GAUTENG DIVISION, PRETORIA

CASE NO: CC 82/2017

(1) REPORTABLE: **YES**
(2) OF INTEREST TO OTHER JUDGES: **YES**
(3) REVISED.

1 April 2019

.....

SIGNATURE

In the matter between:

UZANI ENVIRONMENTAL ADVOCACY CC Prosecutor

And

BP SOUTHERN AFRICA (PTY) LTD Accused

as represented in terms of s332(2)

of Act 51 of 1977 by Mr Robert Sazi Mfeka)

JUDGMENT

SPILG, J:

25 March 2019

INTRODUCTION

1. Pursuant to being granted leave on 29 June 2017 by Judge President Mlambo, Uzani Environmental Advocacy (CC) ("*Uzani*") instituted a private prosecution against BP Southern Africa (Pty) Ltd *("BP")* out of the Gauteng Division.

   Uzani claimed that it had complied with all the legislative requirements set out in s 33 of the National Environmental Management Act 107 of 1998 ("*NEMA* ") to enable it to initiate such a prosecution. As appears later this was put in issue

2. Counts 1 to 21 of the indictment alleged that BP had contravened s 22(1) read with ss 21(1) and 29(4) of the Environmental Conservation Act 73 of 1986 ("*ECA*") read with Item 1(c) of Schedule 1 and Schedule 2 of the Regulations promulgated in terms of that Act under Government Notice R1182 of 5 September 1997 ("*GN R1182*"). [1]

   Counts 22 to 42 alleged the commission of certain acts of common law fraud.

3. After the combined writ of summons and indictment had been served the Judge President directed that the matter be provisionally enrolled on 4 September 2017.

HEARINGS

Hearing of 4 September 2017 (Pre-Plea issues)

4. At the hearing of 4 September a number of pre-trial issues were dealt with and the following order was made by consent; omitting certain unnecessary provisions it reads :

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[1] Schedule 1 of the regulations identified the activities which the Minister determined under s 21 of ECA may have a substantial detrimental effect on the environment.
The correspondingly numbered provisions in Schedule 2 fixed the date from when the provisions of the notice would commence in respect of each activity mentioned in Schedule 1.
The body of the Regulation explained that it did not apply to an activity that was commenced prior to the fixed date.

1. *In the event that the prosecution by Uzani Environmental Advocacy (CC) ("Uzani") is competent the representative of BP Southern Africa (Pty) Ltd ("BP") as identified in the indictment is replaced by Ms Julia Stewart*

2. *In respect of counts 22 to 42;*

    a. *it is recorded that Uzani has not obtained a nolle prosequi and has not provided security for costs and contends that it does not require either as it is pursuing the prosecution under s 32 of NEMA*

    b. *Uzani will on or before 11 September 2017 notify BP and the court in writing whether or not it intends pursuing counts 22 to 42 and if not what it contends should happen in respect of any costs arising from a withdrawal;*

    c. *If Uzani withdraws counts 22 to 42 and the costs consequences contended for by Uzani are disputed then BP will on or before 13 November 2017 notify Uzani and the court in writing as to its contentions regarding costs;*

3. *In respect of all counts:*

    a. *It is recorded that Uzani relies on having complied with s 33(2) of NEMA*

    b. *Uzani will on or before 11 September 2017 provide such documentary proof as it possesses that it has complied with ss 33(2)(b) and (c) of NEMA;*

c. *BP will on or before 13 November 2017 indicate in writing whether it contends that Uzani has failed to comply with the provisions of s 33 (2), on the assumption that s 33(2) is applicable*

4. *Uzani will on or before 11 September 2017:*

a. *Provide copies of all the statements and documents it proposes to produce and rely upon as well as all documents in its possession which are relevant as referred to in para 5(a) of the letter from BP's attorneys dated 14 August 2017;*

b. *Furnish a written response to para 5(b) of the said letter together with its list of witnesses indicating whether it is a final list or not;*

c. *Furnish a written response to para 5(c) of the said letter and provide such documentation it contends it is obliged to produce and state why it objects to produce any other*

5. *BP will on or before 13 November 2017 list in writing and notify Uzani and the court of:*

a. *All pre-plea applications, including production of documents and request for particulars it intends to bring*

b. *All s 106 pleas it intends to raise*

c. *All constitutional issues it intends to raise*

6. *Both Uzani and BP will on or before 13 November 2017 in writing notify each other and the court of when it is intended that BP is to plead to*

the charges under s 105 and s 106 and whether the s106 pleas may be dealt with separately

.... ..

Hearing of 11 November 2017

5. The course of proceedings immediately after the order of 4 September was dealt with in a decision handed down on 13 November 2017 and need not be repeated in full.[2]

   In summary:

   a. On 11 September 2017 Uzani withdrew the fraud charges (counts 22 to 42) as it had to since it relied solely on the provisions of NEMA for its right to prosecute. These counts relied on an alleged contravention of an ordinary common law crime which fell outside the special dispensation afforded by NEMA, in which case it would first have been necessary to obtain a *nolle prosequi* from the State under the Criminal Procedure Act 51 of 1977 (*the CPA"*) which had not been done.

   b. Uzani indicated that it would call the then newly appointed head Gauteng Province's Department for Agriculture and Rural Development *("GDARD")* to testify in relation to BP's application in terms of s 24G of NEMA for the twenty-one filling stations listed in the indictment and to testify to his and the department's competencies and mandate under the applicable environmental legislation.

   c. On 9 November, which was two court days before the hearing of 13 November, BP produced the plea it would be tendering when the time came for it to answer to the charges. It consisted of a plea of not guilty

[2] See *Uzani Environmental Advocacy CC v BP Southern Africa (Pty) Ltd [2017] ZAGPPHC 749*

under s 106(1) (b) of the CPA and also a plea under s 106(1)(h) that Uzani had no title to prosecute BP. BP relied on a number of grounds for its special plea.

d. BP also contended that:

> " *In light of the Private Prosecutor having brought the prosecution, and having brought the Accused before court, it is appropriate that the Accused be allowed to plead to the remaining charges, Counts 1 to 21, in court on 13 November 2017"*

In a subsequent paragraph of its response to the order of 4 September BP added that it was not only appropriate but also necessary to plead to the charges which it would do at the hearing on 13 November "... *as required by sections 105 and 106 of the CPA*".

e. At the hearing of 13 November *Adv Hellens* on behalf of BP persisted that it was entitled to plead to the charges there and then. *Adv Burger* on behalf of Uzani claimed that it was not yet ready to put the charges to BP under s 105. A further issue arose at that hearing when Uzani's tender to pay the wasted costs occasioned by the withdrawal of the fraud charges on the party and party scale was rejected. BP contended that it was entitled to costs on an attorney and own client scale.

f. I declined BP's application to have the charges read out there and then. I also considered that it was premature to determine the scale at which Uzani should pay the costs for withdrawing the common law fraud charges. As mentioned earlier the reasons for my decision have been previously given in a reported decision.

6. BP was dissatisfied with Uzani's contention that it was not in possession of any witness statements and that it had delivered to BP all relevant documents which were in its possession. BP therefore brought an application to compel the

production of sworn witness statements, alternatively such notes of consultations with witnesses as were in Uzani's possession.

BP contended that a prosecution could not proceed unless the private prosecutor has witness statements or notes of the evidence that the witness intends to give. It also indicated that other arguments would be raised centred on among other things its fair trial rights and entitlement to fully and adequately prepare for trial.

7. Uzani delivered an answering affidavit explaining that officials from GDARD had failed to co-operate which compelled Uzani to subpoena its head to produce the relevant documents and to give evidence. Uzani also advised that it would approach the court in early January 2019 to issue a subpoena compelling the attendance of the GDARD witness in order to take a statement.

8. These issues and a number of others were then catered for a court order which covered *inter alia* the delivery of the amended indictment, an objection that would be dealt with procedurally as if it were an objection under s 85 of the CPA and that BP would formally plead to the charges at the next hearing. The salient parts of the order read:

> *1. Uzani ... is to deliver to BP ... any amended indictment by no later than a date to be determined, after hearing counsel, which shall be prior to the date of the hearing of the application to compel documents.*
>
> *2. The application to compel documents will be dealt with procedurally in the same manner as the delivery of particulars in terms of s 87 of the ... CPA and after hearing counsel the court will determine dates for the filing of affidavits and the hearing of the application prior to BP pleading under s106 of the CPA.*
>
> *3. Within a period to be determined, after hearing counsel, BP shall be entitled to exercise its rights under s 85 of the CPA to object to the charge prior to pleading and a date for such hearing will also be determined.*

4. If BP does so object then a date will be determined, after hearing counsel, by when any documents are to be delivered and when such objections will be heard.

5. If BP does not so object then Uzani shall put the charges to BP on the same date determined for the disposal of any objections and BP shall plead thereto in accordance with s 106 of the CPA

6. The determination of the dates will be made on 13 November 2017 and immediately after this ruling is handed down

7. Uzani shall pay the wasted costs occasioned by the withdrawal of counts 22 to 42 however the scale on which such costs are to be paid will be reserved for determination at the conclusion of the trial

9. On the following day and by agreement between the parties an order was made in the following terms:

1. Uzani … is to deliver to BP any amended indictment by no later than15 December 2017.

2. The application to compel documents will be dealt with procedurally in the same manner as the delivery of particulars in terms of s 87 of the CPA and;

a. Uzani is to file an answering affidavit by 15 December 2017;

b. BP is to file its replying affidavit if any by 31 January 2018;

3. The application to compel documents is to be heard on 20 March 2018 and the court has indicating that it will deliver judgment within two weeks of that date

4. *BP shall be entitled to exercise its rights under s 85 of the CPA to object to the charge by;*

    a. *giving notice thereof on or before 13 April 2018*

    b. *delivering its application by 4 May 2018*

5. *If BP does so object then the objections will be heard on 18 May 2018.*

6. *If BP does not so object then on 18 May 2018 Uzani shall put the charges to BP in terms of s 105 of the CPA and BP shall plead thereto in accordance with law.*

Hearing of 16 May 2018

10. BP then brought an application to compel the production of certain documents, a s85 objection under the CPA to the introduction in the amended indictment of count 10 to an attached schedule of charges and an application in terms of section 342A of that Act based on allegations of unreasonable delay.

