCA) at 301A-C, where the following was stated:

'As previous decisions of this court indicate, there are good grounds for a basic approach which avoids piecemeal disposal of the issues in litigation. It is unnecessarily expensive and generally it is desirable, for obvious reasons, that such issues be resolved by the same court and at one and the same time.'

3.6.7 In Consolidated News Agencies (Pty) Ltd (in liquidation) v Mobile Telephone Networks (Pty) Ltd and Another 2010 (3) SA 382 (SCA) the court said the following:

"*[89] Before concluding we are constrained to make the comments that follow. Piecemeal litigation is not to be encouraged. Sometimes it is desirable to have a single issue decided separately, either by way of a stated case or otherwise. If a decision on a discrete issue disposes of a major part of a case, or will in some way lead to expedition, it might well be desirable to have that issue decided first.*"

3.6.8 This Tribunal has previously warned that in many cases, once properly considered, issues initially thought to be discrete "are found to be inextricably linked. And even where the issues are discrete, the expeditious disposal of the litigation is often best served by ventilating all the issues at one hearing. It therefore had to be satisfied that it is convenient and proper to try an issue separately'. Whilst not in the interest of justice to have a piecemeal adjudication of litigation, with unnecessary delays resulting from the raise of procedural points on issues which would not finally dispose of the litigation (see Cloete and Another v S; Sekgala v Nedbank Limited [2019] ZACC 6; 2019 (5) BCLR 544 (CC); 2019 (4) 268 (CC); 2019 (2) SACR 130 (CC), the Tribunal was bound to interfere to attain justice.

3.6.9 This Tribunal thereto aptly ruled on 04 December 2024 that the Respondent's refusal to provide the Appellants' legal representatives with all the data and calculations underpinning the cascading method and any formulae used in its calculation be dealt with and canvassed in one hearing so that the Tribunal, at the conclusion of the case, may decide whether to dispose of the matter in its entirety.

3.6.10 This Ruling which is in respect of an application brought by the Respondent, however, is not disposing of any substantial part of any final relief claimed, but a mere procedural step in relation to another interlocutory application, namely the application by the Appellants to compel, and ancillary to the Appellant's main appeal pending in this Tribunal. The Tribunal, however, was duty bound to decide, as a matter of law, whether the resistance to disclosure of the documents based on confidentiality, should prevail, and whether the Respondent should be compelled to produce the documents so required by the Appellants. It therefore remained open to the Respondent to oppose the application to compel which it so did by filing an affidavit in terms of Directive 25(3)(b)(ii) of the Port Directives.

3.6.11 It must be appreciated that one of the most pressing reasons for the creation of tribunals such as this one, is costs. From an appellant point of view, the Tribunal is more accessible because it is cheaper to apply to them, and usually a speedier process. The characteristics of speed and cost are consequently interlinked, and contribute to each other.

3.6.12 In the spirit for which the Ports Regulator Tribunal was established it is therefore the view of the Tribunal that there should be a single trial of all

3.6.13 In considering this, the Tribunal also asked itself four questions:

3.6.13.1 are those issues still to be tried readily capable of determination in isolation from the other disputed issues?

3.6.13.2 has a clear saving in Tribunal time and costs been identified?

3.6.13.3 would a modular trial order result in any prejudice to the parties? And

3.6.13.4 is the application a device to suit the Respondent or does it

genuinely assist the litigation by helping to resolve the issues.

3.6.14 Given due consideration to aforesaid the Appellants' appeal succeeds and the hearing into the merits in the main appeal is set down for 28 and 29 July 2025.

3.7 **Costs**

3.7.1 Costs are reserved.

4 DISPUTE ON THE WEGO CASCADE POLICY MODEL (CPM)

4.1 The matter was set down for 17 and 19 September 2025, 25-26 September 2025, with arguments heard on 03 December 2025 in order for the Tribunal to hear argument against and in favour of the following:

4.1.1 the lawfulness of implementing CPM;
4.1.2 the rationality of implementing CPM;
4.1.3 the practicality of implementing CPM.