11. On 20 April Uzani produced certain documents which included draft witness statements and on 23 April BP withdrew its application to compel.

12. At the commencement of the hearing on 16 May 2018 Mr Mfeka was formally substituted for Ms Stewart as BP's representative in terms of s 332(2) of the CPA.

13. The s 85 objection was then heard. It related to an additional charge which appeared in the amended indictment delivered in December 2017 in respect of the BP Riverside garage in Nelspruit (count 10). This increased the number of charges to 22 whereas Uzani had claimed that it was pursuing only 21 charges relating to the alleged environmental offences.

After receiving the objection Uzani withdrew this count claiming that it was inserted in error[3]. In my view BP could simply have enquired as to whether Uzani intended to pursue this charge instead of embarking on a substantive application as the charge was not contained in the original indictment nor did the body of the amended indictment contend that anything more than 21 counts were being proffered.

It is therefore unnecessary to consider the basis on which the objection was raised, which itself would have created some difficulties for BP.

14. The application under s 342A was brought on the grounds that there had been unreasonable delay in prosecuting the trial. BP sought an order striking the case from the roll alternatively certain of the older charges which accounted for 15 of the 21 counts.

15. BP contended that eight months had passed before it was given the entire docket and that it had still not received any witness statements.

However prior to the hearing and on 17 April Uzani produced a witness statement in the form of an affidavit by the head of GDARD and BP intimated that it would not proceed with the s 342A application but would be seeking costs of the application on the attorney and own client scale.

16. At the hearing Adv Burger referred to ss 33(2) and (4) of NEMA which deal with private prosecutions and in particular the latter provision which in its terms makes no provision for the award of costs in interlocutory proceedings.

For sake of completeness s 33(4) reads:

> *The accused may be granted an order for costs against the person prosecuting privately, if the charge against the accused is dismissed or*

[3] See para 15 of Answering Affidavit

the accused is acquitted or a decision in favour of the accused is given on appeal and the court finds either:

(a) that the person instituting and conducting the private prosecution did not act out of a concern for the public interest or the protection of the environment; or

(b) that such prosecution was unfounded, trivial or vexatious.

17. It was therefore evident that the court could not deal with costs at this stage if Uzani was entitled to initiate the prosecution; and having regard to the factual aspects raised by the defence, the question of whether it was entitled to prosecute could only be decided once evidence had been led at the trial itself.

PUTTING OF CHARGES AND PLEA

18. A final amended indictment was prepared and the charges were formally put to BP under s 105 of the CPA

The indictment

19. The salient portions of the indictment are set out in the following paragraphs.

20. Uzani identified itself as the prosecutor and asserted that it was a person as defined in s 1 of NEMA, which, *"in the public interest and/or in the interest of the protection of the environment*", was entitled to institute and conduct a prosecution "*in respect of any breach or threatened breach of any duty in any National or Provincial Legislation or Municipal Bylaw, or any Regulation, licence, permission or authorization issued in terms of such legislation, where that duty is concerned with the protection of the environment and the breach of that duty is an offence."*

21. As previously mentioned it claimed to have complied with the provisions of Section 33(2) of NEMA.

22. The preamble to the indictment is important since according to Uzani it contains the substantial facts on which Uzani relies and which it was required to provide in terms of s 144(3)(a) of the CPA. It reads:

WHEREAS at all times relevant to the charges:

1. Section 28(1) of NEMA imposes a duty on every person who causes, has caused or may cause significant pollution or degradation of the environment to take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring, or, insofar as such harm to the environment is authorised by law or cannot reasonably be avoided or stopped, to minimize and rectify such pollution or degradation of the environment.

2. The aforesaid duty, in terms of Section 28(1A) of NEMA also applies to a significant pollution or degradation that:

2.1. occurred before the commencement of NEMA;

2.2. arises or is likely to arise at a different time from the actual activity that caused the contamination; or

2.3. arises through an act or activity of a person that results in a change to pre-existing contamination.

3. In terms of Section 28(2) of NEMA, and without limiting the generality of the aforesaid duty, the persons on whom subsection (1) imposes an obligation to take reasonable measures, include an owner of land or premises, a person in control of land or premises or a person who has a right to use the land or premises on which or in which:

3.1. any activity or process is or was performed or undertaken; or

3.2. any other situation exists,

which causes, has caused or is likely to cause significant pollution or degradation of the environment.

4. In terms of Section 28(3) of NEMA, the measures required in terms of subsection 28(1) may include measures to investigate, assess and evaluate the impact on the environment.

5. In terms of Section 24F (1) of NEMA no person may commence an activity listed in terms of Section 24(2) (a) of the same Act unless the competent authority has granted an environmental authorisation for the activity. One of the activities listed in GN R387 of 21 April 2006 in terms of Section 24(2) (a) is the construction of filling stations, including associated structures and infrastructure, or any other facility for the underground storage of dangerous goods, including petrol and diesel.

6. Section 22(1) of the Environment Conservation Act 73 of 1989 ("ECA") stipulates that no person shall undertake an activity identified by the Minister in terms of Section 21(1) of ECA ("a Controlled Activity") or cause such a

Controlled Activity to be undertaken except by virtue of a written authorization issued by the Minister or by a competent authority or a local authority or an officer, which competent authority, local authority or officer shall be designated by the Minister by notice in the Gazette.

7. Section 22(2) of ECA further stipulates that the aforementioned authorization shall only be issued after consideration of reports concerning the impact of the proposed activity and of alternative proposed activities on the environment, which shall be compiled and submitted by such persons and in such manner as may be prescribed. Such reports involve investigation, assessment and evaluation of the impact on the environment.

8. The Minister, in terms of Government Notice R1182 of 5 September 1997 declared that as from 2 March 1998 the construction or upgrading of transportation routes and structures and manufacturing, storage, handling or processing facilities for any substance which is dangerous or hazardous and is controlled by National Legislation as an activity which may have a substantial detrimental effect on the environment.

9. Petroleum and/or petroleum products are dangerous, hazardous substances which are controlled by national legislation, inter alia the Petroleum Products Act, 120 of 1977, the Hazardous Substances Act, 15 of 1973 and Government Notice R1382 published in Government Gazette 15907 of 12 August 1994 in terms of the aforesaid Act read with the South African Bureau of Standards' Code of Practice 0228: The identification and classification of dangerous substances and goods.

10. In terms of Section 29(4) of ECA any person who contravenes a provision of section 22(1) of that Act shall be guilty of an offence and liable on conviction to a fine or to imprisonment.

11. The Accused, conducting business inter alia in the construction and establishment of filling/service stations and in the supply of petroleum products to filling/service stations during the periods and places specified in Counts 1 to 21, constructed and/or upgraded filling/service stations being storage, handling or processing facilities for petroleum and/or petroleum products. The construction and/or upgrading were done without reports concerning its impact compiled and submitted by the accused in terms of Section 22(2) of ECA and without the written authorization of the Minister responsible for environmental matters or a competent authority or a local authority or an officer designated by the Minister.

12. The Prosecutor relies on the provisions of Section 250(1) of the Criminal Procedure Act 51 of 1977.

23. The charges then follow and are formulated as follows:

(T)he Accused is guilty of:-

COUNTS 1 to 21: Contravening Section 22(1) read with Sections 21(1) and 29(4) of the ECA and Item 1(c) of Schedule 1 and Schedule 2 of Government Notice R 1182 of 5 September 1997.

IN THAT

During or about the dates mentioned in column 2 and at or near the addresses mentioned in column 3 of the Schedule hereto marked "X", the accused wrongfully and unlawfully undertook or caused to be undertaken an activity identified as one which may have a substantial detrimental effect on the environment to wit the construction and/or upgrading of the filling/service stations mentioned in column 3 of the Schedule hereto without the written authorization of the Minister responsible for environmental matters or a

competent authority or a local authority or an officer designated by the Minister.

WHEREFORE THE PROSECUTOR prays for judgment according to law against the accused.

An amended schedule was attached setting out the 21 counts in conformity with the contents of the indictment.

Plea to the charges

24. BP formally pleaded to the charges. Its plea is divided into two sections. The first is a plea under s 106(1)(h) denying Uzani's entitlement to prosecute and the other is a plea of not guilty under s 106(1)(b)

25. The plea is contained in a written document signed on 16 May 2018 and is less extensive than the pro-forma plea produced on 9 November 2017 to which reference was previously made.

The basis of the plea of "*no title to prosecute*" is set out in Section A and reads:

1. *The Accused pleads in terms of section 106(1)(h) of the CPA, that the Private Prosecutor has no title to prosecute the Accused for any of the charges before this court on the basis that –*

1.1. The purported notice given to the Director of Public Prosecution ("DPP") as required in terms of section 33(2) of NEMA, dated 28 January 2016, is defective; and

1.2. There has not been compliance with the requirements of section 33[2) of NEMA and section 8 of the CPA.

1.3. Furthermore, the Accused specifically denies that the private prosecution is in the public interest or in the interest of the protection of the environment as specifically required by section 33(1) of NEMA.

1.4. The plea in terms of section 106(1)(h) is furthermore made with reference to section 24G(4) of … NEMA, which specifically limits the right to prosecute, arising from the submission of an application in terms of section 24G(1) of NEMA, to the National Prosecuting Authority. Therefore, private prosecutions are not permissible in the context of section 24G of NEMA.

26. As it was its right, BP elected not to tender an explanation in respect of the s 106(1) (b) plea.

THE TRIAL

27. Evidence was led on 11 September and continued through to the 18th with the exclusion of the 14th.

28. The prosecution first led the evidence of Prof Izak Jacobus van der Walt. He was followed by Mr Gideon Erasmus.

29. The prosecution then attempted to rely on s 212(3) of the CPA to introduce affidavit evidence by the departmental head Mr Nhlakanipho Nkontwana. BP objected and after hearing argument on 13 September I ruled that:

1. In terms of s 212(3) of the … the Act the affidavit of Mr Nhlakanipho Nkontwana, the current Head of the Gauteng Provincial Department of Agriculture and Rural Development, deposed to on 23 April 2018 is admitted as prima facie proof of its entire contents including the

contents of annexure A thereto to the extent that they relate to the accused.

2. *In terms of s 212(12) of the Act Mr Nkontwana is hereby subpoenaed to give oral evidence before this court sitting at the High Court in Johannesburg .... on Tuesday 18 September 2018.*

3. *Furthermore such subpoena shall be duces tecum, requiring Mr Nkontwana to produce, subject to para 4, the records to which he has made reference in the said affidavit save that it will be unnecessary for him to produce the original register (i.e. annexure A) unless requested to by any party.*

4. *The actual utilisation of a document in the said records by the witness, whether in response to any question or of his own volition, shall be subject to any argument by either party as to the competency of its reception into evidence, which includes the competency of this court to include such an order whether under s 212(12), s 167 or s 186 of the Act.*

5. *The obligation to subpoena and any cost incurred in securing the attendance of Mr Nkontwana under law shall be borne by the prosecution.*

6. *If Mr Nkontwana has already been subpoenaed to attend court in these proceedings, then such subpoena shall constitute compliance with para 2 of this order (save that the venue shall be at the High Court in Johannesburg) and furthermore it shall be sufficient for the purposes of para 3 of this order if its contents are brought to his attention in any*

reasonable manner, subject to Mr Nkontwana's right to claim any prejudice or incompetence in the adoption of such procedure.

Mr Nkontwana attended court on 18 September and was then called by the prosecution to give evidence.[4]

30. The defence closed its case without leading any evidence.

31. During the course of the trial the court received a number of exhibits, in certain cases on a preliminary basis. However by the end of the proceedings all exhibits were finally admitted into evidence. They were:

A. – The curriculum vitae of Prof van der Walt

B. - A series of documents numbered pp1 to 58, containing correspondence between Erasmus (in his capacity as the attorney for Uzani) on the one hand and the Director of Public Prosecutions for both the then North and South Gauteng areas (based in Pretoria and Johannesburg respectively) on the other. The various letters are dated 28 January 2016, 13 April 2016 with attachments, 20 May and 15 June 2018 also with attachments.

One of the attachments to the correspondence consists of extracts from the statutory register maintained by the Gauteng Department of Agriculture and Rural Development ("GDARD") under Regulation 5 (3) of the EIA Regulations promulgated in terms of GN R 982 of 4 December 2014 under NEMA, which it could not be disputed deals with all applications under

[4] In this judgment reference is made to GDARD being threatened with a subpoenas in order for Uzani to consult with its official and prepare the witness statement insisted upon by the accused. While the court accepts that there may be good reason to insist on a PAIA application, the apparent need to threaten a subpoena and the reluctance of the GDARD head to attend court when he was evidently able to do so suggests that the Department may not fully appreciate that NEMA requires transparency and accountability by those tasked with administering environmental management and also requires an acceptance of the significant role and contribution to environmental management that the public, and particularly public interest groups, can play in furthering the objects of the Act.

s 24G of that Act including those which preceded the promulgation of the regulation.[5]

C. – This is annexure CW3 of BP's application of 10 November 2017 to compel the production of documents. It includes a letter from Ms Corinaldi written purportedly on behalf of Uzani to a BP retailer regarding BP's alleged contravention of NEMA.

D. – A mandate dated 27 January 2016 given to Uzali CC by Marndre Beleggings CC. Marndre was the proprietor of a Zenex filling station situated at the corner of Jean and Gerhard Streets in Centurion

E. – An extract from Chapter 2 of the South African Law Commission's Report containing a definition of a public interest action.[6]

F. – A cession agreement dated 7 January 2016 between Uzali CC, represented by Erasmus and Uzani Foundation NPC.

G. It comprised:

G1- being a letter dated 13 December 2017 from the Companies and Intellectual Property Commission (*"CIPC")* confirming changes to Uzani's members with an accompanying CK2 form recording the additions of Mr FD Conradie and Mr MG van Greuning to those of Erasmus and FCJ van Schalkwyk.

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[5] Reg 5(3) of GN R982 dated 4 December 2014 promulgated under NEMA provides:

> 5 (3) A competent authority must keep-
> (a) a register of all applications received by the competent authority in terms of these Regulations;
> (b) a register of all decisions in respect of environmental authorisations;
> (c) copies of all applications; and
> (d) copies of all decisions.

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[6] South African Law Commission Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law Report of August 1998. It was chaired by the late Justice I Mahomed.

G2- being a certificate issued by the CIPC dated 10 September 2108 reflecting information contained on its database regarding BP. It includes the list of directors, auditors and changes to these and other statutory details

H. – The s 212(3) affidavit of Mr Nkontwana, the head of GDARD, together with an annexure marked A.

I. – A letter of 14 September 2018 from Erasmus Attorneys to Warburton Attorneys enclosing:

a. The Foundational documents of Uzani including its Memorandum of Incorporation, certificates confirming change of name and appointment of directors as well as a current certificate of compliance

b. The Manifesto/Charter of the Uzani Foundation NPC; and

c. Additional mandates similar to Annexure D received from owners of filling stations alleged to be potentially affected by BP's actions.

J. – A covering letter from the Law Society of the Northern Provinces dated 14 September 2018 explaining the removal and reinstatement of Erasmus from the roll of attorneys as well as an application by Erasmus in June 1995 for re-admission to the roll of attorneys together with annexure A. Annexure A was the original urgent application brought in April 1986 by the then Attorneys Association of the Transvaal for striking Erasmus' name from the roll of attorney. It was couched in the form of a *rule nisi* returnable some four months later pending the substantive relief for his striking-off. Erasmus' application for re-admission was incomplete as not all the annexures were attached.

K. – A letter dated 28 February 2006 from Mills & Otten CC, who are environmental consultants, addressed to the Gauteng Department of Agriculture, Conservation and Environment ("*GDACE*").

L. – A letter of 28 August 2006 from the Office of the MEC of GDACE to BP.

M. – A series of documents containing the successful application for the upliftment of Erasmus' suspension from practice as an attorney. It includes Erasmus' application of 19 July 2011 and the transcript of the proceedings before Tuchten J on 31 October 2011 for the grant of the order.

Exhibits J through to L were those initially received into evidence on a provisional basis.

32. At this stage it is convenient to read certain extracts from three of the documents.

Exhibit D which is the mandate obtained by Uzani's predecessor, Uzali, from Marndre Beleggings on 29 January 2016 reads:

1. *Uzali CC … has embarked on the private prosecution of … BP in terms of section 33 of … NEMA for the unlawful construction and/or operation of the BP Jean Avenue filling station.*

2. *Section 34 of NEMA provides that a Court may, on conviction, determine and/or award certain compensation and/or damages to the affected persons in addition to and/or instead of fines.*

3. *It has been agreed that, pursuant to BP's conviction:*

   3.1 Uzali will, at its exclusive risk and cost, attempt to prove and recover such damages as may have been suffered by the proprietors of filing stations and/or compensation to which they may be entitled;

3.2 In return for funding and pursuing the prosecution and recovery aforementioned Uzali will be entitled to 25% … of all and/or any monies recovered on behalf of Marndre Beleggings …

In acknowledgment of which, I, the undersigned

PJ Lourens

in my capacity as duly authorised representation of

Marndre Beleggings CC

being the proprietor of the

Zenex Jean Avenue filling station

situated at c/o Jean & Gerhard Streets, Centurion (.."the proprietor")

herewith:

- *unconditionally, irrevocably and exclusively authorise Uzali and/or its nominee to prove, recover and receive on the proprietor's behalf all and/or any damages and/or compensation as envisaged above to which the proprietor may be entitled;*

- *undertake to provide Uzali with all such information related to sales at the proprietor's filling station aforementioned as Uzali may require for purposes of the prosecution and/or recovery;*

- *agree to abide by the expert determination of pro-rata damages and/or compensation due to each affected filling station by Mr French van Heerden as represented to the Court during the prosecution:*

- *confirm that the variation of the terms set out herein will be valid or binding unless reduced to writing and signed or otherwise assented to in writing by all concerned parties.*

Dated at Centurion on this the 29th day of January 2016.

The members of Uzali are identified at the foot of the first page as Erasmus and FCJ van Schalkwyk.

Exhibit I27 and I30 are the additional mandates found by Erasmus. The second one is incomplete but would replicate the first since they both are from the same standard document bearing the printed date of 21 January 2016. They are an earlier version of Exhibit D, although only by a week. Exhibit D bears the printed date 27 January 2016.

Save in two respects Exhibit I27 was is substantially identical to Exhibit D. The first distinction is that in the earlier version (i.e. Exhibit I27) Uzali was entitled to retain 50% of the amounts recovered on behalf of the proprietor not 25% as provided for in the later version.