5 SUMMARY OF EVIDENCE AND THE ARGUMENTS BETWEEN THE APPELLANTS AND THE RESPONDENT

5.1 Captain Vernal Jones was the first factual witness to be called by the Respondent. He is employed as the regional manager responsible for the performance management and terminal oversight. This relates to monitoring performance in terms of the types of agreement with terminal operators, namely the Terminal Operator License and the Terminal Operator Agreement. He confirmed that he is familiar with the weighted Efficiency Gains from Operation (WEGO) and the Cascade Policy Methodology (CPM). However, he is not involved with the implementation or formulation of the CPM. He did confirm that the WEGO imposes penalties on the TNPA if certain key point indicators are

not met or improved upon. This penalty is dealt with through the tariff regime. Adv. Wallis was the first to cross examine Captain Jones. Captain Jones agreed with Adv. Wallis that in respect of each terminal operator they have slightly different parameters, slightly different containers, slightly different operational environments. Captain Jones was not present in any of the consultations that took place with the Appellants by Adv. Wallis. He could not comment on Adv. Wallis' suggestion that his clients did not understand the formula underpinning the CPM. Adv. Wallis then took him through the various types of cargo and cargo stream.

5.2 Mr Simphiwe Hadebe was the next witness for the Respondent. He is employed by the TNPA in route, rail and intermodal processes. Prior to that he worked as an information specialist at head office. His function was to assist the port in determining the performance KPIs that are measured across the port system including the KPIs that the terminal operators are measured on. He is a qualified industrial engineer. He professed to be familiar with the CPM.

5.3 Adv. Pammenter reiterated part of his opening statement to the effect that the WEGO measures the performance of the TNPA against certain key point indicators (KPIs). The first KPI, according to Adv. Pammenter, measured vessel service delays for the terminal operators as well as the marine services.

5.4 Mr. Hadebe confirmed that WEGO measures historical best performance. Regarding vessel service delays he noted that one looks at delays. One would also look at the margin service delays in terms of the percentage of vessels that were delayed against the historical best performance. This is measured against the actual planned best time. When attributing the cause for delays it could mean that the terminal operators were not ready to receive the vessel or if it's marine services, it would mean that the marine craft was unavailable due to breakdowns.

It could also be due to the pilot not being ready. Further, he pointed out, when calculating vessel service delays , no consideration is given to delays that may be caused by third party agencies like SAMSA.

5.5 Mr. Hadebe also stated that ship working hours is a KPI that measures total productive hours during total productive hours. If one is looking at the period of a quarter then one would look at the vessels handled in the quarter and the volumes that were handled in that quarter as well as the sum of working hours. When asked by Adv. Pammenter who should be responsible for an extension in ship working hours his answer was that it could be the terminal operator. Focus then shifted to the third KPI, namely best productivity. This KPI measures volumes handled divided by the time the ship is alongside the quay. Poor performance in this regard could be attributed to the TNPA in terms of mooring and unmooring.

5.6 Adv. Pammenter then examined the fourth KPI, namely the ship productivity indicator. This KPI measures the total volumes handled during the total time of the ship in ports. It also includes the activities that are conducted by the third parties and government agencies. The fifth and final KPI to be examined was ship turnaround time. This is measured from the vessel stay in port measured from breakwater in until breakwater out. Delays in this instance could be ascribed to TNPA in terms of pilot as well as mooring and unmooring.

5.7 Terminal operators and government agencies could also be implicated. Mr. Hadebe affirmed that the KPIs were identified by the Ports Regulator of South Africa after an extensive consultation process with the Ports Consultative Committees where the PRSA sought input into the KPIs. Mr. Hadebe then took the tribunal on an excursus during which he pointed out how penalties were allocated, using the case of Astron Energy. Thereafter he focused on how the penalty or incentive was allocated to operators in the liquid bulk industry in the port of Durban. Mr. Hadebe

further confirmed that using the same methodology the same exercise can be done in respect of dry bulk, break bulk, containers and motor vehicles. He further opined that the share of each terminal in other cargo streams can be calculated using the same formula.