The other difference is an additional clause in the earlier mandate form which provided that the proprietor agreed;

> *"that even in the event of the cancellation of this mandate, Uzali shall be entitled to prove the damages and/or loss aforesaid and to (50% fifty percent) of all/and or any monies then or subsequently recovered by or on behalf of the said proprietor."*

Despite being printed on 21 January it was also signed on the same date as Exhibit D, namely on 29 January. Exhibit I27 was signed by the proprietor of a filling station located in Lyttleton.

The contents of Exhibit F, which is the cession between Uzali and Uzani Foundation NPC also bear mentioning at this stage. It is dated 7 January 2016 and records that Uzali ceded to the Foundation;

1. *the entirety of all awards that any Court may make to it or any of its members in terms of section 34B of … NEMA; and*

2. *the entirety of all or any benefits that may accrue to the close corporation* (i.e. Uzali) *pursuant to a judgment by any Court in terms of sections 34(1) and 34(2) of NEMA*

CASE FOR THE PROSECUTION

Prof van der Walt

33. Prof van der Walt gave evidence regarding the need for environmental authorisation prior to a filling station being erected and why authorisation post-construction adopts lower standards to those demanded by a pre-construction Environmental Impact Assessment Report ("*EIA*"). His evidence was in the nature of expert evidence.

34. According to the professor, authorisation post-construction requires the receipt of a rectification report which accepts that refusing a s24G application was not really an option because it could result in job losses. The process of sanctioning a post-construction application under s 24G is therefore qualitatively inferior to the more rigorous requirements required under an EIA.

35. The professor explained the approach adopted by the environmental legislation which, in its application, entails an evaluation of the biophysical risks involved and also the public's entitlement to participate in the process.

36. He testified that it only required a relatively small volume of fuel to pollute a large area of groundwater and that once pollution occurs it is effectively irreversible. This evidence was given with specific reference to underground storage tanks.

37. The professor was challenged on his claim that post-construction approval under s24G was inferior to that required pre- construction. The professor stood his ground and BP did not attempt to bring contradicting expert testimony.

In my view the reasoning provided by the professor, based on his empirical knowledge in the field, is reliable and should be accepted. I also do not believe that his evidence was an attempt to intrude on the court's function of interpreting legislation but rather provided a factual framework from which the court could appreciate the function and purpose of the legislative requirement for administrative approval in respect of the construction or upgrading of a filling station.

Mr Erasmus

38. Erasmus was called in order to explain the objectives of Uzani, to support Prof van der Walt's evidence and to demonstrate his passion for and extensive involvement in environmental affairs. Obviously he was also called to prove Uzani's entitlement to pursue the prosecution.

39. The purpose of BP's cross-examination was to show that Uzani had a direct pecuniary interest in the litigation which resulted in prosecutorial bias and that the purpose of the prosecution was not to achieve the objects of NEMA but was exploitative for the personal enrichment of Erasmus. It also sought to demonstrate that Erasmus could not be entrusted with the responsibility of litigating on behalf of others and the court should not exercise its powers to enable him to do so.

To these ends BP sought to demonstrate that the purpose of the prosecution was to advance Erasmus' personal interests and that he had been struck from the roll of attorneys for misappropriating client's trust monies.

40. At the outset it was necessary to warn oneself in respect of Erasmus' testimony. He did not enter the witness box as an independent witness or a dispassionate outsider. He is also the driving force behind Uzani.

41. In his evidence in chief Erasmus confirmed that he was a practicing attorney, that Uzani qualified as a juristic person which fell within the provisions of s 33(1) of NEMA and sought to prove through correspondence with the Director of Public Prosecutions (DPP) of both the then North and South Gauteng Divisions that they had received proper notice under s 33(2) of NEMA of Uzani's intention to initiate a private prosecute against BP.

42. The defence did not cross examine Erasmus on the first two aspects. However he was subjected to vigorous cross-examination on the issue of whether Uzani had properly notified the prosecuting authorities in its notice of 20 January 2016 (Exhibit B1-36) of its intention to embark on a public prosecution of BP if the DPPs failed to respond.

43. Erasmus conceded that the body of the notice of 20 January 2016 did not mention that Uzani intended to prosecute BP. He however sought to rely on the annexure attached to the notice.

    The annexure consists of some 32 pages of documents constituting a register maintained by and obtained from GDARD. It contains well over a thousand entries which self-evidently relate to an application brought by each of the entities listed under one of the columns in respect of the sites identified in another column. Save for a few of the pages which do not concern BP:

    a. The first column is headed "*S. Num" and* is consecutively numbered. The numbers relevant to BP are 1035 to 1101:

    b. Then follows a column headed "*DACE Ref*" containing a reference commencing "*S24/G/2/"* followed by what appears to be a unique number:

       In the case of BP the references are consecutively numbered from S24/G/2/1047 to S24/G/2/1113, conforming with the 67 entries in the register relating to BP.

    c. The third column is headed "*Property-Description*" and identifies the sites in question either by title deed description or physical address.

d. The fourth column is headed "*Applicant*". It identifies a large number of corporations ranging from cellular service providers and mining companies to petroleum companies and local authorities. Each entities applications tend to be grouped together. As previously mentioned all BP applications are exclusively grouped in the batch of numbers from 1035 to 1101.

e. The final column is headed "*Activity No*". In this column are found a number with or without a letter. The final column of the first row reads "*2c, 10*".

   In respect of the BP applications mentioned in rows 1035 to 1101 "*to a man*" all 67 entries in the final column read simply "*1c*".

44. Under cross-examination Erasmus explained that "*1c* " in the last column of all the BP applications listed in the register refers to the activity unlawfully commenced by it and corresponds with the regulation number for that offence contained in GN R1182 of 5/9/1997 promulgated under ECA. [7]

45. Erasmus added that anyone with even a passing knowledge of environmental law would have no difficulty in understanding the references and the precise nature of the offence in respect of which the application was being made. It was also self-evident that the application was a rectification application under s 24G (2) as appears from the entry in the second column.

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[7] The unlawful; activity identified under Schedule 1 of Regulation 1182 of 5 September 1987 as 1(c) reads:

1. *The construction, erection or upgrading of-*

...

(c) *with regard to any substance which is dangerous or hazardous and is controlled by national legislation-*

(i) *infrastructure, excluding road and rails, for the transportation of any such substance; and*

(ii) *manufacturing, storage, handling, treatment or processing facilities for any such substance;*

46. It is unnecessary to read out the wording of the notice of 28 January 2016 sent on behalf of Uzali to both DPPs. Suffice that it expressly states that the attachment (marked annexure A) is a copy of the registrar of applications in terms of s 24G of NEMA as provided by GDARD in terms of the Promotion of Access to Information Act 2000. The notice adds that s 24G of NEMA deals with persons who "*have admittedly acted in breach of the applicable environmental legislation" and* that the letter constitutes notice of Uzani's intention to privately prosecute "*all the applicants listed in the hereto attached schedule …"* .The underscoring of the word "*all"* appeared in the body of the letter itself and ought to have been self-evident.

47. The letter itself is headed:

> *"NOTICE IN TERMS OF SECTION 33 OF … NEMA: PRIVATE PROSECUTIONS OF ENVIRONMENTAL OFFENDERS THAT HAVE APPLIED FOR RECTIFICATION IN TERMS OF SECTION 24G OF NEMA"*

Once again it is difficult to conceive of anything clearer.

48. The notice added that the prosecution is to be brought in the public interest and in the interest of those who have suffered damage or loss as a result of the unlawful actions which led to "*the individual applications in terms of section 24G"*

49. The response on 29 March from the DPP's offices in Pretoria was to ask for the police reference to each complaint lodged including the name of the investigator, the accused's name and the charges. The DPP also asked time to study the cases Uzani (at that time Uzali) intended undertaking "*in order to make an informed decision".*

50. Erasmus replied on 10 May and emphasised that Uzani was invoking the provisions of s 33 of NEMA to institute and conduct a private prosecution, referred to the GDARD register which he repeated contained "*a full list of the cases to be prosecuted including details of the statutory provisions that have been breached and the names of the offending parties."* The letter then set out verbatim the wording of ss 33(1) and (2) of NEMA and sought to assist the DPP

by again repeating that Uzani will "*deal only with accused who have formally admitted to having committed the environmental offences they are to be charged with*".

The letter concluded by indicating that, if the DPP considered it prudent, Erasmus would "*gladly meet*" to discuss the matter at the DPP's offices.

51. A meeting was then held on 16 May. It is evident that Erasmus gave the assurance that the prosecution would only be in relation to offences in respect of which applications for rectification had been made in terms of s 24G prior to or during 2010 and that once this;

> *"'backlog' of unprosecuted historical offences has been addressed ... further prosecutions will make up only a small part of what Uzani does with the focus shifting more firmly to;*
>
> *3.4.1. the Uzani Foundation's incubator for young environmental lawyers, practitioners and entrepreneurs; and*
>
> *3.4.2 the envisaged Uzani Virtual School for Environmental Governance, Law and Entrepreneurship."*

52. In the letter to the DPP-Pretoria of 20 May 2016 Erasmus advised that Uzani would replace Uzali as the prosecutor and emphasised that it did not intend to usurp the functions of the prosecuting authority but rather that, in relation to historic s 24G applications for rectification, appropriate circumstances existed where private environmental prosecutions would complement prosecutions by the NPA. It was added that in relation to post-2010 environmental offences Uzani would precede any possible private prosecution by laying criminal charges with SAPS and that Uzani would provide its support in relation to research, data, evidence in aggravation of sentence and representations on behalf of victims of environmental crimes.

53. The letter of 20 May to the DPP-Pretoria also addressed what was considered to be the mistaken view that a s 33 of NEMA notice meant a process similar to a motion application.

Then follows a telling paragraph which records that notice had previously been given during 2012 in respect of the same offences which were to form the subject of the first intended Uzani prosecution and that after discussion with the DPP-Johannesburg the private prosecution commenced with the leave of the President of the Gauteng Regional Court in the Johannesburg Regional Court. A copy of the relevant summonses were attached.

It was then explained that after four continuances the matter was not proceeded with "*due to lack of resources given the approach adopted by the accused. That situation has now been redressed*". Various correspondence between Erasmus with the NPA during 2012 was attached.

54. On 15 June 2016 the DPP-Pretoria replied. I am satisfied that the DPP was unable to meaningfully address the contents of Erasmus' letter of 20 May and in particular the precedent set when the DPP-Johannesburg acceded to Uzali's institution of a private prosecution in respect of the same offences based on the same representations.

I am also satisfied that the DPP-Pretoria was then compelled to resort to obfuscating the issues by harping back on the provisions of s 8 of the CPA and stating that in order to consider withdrawing his right to institute and conduct a prosecution "*in any matter, in terms of section 8 … (inclusive of environmental crimes) I need to apply my mind on information under oath i.e. evidence usually contained in a SAPS docket… ".*

55. The DPP-Johannesburg (Adv Chauke) adopted a slightly different tack. On 15 February 2016 and in response to the initial notice he required to know the factual basis on which Uzali claimed that the private prosecution might be in the public interest, whether any of the alleged offences were reported to the police

and whether any Public Prosecutor had declined to prosecute any contravention under NEMA.

56. Erasmus replied on 3 May 2016. He referred to the events which occurred when a similar notice had been sent in 2012 and that Adv Chauke had personally attended a meeting in the company of Adv Roberts SC also of the DPP with Erasmus pursuant to which the President of the Gauteng Regional Court granted leave for the private prosecution and that Adv Chauke was subsequently informed that the trila had commenced.

57. The letter continued by mentioning that no further explanation appeared necessary where there has been a disregard of environmental laws which place people and the environment unnecessarily at risk and which is by definition contrary to the public interest. It did however indicate that the private prosecution intended to include fraud or perjury charges against the intended accused.

58. The DPP-Johannesburg addressed a letter on 10 May which opened with the following:

> "*I have taken note of the contents of your letter.*
>
> *There exists no need for any meeting at this stage. By virtue of Section 33 of NEMA, you are only entitled to prosecute for environmental matters. Other crimes are excluded and other provisions are applicable for private prosecutions."*

The balance of the letter dealt with enquiries exclusively directed at the fraud and perjury matters.

59. During cross examination Adv Hellens quickly demonstrated that Erasmus, at least as an attorney intimately involved with Uzani, had already tried to solicit financial support from competitor filling stations on the basis that they could either

benefit directly from a successful criminal prosecution or could pursue civil claims for damages through his firm if Uzani's prosecution was successful.

60. Exhibits C and D were introduced during his evidence, and later Exhibits 127 to 30. The contents of Exhibits D and I27-30 have already been mentioned. Exhibit C contains a series of communications between Corinaldi who describes herself as a petroleum industry consultant and the proprietor of another BP filling station situated in Zambezi Drive.

In the communications Corinaldi was clearly soliciting the proprietor in order to obtain a mandate similar to either exhibit D or I27 in order to assist Uzani in funding the prosecution and allow it to make a claim for any losses sustained to the proprietor if there was a successful prosecution.

The emails explain that the proprietor was approached because it operated a BP filling station the revenues of which may have been affected, according to Uzani, by the alleged unlawfully constructed of the Jean Road filling station by BP. The email mentioned that Erasmus himself would set up a meeting with the proprietor.

61. Erasmus was clearly embarrassed about the events which led to his removal and later again suspension as an attorney. It was only through persistent questioning that he was compelled to concede that he had appropriated trust funds and that only those who pursued claiming were repaid which puts into question his credibility. For instance he first claimed that he had abandoned his practice in 1985 and was readmitted in 1995 The facts were that he had been struck from the roll because he had misappropriated trust funds in an amount of some R122 000, had been convicted of theft of this amount in the Regional Court and sentenced to a fine of R25 000 or to four years imprisonment plus an additional two years suspended on certain conditions.

62. He also alleged that he was inactive from practice from about 2002 or 2003 until 2011. It turned out that during this period he was suspended by the Law Society because of shortfalls in his trust account which included making out a trust cheque to bearer and failing to account to clients for trust monies.

By the same token he however was not questioned on whether there was any attempt previously, when Uzali initiated the 2012 prosecutions, to obtain financing or recover amounts under a mandate from owners of filling stations.

Erasmus maintained that any financial benefits which may be received by Uzani pursuant to the mandate, or which it may be awarded directly, had been ceded to the Uzani Foundation which in turn would utilise these funds exclusively for the purpose of advancing a number of environmental causes.

63. It should also be recalled that Erasmus' own involvement dated back to the ECA and included providing input in respect of NEMA legislation including its regulations as well as promoting that Act. He had also headed the Development Studies department at UNISA where one of his subjects was environmental conservation.

Erasmus also stated that he had extensive experience in applications brought to authorise the construction of filling stations yet confirmed that he had never seen any experts report contained in a rectification report pursuant to a s 24G application.

Head of GDARD; Mr Nkontwana

64. Mr Nkontwana's evidence was effectively contained in his s 212 (3) statement.

65. He testified that he was and remains the competent authority in Gauteng in respect of activities that require environmental authorisation prior to commencement and which are identified in terms of ECA and NEMA. He added that he and his predecessors, as head of the department, had all been duly authorised to receive, consider and decide on applications contemplated in s 24G (1) by persons who commenced with a listed activity that falls under GDARD's jurisdiction in contravention of s24F(1) or s 22(1) of ECA because they did not have the required environmental authorisation .

66. Nkontwana stated that GDARD was charged with considering the environmental impacts of such activities and where appropriate, to grant or refuse environmental authorisation for such activity.

67. He also confirmed that in terms of s 24(5) and s 44 of NEMA the Minister of Environmental Affairs had promulgated the Environmental Impact Assessment Regulations, 2014 published under GN R982 (in Government Gazette GG 38282 of 4 December 2014) to regulate the procedure and criteria as contemplated in Chapter 5 of NEMA relating to the preparation, evaluation, submission, processing and consideration of, and the decisions on, applications for environmental authorisations.

68. The witness then explained that annexure X to the indictment constituted the register kept by GDARD under Regulation 5 (3) of GN R982 of 4 December 2014 read together with s 24(5) of NEMA. He confirmed that it constituted a register of all applications received by GDARD in terms of s24G (1) of NEMA. He also confirmed that GDARD keeps a register of all decisions in respect of environmental authorisation.

    He then identified BPs applications in respect of the 67 activities that were said to have been unlawfully commenced without prior environmental authorisation. These included the 21 filling stations listed in the charge sheet.

69. Nkontwana added that he satisfied himself from the records of GDARD as required by s 212(3) of the CPA that BP made application to it in terms of s 24G(1)(a) of NEMA for rectification because it had unlawfully commenced with the activities listed in the register including the construction of the filling stations in question. He then dealt with each application in turn by reference to the date when the construction commenced, when BP made application under s 24G (1) (a), when BP submitted a s 24G rectification report, when BP paid an administrative fine and in what amount and also when GDARD issued an authorisation in terms of s 24G (2) (b) for the filling station in question.

70. The witness also explained that in relation to the filling stations to which counts 3, 4, 7 and 10 related he could find no record of BP submitting a rectification report, paying an administrative fine or of GDARD issuing an authorisation under s 24G(2)(b). In part this evidence accords with the contents of Exhibits K and L, being the letter written by Mills & Otten on 28 February 2006 and the letter from the Department to BP on 28 August 2006 in relation to a reassessment of whether the sites to which the present counts 3and 4 relate required an application for rectification.

71. Under cross-examination Nkontwana accepted that a s 24G application contains the date proffered by an applicant as to when construction of the filling station commenced. He conceded that he had no basis of independent verification and accepted that BP could show through Exhibits K and L that it had discovered on at least two occasions that construction had commenced before the effective date (i.e. 2 March 1998).[8]

72. Nkontwana accepted that the MEC or political section of the Department may have other documents that are not in GDARD's possession. He however contended that the only relevant official documents are those that are in GDARD's possession.

73. In re-examination Uzani sought to hand in the s 24G applications. I refused on the ground that it had the opportunity of doing so at the commencement of its examination but took a deliberate decision not to. Uzani would have been alive to the pros and cons of doing so when it elected not to introduce the s 24G applications that Nkontwana had brought with him; the contents of which Uzani were well aware and knew that BP were similarly apprised.

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[8] See previous footnote: 2 March 1998 was the date fixed by the Minister in Schedule 2 of R 1182 of 5 September 1997 in respect of construction, erection or upgrading activities mentioned in 1(c) which may have a substantial detrimental effect on the environment.

74. I ruled that it could not now change tack when BP was entitled to rely on the election Uzani had made when decided how to proceed with its cross-examination.

THE ISSUES FOR DETERMINATION

75. The first set of issues arise from BP's plea under s 106(1) (h) that Uzani had no title to prosecute. They concern;

    a. Whether the written notice to the DPPs is defective in that it failed to identify the accused or the alleged offence with sufficient accuracy as required by s 33(2) of NEMA;

    b. Whether there was prior consultation with the DPP.