5.8 Similarly, he could compute all the penalties imposed on Astron Energy in respect of liquid bulk at the different ports. At each of the consultation sessions convened by TNPA the terminal operators were furnished with documents, and also allowed to ask questions and make suggestions. As a result of the correspondence received from the affected parties a change was made to the allocation matrix. Adv. Pammenter referred to a letter written by the then chairperson of the Ports Regulator expressing a concern that if there was no speedy resolution between the authority and the terminal operators there would be adverse consequences for the cargo owners. Mr. Hadebe also confirmed his familiarity with the pro forma invoices issued by the TNPA in October, however he emphasized that they were revised and sent our later in March.

5.9 First to cross-examine Mr. Hadebe was Adv. Mullins. He sought confirmation from Mr. Hadebe on the issue of representations received from the parties and not aligning with his view of WEGO or its cascading not being considered. Mr. Hadebe duly confirmed this. Mr. Hadebe was further asked to confirm that it is the liability of an individual operator for a penalty or incentive depends entirely on the performance of that terminal operator. His response was that there are instances where the operator's performance is calculated at a group level or a cargo stream level. Adv. Mullins pressed him to explain how the KPI is determined on a group level or cargo stream level. Mr. Hadebe's response was that the terminal operator would have contributed to the stream performance then the performance is distributed evenly. This elicited an enquiry from Adv. Mullins as to whether the operators are penalized based on their own personal performance or on the fact that they were present at the port. Mr. Hadebe's response was that in some instances performance is

calculated at a stream level. According to him there are KPIs that cannot be calculated at the individual terminal operator level.

5.10 He referenced his own previous evidence to the effect that there are terminal operators sharing a vessel which is a factor when calculating turnaround time. And that was because it is impractical at times to calculate KPIs specific to a terminal operator. Mr. Hadebe also testified to the effect that the CPM was revised to align directly with the WEGO methodology. Adv. Mullins then sought clarity on whether the revised methodology was revised before the message sent out to the terminal operators before the 11th March 2022. He further put it to Mr. Hadebe that he could not expect the operators to have understood what was revised in March 2022, considering that consultations were held in October, November, December 2021. Mr. Hadebe's response was that the revisions were also consulted on, but couldn't explain exactly when this happened. Adv. Mullins pressed Mr. Hadebe on the fact that Richard's Bay Coal Terminal was fined R 6 million for vessel service delays when it did not cause any such delays.

5.11 Mr. Hadebe professed ignorance as to whether this Appellant in fact contributed to vessel delays and consequently could not comment on the justification for the penalty. Mr. Hadebe repeatedly stated that in order to give a clear answer to this question he would need to survey the data. Adv. Mullins would have none of this explanation and insisted that it was in fact the TNPA methodology that was the culprit. In so doing he referred Mr. Hadebe to a letter written by the Chief Executive Officer of the PRSA which asserted that cascading any penalty must be consistent with the continuous improvement programme and not merely cascading. This letter was addressed to the Chairperson of the National Ports Consultative Committee. Mr. Hadebe said he was not 100% in line with those sentiments. Adv. Wallis indicated, when it was his turn to cross examine, that he would cover the same ground as Adv. Mullins because he represented different parties, Mr. Hadebe confirmed that he

reported directly to Mr. Avish Sinnath. Referring to the affidavit of Mr. Sinnath, Adv. Wallis highlighted the part where it says that the terminal operators who failed to reach KPIs or contributed to the failure should be penalized and those who contributed to improved efficiencies should be incentivized.

5.12 Mr. Sinnath's submitted evidence in chief further indicated that the cascade policy sought to recover from those defaulting operators only that portion of the WEGO penalty for which they are responsible. In this sense, the cascade policy did not seek to get money from them that is due to another operator's default. This theme was taken up by Adv. Wallis in a few other iterations. The evidence of Mr. Hadebe, it was put to him, was inconsistent with the affidavit of Mr. Sinnath. Mr. Hadebe also confirmed that each terminal operator would sit down with the operator and through a process of negotiation set particular KPIs for the operator. Mr. Hadebe was in agreement with this proposal. The reason for so negotiating is because of the peculiarities of each terminal. Mr. Hadebe also confirmed that in each terminal operator agreement and terminal operator license there is a provision entitling the Authority to impose penalties. This is provided for in Clause 14. Pursuing this theme Adv. Wallis pointed out that the TNPA had never thought it necessary to impose penalties for non-performance or poor performance on any of his four clients.