       BP contends that a reading of s 33 (2) of NEMA with s 8 of the CPA requires that a private prosecutor can only exercise a right to prosecute under s 33(1) *after* consultation with the DPP as envisaged by s 8 of the CPA, which would in turn require the DPP to be possessed of sufficient information to make an informed decision.

    c. Whether Uzani has proved that the private prosecution is in the public interest or in the interests of the protection of the environment as required by s33(1) of NEMA;

    d. Whether a private prosecution is permissible within the context of applications made under s 24G of NEMA

76. If Uzani satisfies the court in respect of its entitlement to prosecute then the second set of issues relates to whether Uzani has proven its case beyond a reasonable doubt. In this regard BP raises a preliminary issue regarding whether the offence is one of strict liability or whether *mens rea* or culpability short of that, such as *culpa (*negligence) will suffice. BP contends that Uzani has failed to prove either the *actus reus* or the *mens rea.*

WHETHER UZANI HAS PROVEN ITS TITLE TO PROSECUTE

Defective notice

77. BP submits that the notice in terms of s 33(2) of NEMA was defective because it failed to identify the accused or the alleged offence with sufficient accuracy.

78. Section 33(2) of NEMA provides:

> *The provisions of sections 9 to 17 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) applicable to a prosecution instituted and conducted under section 8 of that Act must apply to a prosecution instituted and conducted under subsection (1): Provided that if—*
>
> *(a) the person prosecuting privately does so through a person entitled to practice as an advocate or an attorney in the Republic;*
>
> *(b) the person prosecuting privately has given written notice to the appropriate public prosecutor that he or she intends to do so; and*
>
> *(c) the public prosecutor has not, within 28 days of receipt of such notice, stated in writing that he or she intends to prosecute the alleged offence,*
>
> *(i) the person prosecuting privately shall not be required to produce a certificate issued by the Attorney-General stating that he or she has refused to prosecute the accused; and*
>
> *(ii) the person prosecuting privately shall not be required to provide security for such action.*

79. It is evident that BP contends that the written notice contemplated in subsection (b) must contain sufficient detail for the prosecuting authority to know who is sought to be charged and with what offence in order for it to decide how to react while no doubt appreciating that by doing nothing it will have effectively abdicated its right to prosecute. This would be the result because in terms of s 33(5) of NEMA:

> *When a private prosecution is instituted in accordance with the provisions of this Act, the Attorney-General is barred from prosecuting except with the leave of the court concerned.*

80. In my view the evidence is clear. The notice covered all the applicants who applied for rectification in terms of s 24G and whose names appear in annexure A to the notice. In the notice the word "*all*" was underlined, thereby clearly identifying that Uzani intended to prosecute every person whose name appeared under the column headed "*applicant*" in annexure A to the notice.

81. Similarly the evidence was clear that a person with a modicum of intelligence would understand what the offence related to, that the DPP-Johannesburg in 2012 had no difficulty in understanding this and at no stage was any clarity sought as to the meaning to be ascribed to the reference to 1(c) or 24G/2 in annexure A despite face to face meetings between Erasmus and the prosecuting authority.

82. Finally the last letter from the DPP-Johannesburg clearly demonstrates that he had no objection to the private prosecution continuing; his only objection related to the proposed private prosecution of the two common law crimes of fraud and perjury.

The consultation issue

83. BP relies on a reading of s 33(2) of NEMA with s 8 of the CPA.

S 33(2) has just been quoted.

84. The difficulty facing BP is that s 33(2) does not say that the provisions of ss 8 to 17 of the CPA apply. It categorically states that only ss 9 to 17 of the CPA apply. The reference to s 8 is simply to contextualise the nature of the prosecution, not to impose its contents as a further requirement which must be complied with. In the most fundamental was 8 of the CPA was replaced *in toto* by 33 of NEMA.

This is also evident from the balance of s 8(2) which requires the prosecuting authority to first withdraw its right to prosecute before a competent private prosecution can commence. The requirement of consultation and withdrawal are mutually dependent.

85. In the context of s 8(2) the consultative process must produce a positive act on the part of the prosecuting authority to withdraw its right to prosecute. In a significant way it is directed at ensuring that the State entertains a meaningful consultative process before taking a decision.

It is difficult to transpose a consultative process in a s 33 NEMA situation without creating more uncertainty and litigation over when the process can be said to have been concluded if there is no decision required from the State; only inaction in the face of a notice that complies with the requirements of setting out sufficient detail to enable the prosecuting authority to make an informed decision.

86. It would also mean that if the consultative process led to an impasse or dragged on interminably the person intending to initiate a private prosecution would first have to approach the court for a declaratory order that the consultative process has concluded or is deemed to have occurred. This can hardly be said to have been within the contemplation of the legislature when it seeks to encourage public participation in securing the protection of the environment. .

For sake of completeness s8 (2) of the CPA provides:

> *A body which or a person who intends exercising a right of prosecution under subsection (1), shall exercise such right only after consultation with the attorney-general concerned and after the attorney-general has withdrawn his right of prosecution in respect of any specified offence or any specified class or category of offences with reference to which such body or person may by law exercise such right of prosecution.*

87. Finally the purpose of allowing a private prosecution under NEMA is self-evident. It is foreshadowed in the Preamble to NEMA:

"WHEREAS many inhabitants of South Africa live in an environment that is harmful to their health and well-being;

- *everyone has the right to an environment that is not harmful to his or her health or well-being;*

- *everyone has the right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that—*

    - *prevent pollution and ecological degradation;*

    - *promote conservation; and*

    - *secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development;*

(emphasis added)

These are not words to be treated lightly.

88. The legislature was concerned that there may not be sufficient resources, skilled or otherwise, or a willingness or capacity on the part of a prosecuting authority, which is already stretched just pursuing violent inter-personal crimes. Section 33(2) of NEMA is couched in terms that facilitate, if not encourage, interest groups who wish to protect the environment by compelling compliance with the environmental laws in a manner which makes it easy to fast track private prosecutions for offences under NEMA.[9]

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[9] There is a basic premise given effect to in ss 32 and 33 of NEMA which finds expression in the Preamble and other sections such as s 1 (definition of interested and affected party), ss 2(2), 2(4), 4, 22, 24A(b), 31 and that recognises the fragility of our biosphere, a receptiveness to knowledge and ideas and the need to empower people whose protection and needs are at the forefront of environmental management (e.g. s2(2) and many of the provisions of s4). Man has managed to appropriate the earth's natural and mineral resources. We have done so without appreciating, until relatively recently, that our generally unrestrained acts of exploitation may have come with consequences for our future sustainability and those of other species, on whose existence we may be dependent. We have come to the realisation that this metaphoric well which is Earth may, without

89. If I am wrong then I am satisfied on the evidence presented that there was consultation bearing in mind that a consultation need not necessarily be face to face (but may be satisfied by a phone call or the exchange of correspondence) or reach consensus.

    It is evident that the DPP-Johannesburg had no difficulty in accepting, after being reminded in the discussion referred to in correspondence, that he had previously acceded to the same private prosecution being initiated. Moreover his last communication clearly accepted that Uzani could pursue the private prosecution provided it was confined to offences under NEMA and did not extend to common law offences which required a *nolle prosequi* and in respect of which he required further information.

90. In so far as the DPP-Pretoria is concerned, the less said the better. He had no answer to the fact that a private prosecution had previously been allowed by his colleague in Johannesburg in respect of the same facts as presented to him. He made no attempt to distinguish them from the facts placed before him. He appeared intent on filibustering with no intention of taking up the cudgels and initiate a prosecution himself despite having all the information he needed before him.

    It is therefore unnecessary to consider whether the fact that Erasmus engaged the DPP-Pretoria despite the latter's response being after the 28 days amounts to a waiver.

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intervention become irreversibly poisoned. Our environmental laws recognise the need to ensure sustainability. Each of us is affected by activities currently being undertaken that may significantly impact on the environment. Securing protection is therefore no longer the exclusive preserve of those engaged in these activities, nor of an opaque administration or an under-capacitated and potentially inhibited law enforcement agency which cannot claim the number of successful convictions one would have expected despite clear evidence of historic degradation to our environment. NEMA not only requires a transparent administration but recognised the contribution that can be made to the protection of the environment by a vigilant and committed public which has most to lose.

Whether the prosecution is in the public interest or in the interests of the protection of the environment

91. Section 33(1) of NEMA provides that:

> *Any person may—*
>
> *(a) in the public interest; or*
>
> *(b) in the interest of the protection of the environment,*
>
> *institute and conduct a prosecution in respect of any breach or threatened breach of any duty, other than a public duty resting on an organ of state, in any national or provincial legislation or municipal by-law, or any regulation, licence, permission or authorisation issued in terms of such legislation, where that duty is concerned with the protection of the environment and the breach of that duty is an offence.*

92. I accept that the mandate documents and email to BP Zambezi Drive (Exhibit C) reflect that Erasmus sought funds to assist with the litigation and that in terms of the mandates he obtained, third parties expected to either receive a direct benefit from a successful prosecution or that a conviction would assist in a subsequent civil claim and that there would be a significant "*cut*" for Uzani. Moreover the point which Adv Hellens sought to make was that;

    a. This was part of the evidence demonstrating that Erasmus had failed to motivate why the prosecution was in the public interest

    b. Erasmus had a direct and substantial interest in the financial gain to be made if the prosecution was successful

c. He has shown himself to be untrustworthy with other people's money and had been dishonest with the result that Uzani cannot demonstrate that it is prosecuting for an accepted NEMA purpose as it appears that he is litigating for direct financial gain "*both for himself and in order to gain control over other people's money*".