5.13 The response from Mr. Hadebe was that he could not agree that the TNPA never thought so. This is because the CPM is not in total agreement with the TOPS. This response did not find agreement with Adv. Wallis. Asked to point out a single instance of an investment that was made consequent upon the WEGO penalties Mr. Hadebe was at a loss. It was put to Mr. Hadebe that a witness for the Appellants, Mr. Leisegang, would aver on behalf of RBCT that investments were made by reason of TOPS. Mr. Hadebe also confirmed that the allocation matrix was

fundamental to the process of the CPM. He further confirmed that if the allocation matrix is wrong then every calculation that follows is wrong. Even if mathematically it is correct the outcome could be wrong. Mr. Hadebe was referred to the earlier evidence of Captain Jones that one of the targets is wrong. In this instance Captain Jones was referring to the pilotage figure of the port of Saldanha Bay was wrong. Captain Jones made this observation of the cuff. Not content with Mr. Hadebe's response which he failed to fully understand, Adv. Wallis put it to him that everything in the allocation matrix was an assumption, with the exception of vessel calls. When it was queried by Adv. Wallis why the matrix did not use actuals Mr. Hadebe stated that they wanted to remain consistent but because they could not get data for all ports they used assumptions.

5.14 Mr. Hadebe agreed that targets were used for ship turnaround time. This target is established by looking at previous performance in terms of breakwater in and breakwater out for the particular cargo streams. Adv. Wallis referred to the BRT berth in Durban which is a common user berth, meaning that two terminal operators can use it simultaneously, with each operator providing its own hoses etc. For safety reasons it is necessary that two hoses be plugged in at the same time because it's a pressurized system. This does not necessarily mean that both hoses have product flying through the system. The connection may be for safety reasons. The conclusion is that ship working time is from the first hose that goes on. It ends when the last working hose is removed. Ultimately the ship working time on a common user berth is shared. Mr. Hadebe agreed that it is not possible for the TNPA to work out the ship working out time is for an individual terminal operator that is on a common user berth.

5.15 Mr. Hadebe agreed. He further asked whether, according to Mr. Hadebe, the Appellants were aware from the onset that the CPM had imperfections and still accepted it. The answer was in the negative. He qualified his answer by saying that the matter was discussed extensively

in the PCCs as well as in some of the correspondence exchanged with the individual terminal operators. Such impracticalities according to Mr. Hadebe could be put down to the KPIs which cannot be measured at individual operator level. It was also Mr. Hadebe's response that the failure by the TNPA to take the WEGO on review considering its perceived weaknesses was not within his competence to explain. Adv. Pammenter, during re-examination, suggested to Mr. Hadebe that if a terminal operator believes that it is prevented or delayed from performing its obligations it cannot notify the Authority and request a relaxation to which Mr. Hadebe agreed. Mr. Hadebe further opined that there is no alignment between TOPS and WEGO. Asked by Adv. Pammenter to comment on the submission by Adv. Wallis that operators get a clean bill of health under TOPS but not under the CPM he said this is no surprise to him. This is because performance outcomes are different. Regarding the invoices there was subsequent consultation and final invoices were issued in line with the revised methodology.

5.16 Mr. David Leisegang was then called to the stand by Adv. Wallis. By agreement among the parties he was the last of the witnesses described as factual witnesses after whom expert witnesses were to be called. He is a chartered accountant who has been employed by Bidvest Tank Terminals at Island View storage for over 10 years. Bidvest Tank Terminals uses three berths at Island View, all of which are common user berths. At Island View Bidvest Tank Terminals only handles imported vegetable oils, base oils and the like. An individual vessel can have in excess of 10 hoses connected to it. Very high risk products can only be handled one at a time. His attention was drawn to a clause in its TOPS which entitles TNPA to impose penalties after two years of non-performance. TNPA has never suggested that it would do that and, in fact , has commended Bidvest Tank Terminals at Richard's Bay. This is as a result of Bidvest Tank Terminals having exceeded its TOPS performance indicators. This happened in the year they were penalized. Finally he stated that BTT has never made any

investment based upon the CPM. It was also Adv. Pammenter's contention that an operator could reduce any penalty it faced if it improved its performance. Mr. Leisegang took issue with the evidence of Mr. Hadebe to the effect that there is no alignment between TOPS and WEGO.