93. A further complaint relates to Uzani Foundation NPC to whom Uzani has pledged any funds it recovers. It is still in embryonic form and there is no guarantee that funds will go to the foundation or will be dealt with as undertaken.

94. The difficulty is that Erasmus has a long record of being involved with environmental matters at both initiating and promotional levels. This also came through in one of the letters to the DPP cited earlier.

There is no evidence to suggest that he was embarking on a commercial venture when he first initiated private prosecutions in the Regional Court in 2012. It appears rather that he got burnt by the experience which also according to his letter to the DPP-Pretoria of 20 May 2016 comprised delays on the part of the accused which financially drained the private prosecution endeavour.

95. Adv Burger referred the court to the definition of a public interest action in the SA Law Commission Report (Exhibit E). It is defined as;

> *"one brought buy a plaintiff who, claiming the relief he or she seeks, is moved by a desire to benefit the public at large or a segment of the public. The intention of the plaintiff is to vindicate or protect the public interest, not his or her own interest, although he or she may incidentally achieve that end as well"* (emphasis added)

96. I am satisfied that Erasmus may potentially gain by earning legal fees if successful and if the court were to award Uzani the costs of litigation[10]. Nonetheless he also runs the risk of either BP being acquitted or, in the case of conviction, the court exercising its discretion under s33 (3) not to direct BP to pay Uzani's costs.

97. The argument that Erasmus has shown himself to be mercenary and cannot be trusted to put any award into the Foundation as undertaken is readily met, should Uzani be successful, by the court imposing conditions on the manner in which the funds are utilised and who will exercise control over them and so forth, or in not making any order and leaving the issue for possible civil litigation. [11]

98. This leaves the concern as to whether the objective of the prosecution is in the public interest or in the interests of protecting the environment and whether Erasmus' own interests are incidental.

99. The starting point is that the private prosecutor is Uzani which is a close corporation and which, at least since December 2017, has three other members apart from Erasmus.

100. As its name suggests it is an advocacy group. It also proclaims its involvement in public interest matters by reference to the cession of all awards and benefits pursuant to any judgment by a court to Uzani Environmental Foundation NPC, which in terms of its draft manifesto is to provide an environmental litigation support platform and otherwise support the enforcement of environmental laws. Its further objectives are those that were set out in one of the letters to the DPP in relation to acting as an incubator for young environmental lawyers among others and to establish a virtual school of environmental law.

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[10] In terms of s 33 (3) the award of cost is discretionary. The provision reads:

The court may order a person convicted upon a private prosecution brought under subsection (1) to pay the costs and expenses of the prosecution, including the costs of any appeal against such conviction or any sentence.

[11] See s 34(3) of NEMA

101. The virtually unchallenged evidence of Prof van der Walt regarding the degradation that can be caused by storage tanks and the failure to up-front produce an EIA report while the failure of any applications for authorisation under s 24G to provide rectification reports demonstrates that the prosecution is in the interest of the protection of the environment.

102. In my view the decision concerning the interpretation of NEMA in *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007 (10) BCLR 1059 (CC); 2007 (6) SA 4 (CC) is of application and paras 66 to 69, 79 to 81 and 90 are apposite albeit that the focus was on socio-economic rights:

I will cite some of these passages:

66. The principles of NEMA that have been relied upon by the applicant must be understood in the context of the role of these principles in decisions affecting the environment, the general objectives of integration of environmental management and the procedures for the implementation of the NEMA principles.

67. ...Perhaps more importantly, these principles provide guidance for the interpretation and implementation not only of NEMA but any other legislation that is concerned with the protection and management of the environment. It is therefore plain that these principles must be observed as they are of considerable importance to the protection and management of the environment.

69. The general objectives of integrated environmental management are furthered by section 24 which deals with the implementation procedures. These require, among other things, that the potential impact on the environment, socio-economic conditions and cultural heritage of activities that require authorisation under section 22(1) of ECA and which may

significantly affect the environment must be considered, investigated and assessed prior to their implementation and reported upon to the organ of state charged by law with authorising . . . the implementation of an activity. To underscore the importance of this requirement, subsection 24(7) requires that any investigation must, as a minimum investigate the potential impact, including the cumulative effects of the proposed development on the environment, socio-economic conditions and cultural heritage. The provisions of section 24(7) must of course be read and understood in the light of the regulations that the Minister is empowered to make concerning the scope and the contents of reports that must be submitted for authorisation required by section 22(1) of ECA.

79. *... The Constitution and environmental legislation introduce a new criterion for considering future developments. Pure economic factors are no longer decisive. The need for development must now be determined by its impact on the environment, sustainable development and social and economic interests. The duty of environmental authorities is to integrate these factors into decision-making and make decisions that are informed by these considerations. This process requires a decision-maker to consider the impact of the proposed development on the environment and socio-economic conditions.*

81. *Finally NEMA requires a risk averse and cautious approach to be applied by decision-makers. This approach entails taking into account the limitation on present knowledge about the consequences of an environmental decision. This precautionary approach is especially important in the light of section 24(7) (b) of NEMA which requires the cumulative impact of a development on the environmental and socio-economic conditions to be investigated and addressed. An increase in the risk of contamination of underground water and soil, and visual intrusion and light, for example, are some of the significant cumulative impacts that could result from the proliferation of filling stations. Subsection 24(7) (b)*

specifically requires the investigation of the potential impact, including cumulative effects, of the proposed development on the environment and socio-economic conditions, and the assessment of the significance of that potential impact.

The final passage is at para 90 where the court said:

Here NEMA specifically enjoins the environmental authorities to consider, assess and evaluate the social and economic impact of the proposed filling station, including its cumulative effect on the environment as well as its impact on existing filling stations and thereafter to make a decision that is appropriate in the light of such assessment. This requirement was included in NEMA to guide the environmental authorities in making a decision that may affect the environment. In these circumstances, failure by the environmental authorities to comply with this requirement did not just have formal rather than substantive significance, as my colleague, Sachs J, suggests in his dissenting judgment. In my view, it is a failure which goes to the very function that the environmental authorities were required by statute to perform; the environmental authorities failed to perform the very function which they were required by law to perform.

103. BP also submitted that there is no evidence that any of the filling stations pose a risk to the environment. It relied on submissions made during the so called "amnesty period" which included that the sites were not located in a sensitive environment and do not pose any significant risk to the environment, that there are precautions put in place to ensure maximum environmental protection and that the sites are subjected to a 3 yearly environmental audit which includes facility integrated testing among other things.[12]

104. Firstly these matters were not put to Prof van der Walt. Secondly the untested say-so of BP during an amnesty period can hardly be described as sufficient

[12] There is also no suggestion that these are independently monitored. If they were anything other than internal processes one would have expected BP to have said so.

evidence to counter whether the prosecution is being brought either in the public interest or in the interest of the protection of the environment.

105. The allied argument advanced is that the prosecutor is disbarred from prosecuting where his or her fees are to be paid by the complainant and where consequently, or for another reason, the prosecutor is intent on obtaining a conviction rather than placing credible evidence before a court relevant to the alleged crime. The difficulty with this argument is two-fold. Firstly, if the argument is intended to fall under the rubric of bias, in terms of *Porritt and another v National Director of Public Prosecutions and others* 2015 (1) SACR 533 (SCA); [2015] 1 All SA 169 (SCA) there must be actual bias, not perceived bias.

In the case of a private prosecution under s 33 of NEMA the Act itself allows a prosecution provided it is pursued in the interests of the protection of the environment. It is therefore difficult to see the application of such principles in the present case or even in cases where the State refuses to prosecute but the victim of say a rape obtains a nolle prosequi and then brings a private prosecution.

Whether a private prosecution is permissible within the context of applications made under s 24G of NEMA

106. The argument advanced is that s 24G of NEMA only allows the NPA to prosecute in cases where an application is brought under s 24G(1) or the grant of an environmental authorisation in terms of s 24G (2)(b).

107. The provision relied on is s 24G (6) which reads:

> *The submission of an application in terms of subsection (1) or the granting of an environmental authorisation in terms of subsection (2) (b) shall in no way derogate from—*

(a) the environmental management inspector's or the South African Police Services' authority to investigate any transgression in terms of this Act or any specific environmental management Act;

(b) the National Prosecuting Authority's legal authority to institute any criminal prosecution.

108. Section 24G was amended in December 2013 and in the preamble to the NEMA Amendment Act (Act 30 of 2013) the purpose of the introduction of the section was to "*increase the administrative fine and to provide for criminal investigation and prosecution in certain circumstances"* (emphasis added)

109. Adv Hellens argued that one must interpret the section by reference to the aids expressed by the maxims *generalia specialibus non derogant* and "*unius est exclusio alterius".*

110. In my view the difficulty with the argument is that s 24G (7) expressly provides for criminal investigations and criminal prosecutions in the enumerated circumstances (see also s 24G (1) (b) (ii)). S24G(7) reads:

> *" If, at any stage after the submission of an application in terms of subsection (1), it comes to the attention of the Minister, Minister for mineral resources or MEC, that the applicant is under criminal investigation for the contravention of or failure to comply with section 24F (1) or section 20 (b) of the National Environmental Management: Waste Act, 2008 (Act No. 59 of 2008), the Minister, Minister responsible for mineral resources or MEC may defer a decision to issue an environmental authorisation until such time that the investigation is concluded and—*
>
> *(a) the National Prosecuting Authority has decided not to institute prosecution in respect of such contravention or failure;*
>
> *(b) the applicant concerned is acquitted or found not guilty after prosecution in respect of such contravention or failure has been instituted; or*

(c) the applicant concerned has been convicted by a court of law of an offence in respect of such contravention or failure and the applicant has in respect of the conviction exhausted all the recognised legal proceedings pertaining to appeal or review.