5.17 All the Appellants saw no need to call factual witnesses. The first expert witness, Mr. Jacob Muller, was called by the Respondent. Adv. Pammenter's evidence in chief focused on his expert report. The main thrust of his report was the penalties and incentives in terms of the CPM on both the TNPA and terminal operators and overall port system efficiency. Additionally he also considered whether the CPM had been considered correctly and consistently when calculating the 2024 May invoices. In revisiting his report Mr. Muller had regard to the report submitted by the expert witness for the Appellants, Prof Mncube. He prefaced his evidence with the observation that the two reports differ quite materially in respect of the approach. His marching orders were to assess the economic effects of the CPM whereas the Professor was instructed to assess the logic of the underlying data. He deemed the difference in scope to be crucial. His analysis found that while the CPM is not perfect it is likely to yield higher overall port system efficiency compared to a world without it.

5.18 Adv. Pammenter referred to a joint minute that was drawn by themselves setting out the differences. Mr. Muller then went through the key outcomes from that minute, the first one being around the counterfactual framework which, in his view, is the central difference in the approaches. Adv. Pammenter, during re-examination, suggested to Mr. Hadebe that if a terminal operator believes that it is prevented or delayed from performing its obligations it cannot notify the Authority and request a relaxation to which Mr. Hadebe agreed. Mr. Hadebe further opined that there is no alignment between TOPS and WEGO. Asked by Adv Pammenter to comment on the submission by Adv. Wallis that

operators get a clean bill of health under TOPS but not under the CPM he said this is no surprise to him. This is because performance outcomes are different. Regarding the invoices there was subsequent consultation and final invoices were issued in line with the revised methodology. Mr. David Leisegang was then called to the stand by Adv. Wallis. By agreement among the parties he was the last of the witnesses described as factual witnesses after whom expert witnesses were to be called. He is a chartered accountant who has been employed by Bidvest Tank Terminals at Island View storage for over 10 years.

5.19 Bidvest Tank Terminals uses three berths at Island View , all of which are common user berths. At Island View Bidvest Tank Terminals only handles imported vegetable oils, base oils and the like. An individual vessel can have in excess of 10 hoses connected to it. Very high risk products can only be handled one at a time. His attention was drawn to a clause in its TOPS which entitles TNPA to impose penalties after two years of non-performance. TNPA has never suggested that it would do that and, in fact, has commended Bidvest Tank Terminals at Richard's Bay. This is as a result of Bidvest Tank Terminals having exceeded its TOPS performance indicators. This happened in the year they were penalized. Finally, he stated that BTT has never made any investment based upon the CPM. It was also Adv. Pammenter's contention that an operator could reduce any penalty it faced if it improved its performance. Mr. Leisegang took issue with the evidence of Mr. Hadebe to the effect that there is no alignment between TOPS and WEGO. All the Appellants saw no need to call factual witnesses.

5.20 The first expert witness, Mr. Jacob Muller was called by the Respondent, Adv. Pammenter's evidence in chief focused on his expert report. The main thrust of his report was the penalties and incentives in terms of the CPM on both the TNPA and terminal operators and overall port system efficiency. Additionally, he also considered whether the CPM had been

considered correctly and consistently when calculating the 2024 May invoices. In revisiting his report Mr. Muller had regard to the report submitted by the expert witness for the Appellants, Prof Mncube. He prefaced his evidence with the observation that the two reports differ quite materially in respect of the approach. His marching orders were to assess the economic effects of the CPM whereas the Professor was instructed to assess the logic of the underlying data. He deemed the difference in scope to be crucial. His analysis found that while the CPM is not perfect it is likely to yield higher overall port system efficiency compared to a world without it. Adv. Pammenter referred to a joint minute that was drawn by themselves setting out the differences.