111. By contrast s 33 does not commence with the words "*Subject to s 24G...*". It is formulated in unequivocal terms and its purpose is manifest. It has been said that the invocation of the *unius est exclusio alterius* maxim must at all times be applied with great caution.[13]

112. Perhaps the more compelling argument is that if there is an ambiguity between the unequivocal formulation of s 33 and the provisions of s 24G(6) then it must be resolved by utilising an interpretation that would not lead to an absurdity but would be consistent with the legislation read as a whole. In my view it would be absurd to suggest that the moment an application is brought under s 24G (1) and irrespective of whether it is considered or not a private prosecution is not competent whereas a prosecution initiated by the NPA is.

113. There is no logic that indicates why there should be such a discrimination when s24G effectively provides for an administrative penalty which according to our law does not impact on a right to prosecute.[14]

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[13] *National Director of Public Prosecutions v Mohamed NO* 2003 (4) SA 1 (CC) at para 40

[14] See *Pather and Another v Financial Services Board and Others* [2017] 4 All SA 666 (SCA); 2018 (1) SA 161 (SCA).
Adv Hellens clarified in a set of heads prepared at the court's request after argument was heard that he was not raising directly that the administrative proceedings under s24G of NEMA involving the payment of an administrative fine was of a quasi-criminal nature or having a quasi-criminal effect thereby precluding the laying of a criminal charge as decided in *Han v. Customs and Excise Commissioners* an related cases [2001] 4 All ER 687 CA and discussed in *Tax Board Decision No. 198* (Gauteng West Tax Board) of 1 November 2004. He accepted the SCA decision in *Pather* but submitted that the argument of double jeopardy informed the way in which s 24G should be interpreted as limiting a s 33 prosecution. The submission however would ignore the clear indication that by allowing a State sponsored prosecution the legislature expressly contemplated a criminal prosecution in addition to an administrative sanction. Whether or not the administrative penalty was significant and whether there was any prejudice are matters that the legislature therefore considered should not impact on the entitlement to prosecute but at best may in the ordinary course be considered in respect of sentence should there be a conviction. In any event Adv Hellens did not contend that the penalties imposed could be considered as severe, a requirement that needed to be demonstrated in a *Han* type situation.

Conclusion

114. In my view the s 106(1) (h) defence of want of title to prosecute must fail.

WHETHER THE PROSECUTION HAS PROVED THE OFFENCES

115. Uzani's case is straight forward. It contends that BP breached a duty relating to the protection of the environment. In terms of s 22 (1) of ECA the undertaking of certain identified activities is prohibited absent written authorisation. In turn s 22(2) provides that such authorisation shall only be issued after consideration of reports concerning the impact of the proposed activity on the environment. The report must be compiled and submitted in the prescribed manner.[15]

116. As correctly submitted by Adv Burger, the "*measures to investigate, assess and evaluate the impact on the environment as provided for in section 28(3)(a) of NEMA is what is referred to in s 22(2)of ECA. There was thus a duty on the accused imposed by section 28 to submit the reports in terms of section 22(2)".*[16]

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[15] Ss 22(1) and (2) of ECA provide:

Prohibition of undertaking of identified activities.—

(1) No person shall undertake an activity identified in terms of section 21 (1) or cause such an activity to be undertaken except by virtue of a written authorization issued by the Minister or by a competent authority or local authority or an officer, which competent authority, authority or officer shall be designated by the Minister by notice in the Gazette.

(2) The authorization referred to in subsection (1) shall only be issued after consideration of reports concerning the impact of the proposed activity and of alternative proposed activities on the environment, which shall be compiled and submitted by such persons and in such manner as may be prescribed.

[16] Ss 28 (1), (1A) and (3) read:

28. Duty of care and remediation of environmental damage.—

(1) Every person who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring, or, in so far as such harm to the environment is authorised by law or cannot reasonably be avoided or stopped, to minimise and rectify such pollution or degradation of the environment.

(1A) Subsection (1) also applies to a significant pollution or degradation that—

(a) occurred before the commencement of this Act;

(b) arises or is likely to arise at a different time from the actual activity that caused the contamination; or

(c) arises through an act or activity of a person that results in a change to pre-existing contamination.

117. In making an application under s 24G of NEMA BP admitted that it had *"commenced with a listed or specified activity without an environmental authorisation in contravention of section 24F (1)".*[17]

118. Section 24F(1) provides that:

> *Prohibitions relating to commencement or continuation of listed activities.—*
>
> *(1) Notwithstanding any other Act, no person may—*
>
> *(a) commence an activity listed or specified in terms of section 24 (2) (a) or (b) unless the competent authority or the Minister responsible for mineral resources, as the case may be, has granted an environmental authorisation for the activity; or*
>
> *(b) commence and continue an activity listed in terms of section 24 (2) (d) unless it is done in terms of an applicable norm or standard.*

119. In turn s 24(2)(a) reads:

> *"(2) The Minister, or an MEC with the concurrence of the Minister, may identify—*
>
> *(a) activities which may not commence without environmental authorisation from the competent authority;*

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(3) The measures required in terms of subsection (1) may include measures to—
(a) investigate, assess and evaluate the impact on the environment;

[17] S 24G(1)(a) reads

Consequences of unlawful commencement of activity.—
(1) On application by a person who—
(a) has commenced with a listed or specified activity without an environmental authorisation in contravention of section 24F (1);

120. It will be recalled that one of the activities listed in GN R387 of 21 April 2006 was the construction of a filling station, including associated structures, or any other facility for the underground storage of dangerous goods, including petrol and diesel.

121. Aside from proving the construction or upgrading of the filling stations referred to in the indictment and that it commenced after 2 March 1998[18] Uzani only had to rely on the lack of authorisation by the Minister or the competent authority.[19]

122. Uzani utilised the provisions of s 250(1) (b) of the CPA to cast the onus on BP to establish on a balance of probabilities that it was the holder of the necessary authority. This was held to be constitutionally sound in *S v Fransman* 2000 (1) SACR 99 (W).

123. The relevant provisions of s 250(1) read:

> *Presumption of lack of authority.—*
>
> *(1) If a person would commit an offence if he—*
>
> *(a) ...*
>
> *(b) performed any act;*
>
> ....
>
> *without being the holder of a licence, permit, permission or other authority or qualification (in this section referred to as the "necessary authority"), an accused shall, at criminal proceedings upon a charge that he committed such an offence, be deemed not to have been the holder of the necessary authority, unless the contrary is proved.*

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[18] By reason of the reference to item 1(c) in Schedule 2 of GN R 1182 of 5 September 1997

[19] In terms of s29 (4) of ECA any person who contravenes a provision of s 22(1) is guilty of an offence.

124. The evidence of Nkontwana contained in Exhibit H demonstrated that the filling stations mentioned in all the counts were constructed after 2 March 1998. The evidence provided in exhibits K and L demonstrated that the actual construction of the filling stations referred to in counts 3 and 4 had commenced prior to that date.

125. Moreover in relation to counts 7and 10 Nkontwana stated that he could not state from the records whether BP had submitted a s 24G rectification report, whether GDARD had issued an authorisation under s 24G(2)(b) or whether BP had paid an administrative fine.

126. The reason I exercised my discretion under s 212(12) of calling Nkontwana despite finding that the affidavit in terms of s 212 (3) constituted *prima facie* evidence was to afford an opportunity to cross examine, which otherwise would not have been the case. In my view s 212 (12) enables a court to do precisely that. It does not diminish the status of the s 212 (3) affidavit but allows an opportunity for the contents of the affidavit to be tested or to introduce any other evidence through the witness that may be relevant but which would be stifled if the witness was not called.

127. In my view the fail safe position in respect of this case is whether or not a s24G application had been submitted since in its terms, and without explanation, it amounts to a statement against interest.

128. It is for these reasons that the characterisation of the issues for consideration as raised by Adv Hellens is inappropriate. It was for BP to produce evidence to disturb the deeming provision that the construction of the filling stations after 2 March 1998 were effected without valid authority. Although it only produced Exhibit K and L which establishes sufficient doubt in respect of counts 3 and 4 I am of the view that the admitted *lacuna* in respect of GDARD's records relating to counts 7 and 10 also create sufficient doubt.

129. Insofar as the other counts are concerned there is an effective cross checking and reconciliation of all the records one would expect to find, which would have to

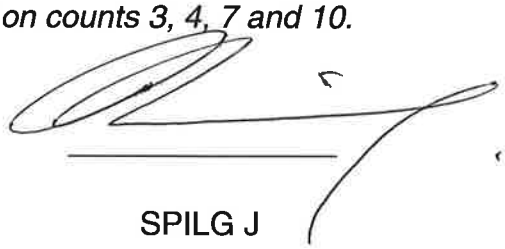
include an application under s24G and the grant of the application or the payment of an administrative fine.

ORDER

130. For these reasons:

1. *The accused is convicted on counts 1, 2, 5, 6, 8, 9 and 11 to 21inclusive of contravening s 22(1) read with ss 21(1) and 29(4) of the ECA and items 1 (c) of Schedule 1 and Schedule 2 of Government Notice R1182 of 5 September 1997.*

2. *The accused is acquitted on counts 3, 4, 7 and 10.*



SPILG J

DATES OF HEARING:	4 September 2017, 11 November 2017, 16 May 2018, 11 – 13 September 2018, 17-18 September and 2 November 2018
DATES OF JUDGMENT:	25 March and 1 April 2019
FOR PROSECUTION:	Adv SF Burger SC Adv JAL Pretorius Erasmus Attorneys
FOR ACCUSED:	Adv MR Hellens SC Adv DJ Joubert SC Warburton Attorneys