5.21 Mr. Muller then went through the key outcomes from that minute, the first one being around the counterfactual framework which, in his view , is the central difference in the approaches. Whilst Mr. Muller emphasized the need set out in the joint statement to take the counterfactual approach Adv. Pammenter lamented that Prof Mncube's approach does not include any explicit consideration of what the counterfactual ought to look like. In his counterfactual, Mr. Muller stated, he took into account TOPS as TOPS does not exist independently of CPM. The counterfactual as he explained is the world where everything remains the same as in the actual except for the CPM being removed. Mr. Muller then went through the five KPI's. These being the basis on which improvement or deterioration is measured in the port system efficiency relative to previous best performance. The CPM, informed the hearing, is in large part a reversal of the WEGO methodology. Seeking to clarify the allocation matrix, in the light of Mr. Hadebe's and Captain Jones evidence, he stated that the allocation matrix splits out the KPI in proportion to the ability of each player to influence that KPI performance. Adv. Pammenter sought clarity on how, absent there being a cascading down of weaker incentives and or penalties, that would affect the performance of terminal operators. The reply was that

an improvement in the efficiency of the port system benefits all players. Further clarity was sought on the inherent limits of contracts to promote vertical efficiencies.

5.22 Economic theories, according to Mr. Muller, tells us that vertical contracts can promote efficiencies in vertical supply chain context. By doing this the CPM enhances terminal operator's incentives to enhance port system efficiency. He went on to say that the CPM cannot be compared to some idealized type of CPM because that type of CPM can never exist. Prof Liberty Mncube was called by the Appellants as an expert witness. Adv. Wallis who led him put six propositions to him, to which he agreed. Firstly, that the correctness of the calculation depends on the accuracy of the allocation matrix. Secondly that the CPM as implemented does not attribute penalties based on actual performance of the terminal operators. During cross examination Adv. Pammenter first focused on the different mandates that were given to Mr. Muller and Prof Mncube by their clients. He further put it to Prof Mncube that, having been around since 2024 the CPM cannot be said to have failed. Prof Mncube agreed. Prof Mncube also explained how the two steps of his report were constructed.

5.23 Adv. Pammenter put it to Prof Mncube that the differences in their approaches affected the outcomes of the two experts' reports to which the Professor agreed on, the subject of inefficiencies Adv. Pammenter put it to Prof Mncube that they could be caused by government agencies or third parties, customs and excise. This proposition was accepted by Prof Mncube subject to the qualification that in the present context at the Durban Harbour they are, in the majority, caused by the TNPA. Later Prof Mncube took issue with Mr. Mueller's characterisation of horizontal externalities, identifying them as an issue in theory. Prof Mncube also did not accept that the CPM encourages improved performance by terminal operators.

6 EVALUATION OF THE EVIDENCE AND SUBMISSIONS

6.1 The overriding complaint of the Appellants is that the CPM was designed, or is implemented in a manner that cascades penalties imposed by the Ports Regulator of South Africa and does nothing to improve performance. Indeed no evidence could be produced by the Respondent to rebut this assertion, save to say that the CPM has been in existence for a year or so. The Appellants also lamented the fact that in the process different types of cargo were aggregated when computing the CPM when, in fact, they should have been dealt with in isolation. Once again the evidence seemed to favor the Appellants. If Mr. Hadebe is to be believed, and there is no reason not to, new invoices were served on the Appellants after extensive consultation. It should be of grave concern that the invoices still penalized parties that should, in fact, have emerged unscathed.

6.2 Equally it is regrettable that at one stage Adv. Pammenter characterized the penalties as "minuscule amounts ". In our assessment that misses the point, namely that such errors should be eliminated. We agree with Adv. Pammenter that it is unrealistic to expect a perfect Methodology. That having been said it is still incumbent on the designers of the methodology to render it as flawless as possible. The evidence reveals that on the same day RBTT received a commendation for good performance it also had a fine imposed on it. This state of affairs borders on absurdity. Mr. Leisegang's view was that the outcomes of the CPM are illogical, an apt observation. Mr. Mueller testified to the effect that in the counterfactual the CPM does not exist independently of TOPS while Mr. Hadebe opined that the CPM and TOPS do not align.

6.3 It is, to emphasize, a red herring to state, as Mr. Mueller stated, that there can be no idealized CPM. There is, we would aver, no expectation by the Appellants that the CPM should be idealized. Regarding the evidence of the experts Proposition 9 of their joint minute seems to

underlie the differences in their approaches. Prof Mncube believes that a more relevant counterfactual would be one with a redesigned CPM which would take into account individualized data. This position did not find favor with Mr. Muller. Adv. Pammenter correctly described the imposition of an R 6 million penalty on RBCT as egregious. A methodology that produces such egregious results requires a very intense and detailed re-design.

6.4 Quite often the greater good is invoked by the Respondent. This suggests that such errors should be considered, however egregious, to be part of a work in progress which will, in the long run, work out to everyone's benefit. However such an attitude does not attract sympathy for two reasons. Explicitly Adv. Pammenter states that this situation would have been averted if the Appellants had been more co-operative. This is an unfortunate exercise in blame shifting. Secondly, Adv. Pammenter avers that such levies (and not penalties) should be par for the course because "this is the only way to do business ". This Tribunal is not convinced that this is the only way to do business. At no stage did the consultation process consider alternatives.

6.5 It is also open to question what, against this background, would have been the value of the consultation process in as much as it was apparently confined to fine tuning the methodology and not a sincere and detailed exploration of the problem and optimum solutions. This query was not raised by the Appellants and we cannot take the matter any further. In the premises it is doubtful that, left to its own devices, the TNPA will self-correct in creating a more reliable methodology. Adv. Pammenter resorted to the analogy of tax where the rich subsidize the poor. In the present context where cross-subsidization is viewed with disfavor such an analogy is unfortunate. A fair amount of the Respondent's difficulties was ascribed by Mr. Hadebe to the five KPIs that are at times apparently unknowable. In our view the correct approach to this scenario would be to revisit them with the Ports Regulator or, at

worst, to take them on judicial review. Grafting an additional methodology to what is deemed to be unsatisfactory in the first instance appears to be compounding problems unnecessarily so.

6.6 The appellants submits that before issuing a directive under section 61 (1), the Authority must give notice to the affected licenced operator indicating the intention to issue the directive, setting out the reasons why it is considering issuing the directive and affording the operator a reasonable opportunity to make representations as to why the directive should not be issued as required in section 61(2) of the Act. The Notice is a condition precedent that must be fulfilled prior to the exercise of the power to issue a directive. The exercise of this power depends on the existence of such prior notice which is a jurisdictional fact.

6.7 The appellants further submit that not only does the use of the peremptory term "must" signal that the provision is mandatory but the object sought to be achieved (compliance with *audi alteram partem*) shows that the intention of the Legislator was to visit non-compliance with nullification or put differently the exercise of the power to issue a directive depends upon the existence of prior notice and if there is not notice the exercise of the "power" to issue a directive in terms of section 61(1) would be unlawful. The power did not in law exist.

6.8 A person can only be said to have a fair and meaningful opportunity to make representations if the person knows the substance of the matter in respect whereof administrative action is to be taken. This is so because a person affected usually cannot make worthwhile representations without knowing what factors may weigh against its interests. To give effect to the right to a fair hearing an interested party must be placed in a position to present and controvert evidence in a meaningful way.

6.9 On 14 March 2022, the appellants received a letter from the Authority dated 11 March 2022. The Authority's issued Terminal Operator Performance Management Directive for the Penalty and Incentive

Model (the "CPM Directive") would come into full force and effect on 1 April 2022; wherein the Authority notified that, Terminal Operators were afforded an opportunity to make further representations in respect to the Authority's 11 March 2022 notice on or before 16:00 on 25 March 2022.

6.10 On 25 March 2022, the appellant (FPT Port Leasing) objected to the implementation of the CPM Directive on 1 April 2022 and to the amendment of its terminal operator licences on several procedural and substantive grounds.

6.11 The principle of *audi alteram partem* is enshrined in section 61(2) of the Act which obligates the Authority, before issuing a directive, to give written notice to the licenced operators of its intention to issue a directive with reasons why it is considering to do so and affording the operators a reasonable opportunity to make representations as to why the directive should not be issued.

6.12 The appellants submits that in terms of section 61(1) directives may be given to ensure reliability of the supply of port services and facilities. The CPM has nothing to do with ensuring the reliability of the supply of port services and facilities and everything to do with merely a cascading of WEGO.

6.13 The Appellants argues that evidence shows that the Authority was aware of imperfections and inaccuracies in the CPM and its application before the penalty invoices were issued to the terminal operators. These imperfections and inaccuracies were not disclosed to the terminal operators during the consultative process in the answering affidavit nor the confidentiality application. Even should it be accepted that the terminal operators were afforded opportunities to make representations such opportunities would have been mere lip service to these requirements as to the knowledge of the Authority there were undisclosed errors, inaccuracies and imperfections, the Authority would

not determine the penalties against individual performance as set out in the CPM Directive and that without the applied data the terminal operators were unable to discover the errors, deficiencies and the like and therefore there was a failure of compliance with the *audi* requirement from the outset.

6.14 The appellants stated that the Authority took a decision to proportion penalties to terminal operators in the form of the CPM Directive. On 14 March 2022, the Authority sent the issued CPM Directive to terminal operators, affording them an opportunity to make representations before 16:00 on 25 March 2022. As the consultation process had, on the Authority's own version, already been concluded by 11 March 2022, before terminal operators were invited on 14 March 2022 to make representations, terminal operators were not afforded a reasonable opportunity to make representations as to why the directive should not be issued, as required by section 61(2)(c).

6.15 Based on the above, it is evident that the Authority did not fully comply with the requirements of section 61(2)(c) of the Act.

7 REASONS FOR THE ORDER ISSUED BY THE TRIBUNAL

7.1 The tribunal's reasons for the above order are as follows:

7.1.1 The CPM model was not supposed to have just "merely cascaded" the WEGO penalties as per the warning letter written by the former CEO, Ms. Johanna Mukondeleli Mulaudzi, the letter which is dated 14 September 2023. It was clear to the tribunal though that the authority clearly cascaded WEGO penalties through "reverse engineering" of the WEGO methodology as per the explanation during the hearing.

7.1.2 In the evidence submitted, some of the calculations of penalties to individual terminal operators were "aggregated" and done at "group level or cargo stream level". This fundamentally does not represent a

true reflection of individual terminal operator penalty calculation(s) as seen in the example of RBCT. This 'maybe' due to the point in paragraph 42.3 below.

7.1.3 Although KPIs are negotiated extensively through PCCs and NPCC and selected thereof, there is no proper alignment between terminal operators' KPIs vs TNPA KPIs vs WEGO KPIs. For all practical purposes, this directly results in the differences in measurements. An attempt was made by the former CEO, Mr. Pepi Silinge through the letter dated 11 March 2022 to align them but that exercise merely resulted in the insertion of certain clauses in the terminal operators' agreements as opposed to aligning the KPIs mentioned above.

7.1.4 Due to lack of validated and accurate volumes' data, any calculation including the calculation of penalties will be rendered unreliable. Volumes are key components of the calculations in this instance and their absence as testified during the case, invalidate the entire exercise.

7.1.5 The testimony submitted by Captain Vernal Jones for all ports demonstrated that in the allocation matrix, hours allocated to pilotage-in (2 hours in each port), mooring time (0,5 hour per port), berth arrival waiting time (0,3 hour per port) as well as pilotage-out time (1, 5 hours per port) are in fact "desired/planned" hours and NOT actual hours. These hours therefore render the whole allocation matrix inaccurate as the hours used are hypothetical as opposed to using real hours.

8 HAVING CONSIDERED the pleadings, submissions, and evidence before the Tribunal, the following orders are made:

8.1 The appeal of the Appellants is upheld.

8.2 All invoices issued by the Respondent against the Appellants in relation to this matter, on or about 30th of April 2024 and 2nd May 2024 are hereby

set aside.

8.3 The Respondent is ordered to pay all costs of the Appellants on scale C, inclusive of the cost of two counsel in the cases of all Appellants, except in the case of the sixth Appellant (FPT), in which case costs of only one counsel will be payable.

Signed at **Durban** on the **27 May 2026**.



A. Ngcobo
Chairperson



R. Setlako
Tribunal Member



P. Mangoma
Tribunal Member



P. Manzini
Tribunal Member